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- Mr. Navin GUNNASAYA [Civil Society]

Secretary: Mrs. Saroj BUNDHUN
About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –
(a) a Chairperson, appointed by the Attorney-General;
(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.
Executive Summary
LAW REFORM COMMISSION OF MAURITIUS
[October 2010]

The Commission has reviewed, from an international and comparative perspective, aspects of consumer law, viz. the Consumer Protection Act; the Consumer Protection (Price and Supplies Control) Act; the Essential Commodities Act; the Fair Trading Act; the Hire Purchase and Credit Sale Act; and the Prices & Consumer Protection Advisory Committee Act.

In this Report, the rationale for consumer laws and the key objectives of consumer policy, in the context of the UN Guidelines, are first considered. The current law and its comparison with other consumer protection regimes are then examined.

The Commission has reached the conclusion that the current consumer laws present lacunas. The manner in which they are administered even give rise to constitutional problems.

The current framework is inadequate. The provisions as to consumer guarantees in respect of supply of goods and services, as to unfair business practices, are insufficient. There is no provision as to unfair contract terms in consumer agreements. Safety requirements are laid down only in respect of goods. Distance selling, doorstep selling and unsolicited consumer transactions are not regulated. The enforcement framework relating to consumer transactions and agreements needs to be strengthened.

A new Consumer Protection Regime should be put in place. The overall objectives of the new legislation should be to promote and advance the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides adequate safeguards to vulnerable consumers.

To that end, legislation needs to be introduced which should make provision for
(a) Consumer rights, including the freedom of consumers to associate and form groups to advocate and promote their common interests;
(b) Standards of consumer information so as to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;
(c) Consumer guarantees in respect of the supply of goods and services;
(d) The protection of consumers from hazards to their well-being and safety, and product liability;
(e) The prohibition of unfair terms in consumer contracts;
(f) The prohibition of unfair business practices;
(g) The regulation of distance selling, doorstep selling and unsolicited consumer transactions;
(h) The regulation of consumer credit;
(i) The establishment and operation of a National Consumer Council, which would encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers;

(j) An effective enforcement framework relating to consumer transactions and agreements;

(k) An accessible, effective and efficient system of redress for consumers, including a mechanism for consensual resolution of disputes arising from consumer transactions.

The consumer law should protect both natural persons and legal entities when goods and services are supplied to them, as well as (a) any user of such goods, or (b) any beneficiary of such services. However, goods acquired or the services availed of must not have been for a commercial purpose.

With the establishment of a new consumer regime, the role of the Ministry will have to be re-assessed. Its operational capability will have to be strengthened: additional resources will have to be put at its disposal.
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(I) **Introductory Note: Background and Method**

1. In accordance with section 5(a) and (b) of the Law Reform Commission Act, the Commission has reviewed, at the request of the Ministry for Consumer Protection, some aspects of the consumer protection laws\(^1\) with a view to proposing reforms to the current legislative framework.\(^2\)

Government has reasserted in its 2010-2015 Government Program its commitment to an in-depth and complete review of all the legislations governing consumer protection and rights, and the strengthening of the Consumer Protection Unit with a view to creating confident consumers.\(^3\)

2. This review stems from the need to examine today’s consumer laws to ensure they remain relevant and effective in a rapidly changing local and global marketplace. Developments such as trade liberalization, globalization, and the advent of the Internet and e-commerce are changing the very nature of the way consumers and businesses

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\(^2\) During debates in the National Assembly on the Appropriation (2010) Bill, it was pointed out that the current legislation in the field of consumer protection is not in line with the new business environment. There is a need to completely overhaul the existing legal framework and to come up with a modern and updated one that would assist in effectively protecting the rights of the consumers whilst promoting business facilitation. It was also emphasized that the officers should be provided with the tools to combat abuses by fraudulent traders.

\(^3\) In the Government 2010-2015 Program, it is announced [at paragraphs 299 & 300]:

“Government will carry out an in-depth and complete review of all the legislations governing consumer protection and rights, with a view to bringing them in line with the new business environment prevailing and to make them readily understandable and accessible to the population.

Government will implement a web-based management information system for the Consumer Unit to provide an enhanced service to consumers.”
interact. Consumers face rapidly changing markets, increased reliance on technology and a faster pace of innovation, all of which pose a significant challenge in ensuring that regulation can keep pace. Hence the need for strategies to enhance consumer confidence in a dynamic market environment.

3. The current law has been reviewed from an international and comparative perspective. At global and regional levels, there have been various initiatives for the protection of consumer interests. We have examined the UN Guidelines for Consumer Protection, which provide a framework for Governments to use in elaborating consumer protection policies and legislation. We have also paid heed to the standards and policy strategies evolved by the European Union and other regional organizations, the OECD Committee on Consumer Policy, and Consumers International.

4 The globalization of financial markets and liberalization of trade, the growing interdependence among countries, the emergence of borderless economic spaces and de-regulation in many areas of economic activity have transformed the world economy, and are creating new dynamics in the functioning of the international markets that directly affect the consumer.


6 The UN General Assembly adopted by consensus on 9 April 1985 (General Assembly resolution 39/248) the Guidelines for Consumer Protection; these guidelines were amended in 1999 to incorporate sustainable consumption.


For an analysis of European Union’s initiatives on consumer protection, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy, University of East Anglia, Norwich, Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008], at pp. 472-486.

4. There has been a general trend world-wide for the review of consumer policies and the elaboration of consumer protection laws,\textsuperscript{12} including constitutional guarantees for


9 In 1973, the Parliament Assembly of the Council of Europe adopted a Consumer Protection Charter [Resolution 543(1973)]. Its Committee of Ministers has also issued recommendations to Member States on various consumer issues: (a) Consumer Education of Adults and Consumer Information [R(79)1]; (b) Consumer Consultation and Participation in Official and Quasi-Official Bodies and Consumer Representation on Standards Bodies [R (79)2]; (c) Legal Protection of the Collective Interests of Consumers by Consumer Agencies [R(81)2]; (d) Consumers and Distribution Systems [R (81)4]; (e) Training of Consumer Advisers, Professional or Voluntary [R(82)3]; (f) Role of Criminal Law in Consumer Protection [R (82)15].


At the level of CARICOM [Caribbean Community], Articles 184 and 185 of the Revised Treaty of Chaguaramas reflect commitments among those nations to promote consumers’ interests within their Community. The Caribbean Law Institute (1995) and CARICOM’s Single Market and Economy Unit (2003) have championed efforts to draft model consumer protection legislation to assist Member States with the goal of harmonizing standards in support of trade liberalisation.

At the level of MERCOSUR [established in 1991 by a Regional Trade Agreement (RTA) between Argentina, Brazil, Paraguay and Uruguay], standards have been laid down for consumer protection guarantees [GMC Res. 126-96 on Advertising, GMC Res. 23-04 on Toy Safety, GMC Res. 42/98 on Consumer Defense in Contractual Guarantees].

At the Inter-American level, the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States has been considering, as far back as 2005, proposals for a ‘Model Law on Consumer Redress Mechanisms’, and for a ‘Model Law or Convention on Consumer Protection in E-commerce’ [CP/CAJP-2309/05].

At the 39\textsuperscript{th} ASEAN [Association of South East Asian Nations] Economic Ministers’ (AEM) Meeting, Makati City, Philippines, 24 August 2007, the Ministers endorsed the establishment of the ASEAN Coordinating Committee on Consumer Protection to promote regional cooperation initiatives that would provide ASEAN consumers with a high level of protection.


For an analysis of the OECD’s initiatives on consumer protection, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy, University of East Anglia, Norwich, Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008], at pp. 455-472.


consumer protection.\textsuperscript{13} Laws and practices in various jurisdictions have been examined with a view to identifying emerging international trends and bench-mark best practices:

(a) India,\textsuperscript{14}

(b) Singapore,\textsuperscript{15}

(c) Malaysia,\textsuperscript{16}

(d) Australia,\textsuperscript{17}

\footnotesize{\textsuperscript{13} There are some 27 National Constitutions which contain specific provisions on consumer protection. The countries are: Cambodia, East Timor, Philippines, South Korea, Thailand, Vietnam, South Africa, Republic of Yemen, Republic of Uzbekistan, Republic of Cape Verde, Turkey, Andorra, Bulgaria, Lithuania, Poland, Portugal, Spain, Switzerland, Ukraine, Argentina, Brazil, Colombia, Costa Rica, Ecuador, Paraguay, Peru, and Mexico.}


\footnotesize{\textsuperscript{15} Legislation includes the Consumer Protection (Fair Trading) Act 2004 (and the regulations made there under) as well as the Consumer Protection (Trade Descriptions and Safety Requirements) Act.}

\footnotesize{In 2005, a Task Force, jointly led by the Consumers Association of Singapore (CASE) and the Ministry of Trade and Industry (MTI), was formed to review the Consumer Protection (Fair Trading) Act [CPFTA] and subsidiary legislation to be made there under. It proposed (a) inclusion of financial products and services under the CPFTA and the draft Consumer Protection (Fair Trading) (Regulated Financial Products and Services) Regulations; (b) amendments to the Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations; (c) a draft Consumer Protection (Fair Trading) (Motor Vehicle Dealer Deposits) Regulations; and (d) a draft Consumer Protection (Fair Trading) (Opt-out Practices) Regulations.}

\footnotesize{\textsuperscript{16} For background to enactment of Consumer Protection Act 1999, vide S.S. Rachagan, Consumer Law Reform: A Report [UNDP, 1992]. As regards a comprehensive review and analysis of the current legal framework, see FOMCA (Federation of Malaysian Consumers Associations), Review of the Consumer Protection Act 1999 and its Regulations [2005].}

(e) New Zealand,\(^{18}\)
(f) UK\(^{19}\),
(g) Jersey,\(^{20}\)
(h) Ireland,\(^{21}\)
(i) France,\(^{22}\)
(j) Canada,\(^{23}\)


For an assessment of the UK framework supporting consumer empowerment, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy, University of East Anglia, Norwich, Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008].


Federal legislation [the Competition Act (which covers such consumer issues as misleading advertising and other deceptive marketing practices), the Hazardous Products Act and its related regulations (which provide for nationwide standards of safety for a wide variety of consumer products, ranging from child restraint systems for

(k) USA, 24  
(l) Barbados, 25  
(m) Trinidad and Tobago, 26  
(n) Jamaica, 27  
(o) South Africa, 28 and  
(p) Other countries. 29

automobiles, to hockey helmets), the Motor Vehicle Safety Act (which requires automobile manufacturers to adhere to safety standards in manufacturing their products), and the Consumer Packaging and Labelling Act], as well as the laws in provinces [such as Quebec’s ‘Loi sur la Protection du Consommateur’, British Columbia’s Business Practices and Consumer Protection Act 2004, Saskatchewan’s Consumer Protection Act, Ontario’s Consumer Protection Act 2002 (as amended by the Consumer Protection and Service Modernization Act 2006), and Manitoba’s Consumer Protection Act and Business Practices Act], have been considered.


24 The Commission has considered federal laws [such as the Trade Commission Act, the Consumer Product Safety Act, and the Fair Packaging and Labeling Act] as well as state laws [such as Louisiana’s Unfair Trade Practices and Consumer Protection Law, Pennsylvania Unfair Trade Practices and Consumer Protection Law, and California’s statutes (the Unfair Practices Act, provisions of the Business and Professional Code relating to advertising, and the Consumer Legal Remedies Act)], which regulate consumer affairs.


29 Consumer protection regimes in other countries, such as Bahamas Consumer Protection Act 2006, Botswana Consumer Protection Act 1998, Argentinean and Brazilian Consumer Protection Codes, Denmark consumer protection legislation (for instance the Price Marking and Display Act, the Product Safety Act, the Marketing Practices Act, and Act on Actions for Injunctions), Finish Consumer Protection Act (1978), Latvia Consumer Rights Protection Law (2001), Tonga Consumer Protection Act 2000, the Ugandan Consumer Protection Act, Sarajevo Consumer Protection Act 2001 as well as the Mexico Federal Consumer Protection Law, have also been considered.

For a detailed analysis on consumer protection laws of various countries, see S.K. Verma and M. Afzal Wani, A
The foreign laws and practices have been viewed in the light of the economic, social and environmental circumstances of those countries, and the needs of their population.

5. The reflections of other law reform agencies on reform of this aspect of the law have also been considered.  

6. The Commission has heard concerns of Officers from the Consumer Protection Unit of the Ministry about the application/enforcement of the law in Mauritius.

7. The views of local consumer organizations on the current legislative framework for consumer protection and areas in need of reform have also been sought.

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31 A Document embodying their concerns about the current law was submitted to the Commission on 29 January 2010.

32 ICP [Institute of Consumer Protection] has submitted proposals for reform of the law. The Commission has also taken note the views of the Executive Director of ICP, Mr. Mosadeq Sahebdin, on the ‘Challenges facing the consumer movement in Mauritius’ published in the issue of Business Magazine of 12 March 2010. The views of the representative of ACIM [Association des Consommateurs de l’île Maurice] have also been sought on the adequacy of the current law.
8. In this Report, the rationale for consumer laws and the key objectives of consumer policy, in the context of the UN Guidelines, are first considered. The current law and its comparison with other consumer protection regimes are then examined. Thereafter, proposals on aspects of the law in need of reform are formulated.

Draft legislation for the Strengthening of the Consumer Protection Regime is reproduced as an Annex to this Report.
(II) Preliminaries: The Rationale for Consumer Laws and Key Objectives of Consumer Policy

(1) The Rationale for Consumer Laws and its Linkage with Constitutionalism and Good Governance

9. Although laws protecting the public against fraud concerning merchandise are quite ancient, the enactment of consumer protection laws is a relatively recent phenomenon. It started some fifty years ago under the influence of the consumer protection movement and the ensuing consumer protection programs.

33 In France, comprehensive (penal) legislation in that respect exists since 1905: vide ‘Loi du 1er Aôut 1905 sur la Répression des Fraudes’, now part of the Code de la Consommation. See also Bihl, Consommateur défend toi (Paris, 1975).

34 In March 1960, the International Organization of Consumers Unions (IOCU) was established [the organization changed name from IOCU to Consumers International (CI) in 1995].
In Europe and North America, the 1960s witnessed a rise in consumer activism though other “waves” have been identified earlier than this: vide J. Finch, ‘A History of the Consumer Movement in the United States: its Literature and Legislation’ (1985) 9 (1) Journal of Consumer Studies and Home Economics 23.
Modern consumer advocacy reached the peak of its influence in the decades after World War II. Growing out of the product-testing activities of Consumer Reports and its international counterparts (including Which? in the United Kingdom, Que Choisir in France, and Test in Germany), consumerism evolved into a truly global social movement. Consumer unions, NGOs, and individual activists like Ralph Nader emerged in countries around the world - including developing countries in Southeast Asia and Latin America - concerned with creating a more equitable marketplace and articulating a politics of consumption that addressed the needs of both individuals and society as a whole.

35 In USA, on 15 March 1962, President Kennedy called upon Congress to give its approval to the Consumer Bill of Rights. The Bill outlined four basic consumer rights: the right to safety, the right to be informed, the right to choose among a variety of products and services at competitive prices, and a right to a fair hearing by government during the formation of public policy. The first World Consumer Rights Day was held in 1982 and is celebrated on 15 March annually to commemorate the President’s speech.
In UK, a government Committee, chaired by Mr. Molony, was charged in 1959 with examining whether measures to improve consumer protection were desirable and, if so, which reform proposals could be made. In 1962, the Committee submitted its Final Report [Final Report of the Committee on Consumer Protection, Cmnd. 1781]. The report prepared by the Molony Committee determined the future legislation on consumer protection to a great extent. Various acts were passed in the seventies and in the eighties in relation to the rights and duties of sellers and consumers and to the quality protection of goods.
In the rest of Europe, consumer laws prospered in the 1970s and the 1980s with Sweden played a pioneering role by adopting in 1970 the Market Practices Act.
10. Goldring considers the rationale for consumer laws to be as follows:

“Consumers have sought protection through legislation because the general laws and market forces have failed to provide it. Many consumer protection laws either relate to the terms and conditions of contracts that consumers make with suppliers for the supply of goods and services, or to conduct intended to encourage the making of such contracts (marketing, packaging, advertising and provision of information). Previous laws, especially the law of contracts, assumed that the parties to contracts are legally equal in terms of power and information. In substance, in real markets, almost invariably consumers have markedly less power and information than suppliers. The law deems the action of a consumer in buying a commodity to be the making of a contract - in theory a free, consensual act. In practice, the legal consequences are attributed to the action by the law without any consideration of what the consumer actually knows or wants. The common law of contracts simply cannot afford consumers the protection they probably would seek if they were rational, fully informed, and equal in economic power to the supplier. Because contract law offers an inadequate basis for an equitable legal transaction, it must be modified by legislation in order to afford greater protection to consumers than they can negotiate individually for themselves.”

11. Consumer protection laws enable the correction of market failures and the redress of inequalities of information and power. Consumer policy is designed to help make markets work, to ensure that consumers are able to obtain goods and services of quality, on terms, and at the price they are willing to pay.

12. As noted by Boleat:

“The government and specific regulators will generally make explicit their objective of removing market imperfections so that the consumer can benefit from a competitive marketplace. Regulatory action therefore properly seeks to give the consumer more information that is useful in the buying process, and to even up the bargaining power between a producer and an individual consumer.

Legislation can help ensure that the consumer has the information needed to exercise bargaining power. Regulators and government departments will


generally cite this as justification for any new requirement for information to be
given to the consumer. At a simple level, the requirement to state a price in
relation to specific units for cheese or meat helps to give the consumer
information to shop around if only in a particular supermarket. There are also
requirements relating to advertising that prevent manufacturers or retailers
claiming that a good or service has characteristics which it does not …

It is unrealistic to expect the individual consumer to be able to take legal action
against someone who has provided poor service. Trading standards officers are
able to play an important role where there is clear evidence of a trader not
complying with a contract that they have entered into.

Properly, governments take power to deal with anti-competitive practices that
adversely affect the consumer through competition legislation.

The nature of some goods and services is such that general laws on trade
descriptions or advertising may not be regarded as sufficient and, accordingly,
there will be a demand for special regulation. Financial services has been singled
out in most countries because the nature of many financial products is that their
value cannot easily be ascertained until the end of a rather lengthy period of time,
after which it is costly to attempt to undo the transaction. Similarly, there are also
specific regulatory regimes for the utilities, recognizing the quasi-monopoly
position that some of these have and the special nature of the industries, in
particular they need to serve every customer, even those who might be
uneconomic to serve because of their location. In some sectors, the government
has also addressed the bargaining power point by providing for specific
ombudsmen. These are most common in the public sector.38

13. There is a close link between Consumerism and Constitutionalism. As observed by the
Planning Commission of the Government of India:

“Constitutionalism and consumerism both seem to be twin sisters with similar
objectives. Constitutionalism, in a politically organized society, is concerned with
the protection and promotion of an individual’s rights, dignity and welfare as a
citizen. Similarly, consumerism is concerned with the protection, promotion and
welfare of the rights of the individual as a consumer. In the final analysis, it is the
individual, who is the concern of both whether as a citizen or as a consumer.
Constitutionalism provides the policy framework, institutional mechanism,
finances and functionaries for better service and empowerment of the citizen. On
the other hand consumerism provides ways and means to demand quality goods,
better services, better protection, empowerment, welfare and value for money.
Thus, both are supplementary and complementary to each other.

Constitutionalism promotes by way of constitutionally directed fundamental duties of a citizen, development of a scientific temper and spirit of inquiry and consumerism facilitates consumers to know about the products and services in detail and in all its aspects. Finally, constitutionalism as well as consumerism is an art and science for ensuring quality of life. Therefore, promoting consumerism is directly related to the promotion of constitutionalism. In a more practical perspective the focus of both is good governance in all its dimensions, i.e., transparency, accountability, responsiveness, efficiency, effectiveness and economy at all levels with a vision to develop a better society guaranteeing thereby a better life to all citizens.\textsuperscript{39}

14. The effective, efficient and fair implementation of the Consumer Protection laws is a condition precedent for the promotion of a culture of good governance:

“Generally speaking, the thrust of good governance movement, \textit{inter alia}, is – efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, impartiality and participation. In view of these requirements of good governance, one can easily and with success establish a correlation with the concerns of the Consumer Protection Law and policies. From the point of view of the Consumer Protection Law, it may generally be emphasized that the concerns of consumer rights protection are to ensure fair trade practices, quality goods and deficiency-free services with information to consumers in regard to quality, quantity, potency, composition and price of their choice of purchases. In view of the remedies available to the consumers under the Consumer Protection Laws there is no doubt that at the end of the day, if efforts of the operators of law and enforcement agencies are genuine and there is a sense of commitment, the culture of good governance would pervade wherein the consumers would feel satisfied and there would be no real cause for making a complaint or showing their dissatisfaction. Therefore, the proper and effective implementation of the laws, dealing with the protection of the consumers’ rights would promote the cause and concern of good governance.\textsuperscript{40}


\textsuperscript{40} Ibid., at pp. 4-5.

15. The UN responded to the global consumer movement in the 1970s when it began establishing various standards and guidelines to protect consumers. In 1977, the Economic and Social Council, recognizing that consumer protection had an important bearing on economic and social development, asked the Secretary-General to prepare a survey of national institutions and legislation in the area of consumer protection. In 1979, the Council requested a comprehensive report containing proposals for measures on consumer protection for consideration by Governments. In 1981, the Council, aware of the need for an international policy framework within which further efforts for consumer protection could be pursued, requested the Secretary-General to continue consultations with the aim of developing a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries. Accordingly, the Secretary-General carried out consultations with Governments and international organisations and submitted draft guidelines for consumer protection to the Economic and Social Council in 1983.

Since the Guidelines were adopted, the issue of environmentally sustainable consumption had taken a leap forward by the adoption of Agenda 21 and, specifically, by means of the

41 Such as WHO and FAO’s ‘Codex Alimentarius’ Commission, the International Programme on Chemical Safety and the London Guidelines for the Exchange of Information on Chemicals in International Trade.


objectives set out in its chapter 4 on changing consumption patterns. In 1999 ECOSOC transmitted to the General Assembly, for adoption, the amended guidelines expanded to incorporate sustainable consumption. The thus amended guidelines were duly adopted by the General Assembly.

16. The UN Guidelines for Consumer Protection provide a framework for governments to use in formulating legislation and policies. Governments were called upon to develop, strengthen and maintain a strong consumer policy to protect their population as consumers. Governments were expected to provide a legal basis for enforcing basic consumer rights, with a minimum of consumer protection legislation covering physical safety, promotion and protection of consumer economic interests, standards for the safety and quality of food and service, distribution facilities, redress and education information programs. Governments would also provide the necessary machinery for the enforcement of such rules.

The Guidelines observe that Governments should set their own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures. The Guidelines also require Governments to pay attention to the issue of vulnerable consumers, insisting that special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty.

44 At its third session, held in New York in April 1995, the Commission on Sustainable Development had before it a report of the Secretary-General on changing consumption patterns (E/CN.17/1995/13). It subsequently adopted a work program that called for inter alia the expansion of the Guidelines to include guidelines for sustainable consumption patterns (E/1995/32). The Economic and Social Council also adopted similar resolutions (1995/53 of 28 July 1995 and 1997/53 of 23 July 1997), that requested the Secretary-General, inter alia, to elaborate the guidelines in the area of sustainable consumption patterns. A 1998 report of the Secretary-General (E/CN.17/1998/5) also dealt with the expansion of the Guidelines. Similar recommendations were made by the Interregional Expert Group Meeting on Consumer Protection and Sustainable Consumption, held at São Paulo, Brazil, from 28 to 30 January 1998 (E/CN.17/1998/5).

45 The guidelines addressed the interests and needs of consumers worldwide and recognized two interrelated concerns: first, the imbalance that consumers face in economic terms, educational levels and bargaining power; secondly, the importance of promoting just, equitable and sustainable economic and social development and environment protection.
17. By and large, the Guidelines have been regarded as a valuable set of principles for consumer protection and have had a major impact on the consumer policies of States, both developed and developing countries.\footnote{Vide 1995 and 1997 Reports of the Secretary-General on the implementation of the UN Guidelines by Member States [E/1995/70 and E/1997/61]. Of those developed countries reporting, Germany, Sweden, Australia, Norway, Denmark, U.S., Canada, and New Zealand indicated that the Guidelines have had a positive impact on their national consumer policies. Australia appears to have been particularly proactive in implementing the Guidelines. Immediately after their adoption, the Attorney-General requested the National Consumer Affairs Advisory Council to advise him on the extent to which the consumer policy in Australia met with the objectives set out in the Guidelines. In its responding report, the Council pointed out that the consumer policy in Australia have largely met the objectives set out in the Guidelines, but also identified areas which needed to be considered for Improvement [vide National Consumers Affairs Advisory Council, \emph{Australia and the United Nations Guidelines for Consumer Protection}, (Canberra: Attorney-General’s Department, 1986)]. The Guidelines have had a major impact on the consumer policies of developing countries. The Secretary-General’s 1995 Report noted that European Union had funded the Africa Conference on Consumer Protection in 1996. The 1996 Africa Conference organized by Consumers’ International, in collaboration with the U.N. Department for Policy Coordination and Sustainable Development, helped launch the Model Law for Africa, designed to protect the African consumer and serve as a guide for African Governments in their effort to develop appropriate policies and legislation and enforcement mechanism in the area of consumer protection. A similar conference was organized in Asia in 1997 by Consumers’ International, in collaboration with the U.N. and other organisations. As to impact in Latin America, vide R. Vaughn ‘Consumer Protection Laws in South America’ (1994) 17 \emph{Hastings Int’l & Comp. L. Review} 275.}
(3) The UN Guidelines and Consumer Rights

18. In accordance with the UN Guidelines for Consumer Protection, Governments are required to afford protection to consumer rights. Consumers are recognized the following rights:
   (a) Right to Satisfaction of Basic Needs,
   (b) Right to Safety,
   (c) Right to Choice,
   (d) Right to Information,
   (e) Right to Consumer Education,
   (f) Right to Redress,
   (g) Right to Representation, and
   (h) Right to a Healthy Environment.

(a) Right to Satisfaction of Basic Needs

19. This is the right to basic goods and services, which guarantee a dignified living.

The UN Guidelines provide inter alia that:

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47 The legitimate needs which the Guidelines are intended to meet are the following:
   (a) The protection of consumers from hazards to their health and safety;
   (b) The promotion and protection of the economic interests of consumers;
   (c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
   (d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
   (e) Availability of effective consumer redress;
   (f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
   (g) The promotion of sustainable consumption patterns.

48 It includes adequate food, clothing, health care, drinking water and sanitation, shelter, education, energy and transportation.
(1) Governments should give priority to areas of essential concern for the health of the consumer, such as food, water and pharmaceuticals;

(2) Policies should be adopted or maintained for product quality control, adequate and secure distribution facilities, standardized international labelling and information;

(3) When formulating national policies and plans with regard to food, Governments should take into account the need of all consumers for food security; Governments should strengthen national policies to improve the supply, distribution and quality of water for drinking;

(4) Governments should develop or maintain adequate standards, provisions and appropriate regulatory systems for ensuring the quality and appropriate use of pharmaceuticals through integrated national drug policies which could address, inter alia, procurement, distribution, production, licensing arrangements, registration systems and the availability of reliable information on pharmaceuticals.49

(b) Right to Safety

20. This is the right to be protected against products, production processes and services, which are hazardous to health or life.

The UN Guidelines considers the right to safety as one of the fundamentals. Governments are required to

(1) Adopt food safety measures, including safety criteria, food standards and dietary requirements,50 effective monitoring, inspection and evaluation mechanisms;

49 The UN Guidelines also provides that Governments should adopt appropriate measures in areas, such as pesticides and chemicals in regard, where relevant, to their use, production and storage, taking into account such relevant health and environmental information as Governments may require producers to provide and include in the labelling of products.

(2) Elaborate and implement standards for the safety and quality of goods and services;\(^{51}\)

(3) Adopt specific policies to ensure distribution of essential goods and services, where this distribution is endangered, including assistance for the creation of adequate storage and retail facilities;

(4) Encourage and ensure the availability of facilities to test and certify the safety, quality and performance of essential consumer goods and services; and

(5) Adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial and severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it; if it is not possible to do this within a reasonable period of time, the consumer should be adequately compensated.

(c) Right to Choice

21. This is the right of consumers to choose between different alternatives, to obtain optimum benefit from their economic resources.

The UN Guidelines provide that Government policies should seek to achieve the goals of satisfactory production and performance standards, adequate distribution methods, fair business practices, informative marketing and effective protection against practices which could adversely affect the economic interests of consumers and the exercise of choice in the market place. Governments should, in particular, adopt:

(1) Laws and standards to monitor adverse practices, such as the adulteration of foods, false or misleading claims in marketing and service frauds;

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\(^{51}\) Governments are expected to adopt appropriate policies which would ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. The Guidelines aim to achieve this by requiring that those responsible for bringing the goods to the market, in particular suppliers, exporters, importers, retailers and the like, should ensure that while in their care these goods are not rendered unsafe through improper handling or storage and that while in their care they do not become hazardous through improper handling or storage. They are required to instruct the consumers in the proper use of goods and also inform them of the risks involved in its use. Vital safety information should also be conveyed to consumers by internationally understandable symbols wherever possible.
(2) Laws for the regulation of promotional marketing and sales practices, which should be guided by the principle of fair treatment of consumers (through the provision of the information necessary to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate);

(3) Laws protecting consumers from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts, and unconscionable conditions of credit by sellers;

(4) Laws pertaining to weights and measures, with adequate machinery for its enforcement;

(5) Measures relating to the control of restrictive and other abusive business practices which may be harmful to consumers, including means for the enforcement of such measures;\(^52\)

(6) Policies encouraging the formulation and implementation by business, in cooperation with consumer organizations and other interested parties, of codes of marketing and other business practices to ensure adequate consumer protection (which should receive adequate publicity);

(7) Policies that make clear the responsibility of the producer to ensure that goods meet reasonable demands of durability, utility and reliability, and are suited to the purpose for which they are intended, and that the seller should see that these requirements are met (including, where appropriate, adequate availability of reliable after-sales service and spare parts); similar policies should apply to the provision of services; and

(8) Measures for fair and effective competition in order to provide consumers with the greatest range of choice among products and services at the lowest cost.\(^53\)


\(^{53}\) The UN Guidelines are based on the premise that effective competition is a cornerstone of markets that benefit the consumer: vide Anja Peltonen, Director, Finnish Consumer Agency, “Consumer Rights and Fair Competition — UN Guidelines on Consumer Protection” (January 2008), as well as P.S. Mehta, “Promoting Competitive Reforms in Developing Countries through consumer action” (CUTS, 2008); vide also Consumers International, *Consumers and Competition: A consumer welfare analysis of three retail markets in 14 EU member states* (2007).
(d) Right to Information

22. This is the right of the consumer to be informed about the quality and price of goods or services. The right to information is essential for making “informed decisions”; therefore, consumers must be provided with adequate information, enabling them to act with discernment.

The UN Guidelines require, inter alia, that:

(1) Vital safety information should be conveyed to consumers on proper use of goods and risks involved in intended or normally foreseeable use;

(2) There should be free flow of accurate information on all aspects of consumer products;

(3) Consumer access to accurate information about the environmental impact of products and services should be encouraged through such means as product profiles, environmental reports by industry, information centres for consumers, voluntary and transparent eco-labelling programs and product information hotlines.

(e) Right to Consumer Education

23. This is the right to acquire the knowledge and skills to be an informed consumer.

According to the UN Guidelines, Governments should develop or encourage the development of general consumer education and information programs, including information on the environmental impacts of consumer choices and behaviour and the possible implications, including benefits and costs, of changes in consumption, bearing in
mind the cultural traditions of the people concerned. The aim of such programs should be to enable people to act as discriminating consumers, capable of making an informed choice of goods and services, and conscious of their rights and responsibilities. In developing such programs, special attention should be given to the needs of disadvantaged consumers, in both rural and urban areas, including low-income consumers and those with low or non-existent literacy levels. Consumer groups, business and other relevant organizations of civil society should be involved in these educational efforts.

24. **(f) Right to Redress**

The UN Guidelines provide that Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.

It is envisaged that consumer education should, where appropriate, become an integral part of the basic curriculum of the educational system, preferably as a component of existing subjects. Governments should also organize training programs for educators, mass media professionals and consumer advisers. Consumer education and information programs should cover such important aspects of consumer protection as the following:

(a) Health, nutrition, prevention of food-borne diseases and food adulteration;
(b) Product hazards;
(c) Product labelling;
(d) Relevant legislation, how to obtain redress, and agencies and organizations for consumer protection;
(e) Information on weights and measures, prices, quality, credit conditions and availability of basic necessities;
(f) Environmental protection; and
(g) Efficient use of materials, energy and water.

The following administrative and legislative measures need to be taken: consumer education programs through co-operation with other branches of the government like the Education Ministry and business chambers; budgetary provisions and institutional mechanism to be provided to conduct training on a regular basis; and consumer organisations and other NGOs to be provided resources to carry this out effectively.
The Guidelines also provide that Governments should encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers. Information on available redress and other dispute-resolving procedures should be made available to consumers.

(g) Right to Representation

25. This is the right to be heard, the right to advocate consumers’ interests with a view to their receiving full and sympathetic consideration in the formulation and execution of economic and other policies.

The UN Guidelines provide that Governments should facilitate the development of independent consumer groups, recognize the freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them.
(h) **Right to a Healthy Environment**

26. This is the right to consume goods and services in a sustainable manner, that is in a manner which meets the needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable.

According to the UN Guidelines, responsibility for sustainable consumption is shared by all members and organizations of society, with informed consumers, Government, business, labour organizations, and consumer and environmental organizations playing particularly important roles.\(^{56}\)

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\(^{56}\) Informed consumers have an essential role in promoting consumption that is environmentally, economically and socially sustainable, including through the effects of their choices on producers. Governments should promote the development and implementation of policies for sustainable consumption and the integration of those policies with other public policies. Government policy making should be conducted in consultation with business, consumer and environmental organizations, and other concerned groups. Business has a responsibility for promoting sustainable consumption through the design, production and distribution of goods and services. Consumer and environmental organizations have a responsibility for promoting public participation and debate on sustainable consumption, for informing consumers, and for working with Government and business towards sustainable consumption.

Vide Ministry of Environment and Sustainable Development, *Pocketbook on Sustainable Consumption and Production Indicators* (2010). The pocketbook, which presents a set of 30 indicators on Sustainable Consumption and Production, aims at guiding our understanding of the consumption and production patterns in Mauritius in order to trigger appropriate policy responses and set appropriate norms.
(4) Key Objectives of Consumer Policy

27. Any market is based on the interaction between producers and suppliers of goods and services, and the consumption of these by customers. How well such a market functions depends on a number of factors, including the level of competition between producers and suppliers, the information available to consumers, the business ethics of producers and suppliers and the conduct of consumers. In situations where consumers have little or distorted information at their disposal, where consumers passively accept the goods and services provided to them, and where producers and suppliers have disproportionate power in the market place, the result will be an inefficient business environment, which provides poor quality, high cost products and services. It will further result in an economy that is uncompetitive internationally. Thus, active, confident and vocal consumers are the key to driving competitiveness. The key objective of consumer policy should be to empower consumers to participate in markets to access goods and services that meet their needs.

28. Consumer policy also plays a vital role in protecting vulnerable and disadvantaged consumers who have substantial difficulties in participating in markets. Against these, consumer policy must ensure that the regulatory responses to market failings deliver net benefits to society and that the regulatory mechanism does so with the least possible cost burden.
(III) The Current Legal Framework for Consumer Protection and its Lacunas

29. Legislation affording protection to consumers in the following Acts and subsidiary legislation made there under are hereby considered:
   (a) Consumer Protection Act; 58
   (b) Consumer Protection (Price and Supplies Control) Act; 59
   (c) Essential Commodities Act; 60
   (d) Fair Trading Act 61;
   (e) Hire Purchase and Credit Sale Act; 62 and
   (f) Prices & Consumer Protection Advisory Committee Act. 63

57 Other legislation protective of consumers, such as the Mauritius Standards Bureau Act, the Legal Metrology Act, the Jewellery Act, the Borrower Protection Act, the Banking Act, the Food Act, the Meat Act, the Public Health Act and the Genetically Modified Organisms Act, as well as the Competition Act are not considered as such in this Report as they fall beyond the scope of this review.

58 Act No. 11 of 1991.

59 Act No. 12 of 1998 (as subsequently amended).

60 Act No. 8 of 1991.

61 Act No. 26 of 1979 (as subsequently amended).

62 Act No. 6 of 1964 (as subsequently amended).

63 Act No. 57 of 1983.
(1) Consumer Protection Act

30. The Consumer Protection Act [CPA] lays down general standards regarding the safety and quality of goods supplied. Section 3(1) of the Act provides that no person shall supply any goods which suffer from any fault with regard to any prescribed quality, quantity, potency, purity or standard or, in the case of any machinery or motor vehicle, with regard to the quality, nature or manner of its performance.

31. When moving that the Consumer Protection Bill No. XII of 1991 be read a 2nd time in the National Assembly, the then Minister of Trade and Shipping, Hon. Mr. D. Gungah, had this to say about the overall objective of the Bill:

“The Bill before the House … will give greater protection to consumers by regulating the safety of goods not so far covered by any regulations in force …. The Bill will apply to the supply of consumer goods, i.e. those ordinarily intended for private use or otherwise e.g. electrical appliances, tyres, cooking utensils, cosmetic products, and children’s bicycles. Certain goods, whose safety is already controlled under existing legislation, are specifically excluded. For example food is controlled under the Food and Drugs Act and the Public Health Act; the safety of drugs is governed by the Pharmacy Act; chemical fertilizers are to be stored and weighted separately from foodstuffs according to the Chemical Fertilisers Control Act; the grading and moisture content of tobacco is taken care of in the Tobacco Production and Marketing Regulations 1945 … This Consumer Protection Bill, Mr. Speaker, Sir, will make it a duty for any person supplying goods to check whether the goods comply with the respective safety regulations and also to take all reasonable steps and to exercise all due diligence to make sure that the goods are not unsafe.

64 According to section 2 CPA, “supply” in relation to goods –
   (a) means any transaction by way of trade whether for money or for money’s worth;
   (b) includes an exchange of goods, a credit sale agreement, a hire purchase agreement and giving the goods as a prize or otherwise as a gift;
   (c) includes also offering to supply, exposing for supply or being in possession for supply.

65 Section 3(2), however, excludes from the ambit of the Act:
   - growing of crops or things comprised in land by virtue of being attached to it;
   - water, food, animal feed or chemical fertilizer;
   - aircraft;
   - drugs or medicine;
   - tobacco; and
   - goods intended exclusively for export under an EPZ certificate.
In the past whenever legislation regarding the purity, safety of a commodity had to be made, it was necessary to introduce in Parliament a Bill to make provision there for. With the passing of the Consumer Protection Act, it will not be necessary to come to Parliament for regulating the safety aspect of specific commodities. This can henceforth be conveniently done by the making of regulations under the Consumer Protection Act …

Mr. Speaker, Sir, I have no doubt that this Bill will meet its objectives insofar as the population will be better protected against unsafe consumer goods. The risks of accidents by unsafe goods (for example unsafe dummies, unsafe pushchairs, unsafe toys, unsafe electrical appliances, unsafe gas equipment etc) will be considerably reduced.”

32. Under section 4(1) CPA, the Minister\(^\text{67}\) may make such safety regulations as he thinks fit for the purposes of this Act. He may, in particular, provide for -

(a) the composition, design, construction, finish or packing of goods;
(b) the giving, refusing, alteration, cancellation or approval of such goods;
(c) prohibiting persons from supplying goods, including components and raw materials thereof;
(d) standards to be applied in carrying out any test or inspection of goods;
(e) the requiring of a mark, warning or instructions to be put on or to accompany the goods;
(f) levying of fees.

33. So far, standards have been laid down in respect of toys,\(^\text{68}\) laser pointers,\(^\text{69}\) and plastic and polyethylene pipes and fittings.\(^\text{70}\)

The Toys (Safety) Regulations 1994 lay down (1) the essential safety requirements to be observed by a manufacturer of toys in Mauritius or importer of toys designed or intended

\(^{66}\) Hansard, Debates 4 June 1991.

\(^{67}\) “Minister” is defined in section 2 CPA as meaning the Minister to whom responsibility for the subject of consumer protection is assigned.

\(^{68}\) Toys (Safety) Regulations 1994 [GN No. 43 of 1994].

\(^{69}\) Laser Pointers (Safety) Regulations 2007 [GN No. 22 of 2007].

\(^{70}\) Plastic and Polyethylene Pipes and Fittings (Mauritius Standard Specifications) Regulations 2007 [GN No. 54 of 2007].
for use in play by children under 14 years of age, with a view to rendering negligible the risks involved to health, physical integrity and life of a child user; (2) every toy shall be accompanied by the appropriate warnings and indication of precautions to be taken during use; (3) the manufacturer of toys in Mauritius or importer of toys shall keep certain information [such as detailed information concerning the design and manufacture of the toys, the use of a test report or technical file regarding conformity of production with essential safety requirements] in respect of toys supplied in Mauritius for inspection by the enforcement authority [which is defined as including any officer of the Ministry of Trade and Shipping, when it would have been more appropriate to define it as any officer of the Ministry to which responsibility for the subject of consumer protection is assigned]; and (4) criminal liability of the supplier, manufacturer or importer of toys, in respect of statutory requirements not complied with.

The Laser Pointers (Safety) Regulations 2007 provide there shall be affixed on every laser pointer (a portable electric lamp which is battery operated and produces a beam of electromagnetic radiation of not more than 1 milliwatt) a label indicating the safety precaution for the use of the product. The regulations purport to lay down in the First Schedule to the regulations the essential safety requirements in respect of a laser pointer to be supplied in Mauritius: as at now, more than three years since the regulations were made by the Minister, the provisions of the First Schedule to the regulations have not been enacted!

The Plastic and Polyethylene Pipes and Fittings (Mauritius Standard Specifications) Regulations 2007 provide that (1) no person shall import, sell or manufacture plastic and polyethylene pipes and fittings, which do not conform to the appropriate standard specified in the Schedule to these regulations; (2) no manufacturer or distributor shall, without lawful authority or reasonable excuse, have in his possession plastic and polyethylene pipes and fittings which do not conform to the appropriate standards
specified in the Schedule to these regulations; (3) there shall be regular testing of plastic and polyethylene pipes and fittings sold or stored by a manufacturer and distributor.\textsuperscript{71}

34. It is to be noted that, when moving that the Consumer Protection Bill No. XII of 1991 be read a 2\textsuperscript{nd} time in the National Assembly, the then Minister of Trade and Shipping, Hon. Mr. D. Gungah, announced the enactment of safety standards in respect of a wider range of goods:

“Regulations under the Act are being prepared to cover the safety of the following consumer goods:
(i) Children equipment such as children’s bicycles, children clothing, babies dummies and children’s toys;
(ii) Personal protective equipments such as helmets;
(iii) Household equipment e.g. domestic pressure cookers, kettles and domestic gas appliances;
(iv) Do-it-yourself equipment such as vehicle support stands, hand hammers and chain saws.”\textsuperscript{72}

35. In case of goods supplied, which are suspected to be unsafe for use or consumption, section 5(1) CPA provides for a Prohibition Notice which may be served by the Enforcement Authority\textsuperscript{73} on the supplier to prevent him from supplying any such goods. The Notice shall specify the reasons for which the goods are believed not to be safe for use or consumption,\textsuperscript{74} and the aggrieved supplier may make representations to the Minister on whom the final decision rests.\textsuperscript{75}

\textsuperscript{71} Regulation 4(a) provides that every manufacturer and distributor shall inspect and test, at regular intervals, plastic and polyethylene pipes and fittings sold or stored by him. This provision assumes erroneously that the manufacturer or importer possesses the expertise for the testing of the pipes and fittings; we consider it would have been more appropriate to provide that “every manufacturer and distributor shall arrange for testing by the Mauritius Standards Bureau, at regular intervals, of plastic and polyethylene pipes and fittings sold or stored by him.”

\textsuperscript{72} Hansard, Debates 4 June 1991.

\textsuperscript{73} Section 2 CPA defines the “enforcement authority” as meaning the Ministry of Trade and Shipping. We are of the opinion it would have been more appropriate if the Act had defined the “enforcement authority” as the Ministry which has responsibility for the subject of consumer protection.

\textsuperscript{74} Section 5(2) CPA.

\textsuperscript{75} A person who has been served with a prohibition notice may, within 10 days of the receipt thereof, make representations in writing to the Minister, specifying the grounds on which he relies. Upon receipt of any representations, the Minister shall hear the representor within 15 days and take a decision. Where the Minister
With a view to ensuring effective enforcement of the provisions of the Act, section 7(1) CPA provides that an authorised officer\(^{76}\) may, at all reasonable times and on showing his certificate of authority,\(^ {77}\) enter any trading premises for the purposes of ensuring that the provisions of this Act are being complied with. Where the authorised officer has reasonable grounds for suspecting that there has been a contravention in relation to any goods, he may inspect the records of such goods and seize them, if necessary; he also take a sample of the goods.\(^ {78}\) It is an offence to obstruct an authorised officer in the performance of his functions, or to fail or refuse to give to an authorised officer such information as he may reasonably require in the performance of his functions.\(^ {79}\)

36. In our view, the Act should have provided that the Permanent Secretary and authorized officers are afforded “Protection from liability”; CPA fails to provide that “no liability, civil or criminal, shall attach to the Permanent Secretary or an authorised officer in respect of anything done in good faith in the exercise of his powers under this Act”.

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\(^{76}\) Section 2 CPA defines “authorised officer” as meaning a person authorised in writing by the Minister to assist the enforcement authority in carrying out its functions under the Act.

\(^{77}\) “Certificate of authority” is defined in section 2 CPA as meaning such certificate of identity and authority as the Minister may issue to an authorised officer.

\(^{78}\) Section 7(2) CPA.

\(^{79}\) Section 8 CPA.
(2) Consumer Protection (Price and Supplies Control) Act

37. The Consumer Protection (Price and Supplies Control) Act [CPPSCA] aims at providing better protection to the consumer against abusive trade practices by regulating trade, supply and price of goods.\(^{80}\)

38. Section 35(1) CPPSCA confers on the Minister\(^{81}\) law-making power (the power to make such regulations as he thinks fit for the purposes of the Act and for the purpose of regulating trade, supply and prices),\(^{82}\) he may, in particular, provide for the issue of licences and permits,\(^{83}\) the levying of fees and charges,\(^{84}\) the registration of householders

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\(^{80}\) According to section 2 CPPSCA:
“Consumer” means a person to whom goods are supplied;
“Goods” means any article which may be the subject of trade or business;
“Trade” means the manufacture, production, distribution, sale, transfer, import, export, use or other dealing in goods;
“Supply”, in relation to goods (a) means any transaction by way of trade whether for money or for money’s worth; (b) includes supply by way of sale, lease, hire, hire purchase or credit sale; (c) includes offer to supply, expose for supply or be in possession for supply.

\(^{81}\) Minister is defined in section 2 CPPSCA as the Minister to whom responsibility for the subject of consumer protection is assigned.

\(^{82}\) As mentioned earlier, regulations made under the Supplies Control Act No. 20 of 1974, which was repealed by section 38(1) of the Consumer Protection (Prices and Supplies Control) Act, are still in force by virtue of section 17(1) of the Interpretation and General Clauses Act, viz. Commodities (Registration of Traders) Regulations 1978 (GN No. 126 of 1978), Bread (Control of Manufacture and Sale) Regulations 1988 (GN No. 04 of 1988), and Sugar (Maximum Price) Regulations 1987 [GN No. 107 of 1987] as updated.

\(^{83}\) Under the Bread (Control of Manufacture and Sale) Regulations 1988 [GN No. 4 of 1988], it is provided that no person shall carry on the business of a baker unless he holds a licence issued by the Minister; every licence issued shall specify the premises in relation to which it is issued and be subject to such conditions as the Minister may impose. It is also provided that except with the Minister’s authorisation, no baker shall cease to carry on his business, whether temporarily or permanently, or cause to be manipulated in any day or night by every team he employs less than the minimum amount of bags of flour specified in the Schedule to the Baking Industry (Remuneration Order) Regulations. It is further provided that no person (except with the approval of the Minister) shall manufacture, expose, sell or offer for sale bread of any type other than that specified in the Schedule, or bread which contains more moisture by weight than that specified in the Schedule. According to the Consumer Protection (Control of Imports) Regulations 1999 [GN No. 135 of 1999], as subsequently amended, no person shall import any controlled goods specified in the First Schedule to the regulations (except for goods such as household and personal effects of a passenger) unless he holds an import permit from the Permanent Secretary.

\[^{NB}: (1) The term “controlled goods” is inappropriate since these are goods defined in the parent Act [CPPSCA] as those listed in the First and Second Schedules to the Act (and these do not include, for instance, ‘rough diamonds’ etc. which are mentioned in the First Schedule to the Regulations); it would have been more appropriate to use the term ‘restricted goods’; (2) The Permanent Secretary is defined in the Regulations as the permanent secretary of the
and traders,\textsuperscript{85} the giving of information, the inspection of premises or articles and the production and inspection of such documents as the Minister may require; the regulation

Ministry responsible for the subject of Commerce; this is in contradiction with the parent Act where the Permanent Secretary is defined as the Permanent Secretary of the Ministry to which responsibility for the subject of consumer protection is assigned.

The Consumer Protection (Control of Imports) Regulations 1999 also provide that no person shall import a prohibited good [the list thereof is provided in the Second Schedule to the regulations].

The Consumer Protection (Importation and Sale of Second-hand Motor Vehicles) Regulations 2004 [GN No. 196 of 2004] provides that no person shall carry on the business of importation and sale of second-hand motor vehicles unless the person is a company which (a) has an issued share capital of not less than 2 million rupees; (b) holds a licence issued by the Permanent Secretary; and (c) operates from its business premises [the business premises shall consist of a show room, or a closed yard, or both, and an office which are (i) destined solely for the display and sale of imported second-hand motor vehicles, and sale of spare parts; (ii) separated from any other compound or building used for some other purpose; and (iii) easily accessible to the public and motor vehicles].

By virtue of the Consumer Protection (Export Control) Regulations 2000 [GN No. 97 of 2000], no person shall export any controlled goods unless he holds an export permit from the Permanent Secretary. Controlled goods are those goods specified in the First Schedule to the Regulations, such as live animals and rough diamonds; for the purpose of export to the Islamic Republic of Pakistan in addition to the goods specified in the First Schedule, controlled goods are the goods specified in the Fifth Schedule.


\textsuperscript{84} The Consumer Protection (Fees) Regulations 2005 [GN No. 35 of 2005] requires that every producer [that is any person or company manufacturing any specified product [any textile or apparel article specified in Group SE of the First Schedule to the Export to the United States of America (AGOA) Regulations 2000] shall, in respect of the export of a specified product to the United States of America, pay a fee to the Accountant-General who shall then deposit the fee to the account of Enterprise Mauritius. Vide also Consumer Protection (Importation and Sale of Second-hand Motor Vehicles) Regulations 2004 [GN No. 196 of 2004] as to fee payable, and security to be provided, by an "authorized dealer" in "second-hand motor vehicle".

\textsuperscript{85} The Commodities (Registration of Traders) Regulations 1978 [GN No. 126 of 1978], provides that no trader shall deal in a commodity [Fresh fruits, Vegetables, and Fresh fish] unless he holds a certificate of registration issued by the Minister following a written application; the certificate is valid for a period of one year from the date of issue and is renewable for further periods of one year. Every certificate of registration shall be kept by the trader on his trade premises, or, where he has no premises, in his possession whilst exercising his trade, and be produced on demand to an authorized officer. These regulations, however, quite astonishingly, do not provide that it is an offence to act in contravention of the provisions of the regulations.
and control of season sales, clearance sales, bargain sales or other sales, or product promotion.\textsuperscript{86} The Minister may also authorise the Permanent Secretary, by regulations or by written directions, to make provision for any matter incidental to any regulation made.\textsuperscript{87}

39. It is to be noted that municipal and district councils,\textsuperscript{88} as well as the Rodrigues Regional Assembly,\textsuperscript{89} are empowered to regulate and exercise some control over the exercise of

\textsuperscript{86} According to the Consumer Protection (Trade Fair and Exhibition) Regulations 2003 [GN No. 50 of 2003], any person wishing to hold a trade fair or an exhibition shall apply to the Minister for authorisation, not less than one month before the proposed first day of the trade fair or exhibition. A trade fair is a commercial event of a period of not less than one day, nor more than 10 days, at a specific place where participants are allowed both to exhibit and to sell their products and services, and does not include an event organized for one day for fund-raising purposes by an educational, a governmental or a non-governmental organization; an exhibition is a commercial event of a period of not less than one day, nor more than 10 days, at a specific place where participants are allowed to exhibit their products and services, and does not include an event organized for one day for fund-raising purposes by an educational, a governmental or a non-governmental organization.

\textsuperscript{87} Section 35(2)(b) CPPSCA. Under the Consumer Protection (Provision for Incidental Matters) Regulations 2006 [GN No. 75 of 2006], the Permanent Secretary may, by written directions, provide for -

(a) the price structure [that is the breakdown of the price of specified goods into all the relevant cost items and charges pertaining to the importation and sale of specified goods in Mauritius and Rodrigues] in respect of any specified goods [that is bulk or bag cement and any other controlled goods, the price of which has been fixed by regulations made under section 35(1) of the Consumer Protection (Price and Supplies Control) Act];

(b) the collection by an importer of specified goods of, an amount under the items "Price Equalisation Account" [that is the item in the price structure, representing the amount collected by an importer of specified goods on a sale of specified goods as compensation for foreign exchange loss] and "Exchange Loss Recovery Account" [that is the item in the price structure, representing the amount collected by an importer of specified goods on a sale of specified goods as compensation for past losses incurred due to fluctuation in exchange rate];

(c) the collection of an amount under the Rodrigues Subsidy [that is the item in the price structure, representing the amount collected by an importer of specified goods to subsidise the sale of imported goods in Rodrigues].

\textsuperscript{88} By virtue of section 51(1)(d)(i)&(m) of the Local Government Act (1989), a municipal or district council shall within the limits of the area under its jurisdiction be responsible, inter alia, for the provision and regulation of public markets, fairs and places of public auction, the control of premises used for commercial, industrial, professional and other related activity, and the control of hawkers. It may make, under section 141 of the Act, may make regulations to provide for anything which it may provide for under this Act and not specifically provided for and generally for the good rule and government of the whole or any part of the town or district. Vide, for instance, Ibrahim Abdoolah Municipal Market/Fair Regulations 2007 [GN No. 97 of 2007].

\textsuperscript{89} According to section 26(3)(a) of the Rodrigues Regional Assembly Act, the Rodrigues Regional Assembly shall, in relation to Rodrigues, have all the powers and privileges which, under the Local Government Act 1989 or any other enactment are, in the Island of Mauritius, vested in a Municipal Council as Local Authority and the Regional Assembly shall, in particular, carry out, with such modifications as may be specified in the Fifth Schedule to this Act, the duties referred to in section 51 (1) of the Local Government Act.
trade for the purpose of good local/regional government, but responsibility for the administration/enforcement of the provisions of CPPSCA rest exclusively with the Ministry.

40. We wish to highlight that, in our view, the law-making powers conferred on the Minister by Parliament, by virtue of sections 3(1), 4(1), 5(1) and 35(1) CPPSCA, are entrusted only to one Minister, the one to whom responsibility for the subject-matter of consumer protection is assigned by the President of the Republic. Responsibility for the administration/enforcement of the provisions of CPPSCA cannot be assigned to different Ministers. Indeed, the assignment to a Minister of responsibility for the conduct of any business of the Government, including responsibility for the administration of any department of Government, is subject to the Constitution and any other law. The current practice of having the CPPSCA administered by two different Ministries is in our view unconstitutional, and may well result in many legislative/administrative acts being tainted with illegality, and we urge that this matter be urgently addressed and remedied.

Section 26(3)(b)(i) of the Rodrigues Regional Assembly Act is to the effect that no person shall carry out, in Rodrigues, any activity specified in the Eighth Schedule to the Local Government Act 1989 unless he has obtained a licence to that effect from the Regional Assembly and paid such fee as may be prescribed by the Regional Assembly.

For instance, on 25 June 2010, Cabinet has taken note that the Minister of Industry and Commerce would promulgate Regulations to amend the Consumer Protection (Control of Price of Petroleum Products) Regulations to take into consideration the f.o.b. price of petroleum products of vessels loaded during the period 1 to 30/31 of the month with a view to standardising alignment in the computation of the price of petroleum products during the APM exercises when responsibility for ‘consumer protection’ is entrusted to the Minister of Business, Enterprise, Cooperatives and Consumer Protection.

Section 62 of the Constitution, entitled ‘Assignment of responsibilities to Ministers’ provides that the President of the Republic, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of Government. [The underlining is ours].
(a) Price Control Mechanism

41. This is what Hon. Mr. S. Sunassee, then Minister of Industry and Commerce, stated about the price control mechanism framework during the 2nd reading of the Consumer Protection (Price and Supplies Control) Bill No. XVII of 1998 in the National Assembly:

“Part II of the law sets up a new framework for an effective and comprehensive price control with the number of controlled goods being increased to include most, if not all, currently used commodities and the obligation for the trader to affix appropriate labels indicating the selling price of a commodity and where applicable to state that VAT is not chargeable. The price control mechanism under the Bill is made up of three components which permit the system to be more flexible. It permits the system to evolve with time and needs as they are felt. These three components are the Maximum Price, the Maximum Mark-up and the Maximum Recommended Retail Price. The evolutionary nature of the proposed system is such that a product which is today under the regime of Maximum Price could over time move across in the system to be subject to the more liberal component Maximum Recommended Retail Price. With the introduction of VAT traders shall have to affix appropriate price tags to inform the public what the selling price inclusive of VAT is for all articles on sale and to inform the public where no VAT is chargeable; there is also the provision for different colour of price labels as a means of informing the public.

Mr. Speaker, Sir, with the liberalisation of prices, traders have been used during the past year to operate in a free and liberal environment and they may, therefore, think that they can charge whatever price they want and get away with this. With the introduction of VAT, the temptation to charge higher prices will become still higher and this legislation specifically purports to curb that temptation by providing tougher penalties for those who would contravene its provisions. A measure that may effectively prevent such abuses and provide meaningful protection to the consumer is the price control of a large number of commodities. This measure has become inevitable for the maintenance of social peace and stability in the country, at least, during the early stage of the implementation of the VAT. The number of commodities subjected to price control both under the Maximum Price and the Maximum Mark-up systems has accordingly been increased to include goods that are currently purchased by the ordinary consumer.”

42. Section 3(1) CPPSCA provides that in respect of controlled goods specified in the First Schedule to the Act, the Minister may, by regulations, fix the price.

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Part I of the First Schedule to CPPSCA provides the list of goods in respect of which the price is fixed and which is applicable to the island of Mauritius: Bread, Butter and Margarine, Canned Fish (Sardines & Pilchards), Canned Meat (Corned Beef & Corned Mutton), Cement, Cheese, Coconut Oil, Coffee, Cooking Gas, Cornflakes, Fertilizers, Flour including Whole Wheat Flour, Frozen Fish, Frozen Chicken, Frozen Meat, Fruit Juices, Ghee, Infant Milk Powder, Milk Powder, Onion (other than the type known as “Traditional Toupie”), Petroleum Products (including Kerosene), Pulses, Rice (excluding Luxury Rice), Sugar, Concrete blocks, and Potassium-based additive.\(^93\)

Part II of the First Schedule to CPPSCA (as updated by GN No. 286 of 2008) provides the list of goods in respect of which the price is fixed and which is applicable to the island of Rodrigues: Bread, Butter and Margarine, Canned Fish, Canned Meat, Canned Poultry, Canned sausages, Cement, Cheese, Dual Purpose Kerosene (DPK), Flour, Fresh Fish, Infant Milk Powder, Liquefied Petroleum Gas (LPG in cylinder of 5, 6 and 12 kgs), Milk Powder, Rice, and Tea.

Under the Consumer Protection (Consumer Goods) (Maximum Price) Regulations 1998 [GN 151 of 1998], as subsequently amended, the importer or local manufacturer of certain consumer goods [Bread, Cement, Fertilizers, Flour including whole wheat flour, Dual Purpose Kerosene (DPK), and Rice (excluding Luxury rice)] is required to make an application (with such documents as are specified) to the Minister to fix the maximum price of the consumer goods. On receipt of an application, the Minister may, where he is satisfied that the maximum wholesale and maximum retail prices of the consumer goods have to be fixed, grant the application on such conditions as he thinks fit and

\(^93\) It is to be noted that the First Schedule was amended, by way of regulations [by the Minister under section 35(3) CPPSCA]: (1) Iron/steel bars (excluding 6mm bars) were removed from the list in 2007 [GN No. 44 of 2007]; 6mm bars had already been excluded from the list as far back as 2004 [GN No. 111 of 2004]; (2) Salted Fish/Salted Snoek was removed from the list in 2004 [GN No. 104 of 2004]; (3) Edible oil was removed from the list in 2003 [GN No. 21 of 2003]; (4) Beer and Stout were removed from the list in 2003 [GN No. 48 of 2003] after having been added to the list in 2000 [GN No. 123 of 2000]; (5) Potassium-based additive was added to the list in 2002 [GN No. 142 of 2002]; (6) Mineral Water was removed from the list in 2003 [GN No. 48 of 2003] after having been added in 2000 [GN No. 133 of 2000]; (7) Aerated Beverages were removed from the list in 2003 [GN No. 48 of 2003], Aerated Beverages (in glass bottles) having been removed from the list in 2000 [GN No. 132 of 2000]; (8) Concrete Blocks were added to the list in 2000 [GN No. 123 of 2000].
communicate his decision to the importer or manufacturer by way of a permit. No importer shall, in respect of the consignment of any consumer goods, sell or supply the consumer goods unless he holds the permit in respect of that consignment.

As to price of taxable and non-taxable goods, listed in Part I of the First Schedule to CPPSCA and applicable in Mauritius, the Minister has made the Consumer Protection (Control of Price of Taxable and Non-Taxable Goods) Regulations 1998, which since has been regularly updated.

Regarding price of taxable and non-taxable goods, listed in Part II of the First Schedule to CPPSCA and applicable in Rodrigues, the Minister has made the Rodrigues Consumer Protection (Control of Price of Taxable and Non-Taxable Goods) Regulations 1998, which time and again has been updated. Astonishingly, it is still the Minister who makes such regulations when since the coming into operation of the Rodrigues Regional Assembly 2001, this law-making power is no longer vested with the Minister but with the Rodrigues Regional Assembly [sections 26(1) and 31(1) of the Rodrigues Regional Assembly Act, and the Fourth Schedule thereto, item (8)].

Under the Sugar (Maximum Price) Regulations 1987 [GN No. 107 of 1987], as subsequently amended, the Minister fixes the maximum prices at which sugar may be sold in the island of Mauritius and the island of Rodrigues (which with the coming into operation of the Rodrigues Regional Assembly Act this power has now devolved to the Rodrigues Regional Assembly in respect of the island of Rodrigues).

94 GN 164 of 2008.

95 Vide, for instance, Rodrigues Consumer Protection (Control of Price of Taxable and Non-Taxable Goods) (Amendment No. 8) Regulations 2010 [GN No. 86 of 2010].

96 Indeed, the Rodrigues Regional Assembly (Consumer Protection - Fixing of Price of Fish) Regulations 2008 [Rod GN 1-2008], which fixes the maximum retail price at which fresh or chilled or gutted fish may be sold in Rodrigues, repealed the Rodrigues (Fresh and Chilled Fish) (Maximum Price) Regulations previously made by the Minister.
The price of petroleum products is determined in accordance with the provisions of the Consumer Protection (Control of Price of Petroleum Products) Regulations 2004 [GN No. 38 of 2004], as updated.

Under the Consumer Protection (Control of Price of Fertilizers) Regulations 1998 [GN No. 177 of 1998], the maximum prices at which fertilizers may be sold are laid down by the Minister.

The maximum price at which bread shall be sold is specified by the Minister in the Schedule to Bread (Control of Manufacture and Sale) Regulations 1988 [GN No. 4 of 1998], as subsequently amended.

43. A trader who sells or supplies any controlled goods at a price higher than that which has been fixed shall commit an offence.97

44. Section 4(1) CPPSCA provides that the Minister may, by regulations, determine the maximum mark-up of any controlled goods specified in the Second Schedule.98

The Second Schedule to CPPSCA [updated by GN No. 175 of 2004] lists down the controlled goods in respect of which the Minister may determine the maximum mark-up:

Electric and gas cookers and ovens or any combination thereof, Exercise books, Imported fresh fruits, Infant food, Paints, Pharmaceutical products, Pressure cookers, Soap, detergents and scouring powder, Soap powder for washing machines, Tea, Television receivers, Timber, Toasters, Tyres and tubes, Vacuum cleaners, and Water heaters.

Under the Consumer Protection (Consumer Goods) (Maximum Mark-Up) Regulations 1998,99 as subsequently amended, an importer or local manufacturer of consumer goods

97 Section 3(2) CPPSCA.

98 “Mark-up”, according to section 2 CPPSCA, means such amount or percentage added to the cost price of any controlled goods; “cost price” means the price of any controlled goods calculated in such manner as shall be prescribed: vide Consumer Protection (Consumer Goods) (Maximum Mark-Up) Regulations 1998.
[Imported fresh fruits, Infant milk powder, Pharmaceutical products and simple drugs, Timber, Tyres and tubes, Corned beef, Corned mutton, and Pilchards], before selling or supplying the consumer goods, need to submit to the Minister documentation and other information needed for him to determine the maximum mark-up and the special allowance applicable to those consumer goods. The regulations provide that, where any importer, manufacturer or wholesaler of consumer goods makes a sale of the consumer goods, he shall draw up the bill of sale; no retailer shall take delivery of any consumer goods which he has purchased from any importer or wholesaler of the consumer goods, unless the importer or the wholesaler, as the case may be, has issued to him a bill of sale. The regulations also provide that (1) Every importer shall, prior to making a sale or supply of a medicine, affix a label to every pack, packet or container of the medicine, indicating legibly his name and the maximum retail price at which the medicine is to be dispensed, exposed, offered for sale or sold to consumers; no retailer or wholesaler shall take delivery of a medicine which he has purchased unless the price label has been affixed to the medicine; (2) Every retailer who sells or supplies imported fresh fruits shall affix a label indicating conspicuously the country of origin of the fresh fruit and the maximum retail price per half kilo at which the fresh fruit shall be sold.

45. A trader who sells or supplies any controlled goods at a price which includes a mark-up which exceeds the maximum mark-up shall commit an offence.\(^{100}\)

46. According to section 5(1) CPPSCA, the Minister may establish a Code of Practice\(^ {101}\) to provide for the method to be adopted for the determination of the maximum

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\(^{99}\) GN No. 150 of 1998.

\(^{100}\) Section 4(2) CPPSCA.

\(^{101}\) “Code of Practice” is defined in section 2 CPPSCA as meaning the Code of Practice relating to the methods to be adopted in connection with the determination of maximum recommended retail prices and including—

(a) the terms and conditions, including the maximum recommended retail price, on which or subject to which goods are supplied;
(b) the manner in which those terms and conditions are communicated to consumers;
(c) the way in which goods are packed, bottled, canned, labelled, marked or otherwise prepared for the purpose of being supplied.
recommended retail price of goods other than controlled goods and, where he intends to do so, he shall give notice of the Code of Practice by its publication in the *Gazette*.

Where a Code of Practice has been established by the Minister, no trader shall act in breach of the Code of Practice; a trader who sells or supplies any goods for which there is a maximum recommended retail price shall affix a label in a conspicuous place on a specimen on any such goods indicating the maximum recommended retail price. Section 5(4) CPPSCA further provides that a trader who affixes, in relation to such goods, a maximum recommended retail price which is higher than the maximum recommended retail price provided for in the Code of Practice shall commit an offence.

47. The Consumer Protection (Maximum Recommended Retail Price) (Code of Practice) Regulations 2008 has been made by the Minister and concerns milk powder. It is astonishing that a Code of Practice for the maximum recommended retail practice of this good has been made by the Minister, as if “milk powder” is a non-controlled good, when this good is a controlled good listed in the First Schedule to CPPSCA in respect of which the Minister must fix the maximum price.

48. Section 7(1) CPPSCA provides that where VAT is chargeable by a trader in respect of any goods, the trader shall affix a label in a conspicuous place on a specimen of the goods indicating the total selling price of the goods inclusive of VAT; where VAT is not chargeable by a trader on any goods, the trader shall affix a label in a conspicuous place on a specimen of the goods indicating the selling price and that the amount of VAT is nil. Failure to comply with these would amount to an offense under the Act.

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102 Section 5(2) CPPSCA.

103 Section 5(3) CPPSCA.

104 GN No. 181 of 2008.

105 Trader, according to section 2 CPPSCA, means a person engaged in any trade and includes the employee or agent of any such person.

106 Section 7(4) CPPSCA is to the effect that the Minister may prescribe the form or colour of a label or any distinctive mark which such label shall bear.
It is an offence to charge VAT on non-chargeable goods as well as charging VAT at a higher rate.\textsuperscript{108}

It is also an offence for any trader to sell any goods at a price which is higher than the price shown on a label affixed.\textsuperscript{109}

Furthermore, a trader who gives (by any means whatever) to any consumer an indication which is misleading as to the price at which any goods are sold or supplied shall commit an offence.\textsuperscript{110}

Under the Consumer Protection (Price Label) Regulations 1998 [GN No. 110 of 1998], where VAT is chargeable in respect of any goods exposed or kept for sale, the price label affixed shall be white in colour; where VAT is not chargeable in respect of any goods exposed or kept for sale, the price label affixed shall be blue in colour.

\textsuperscript{107} Section 7(3) CPPSCA.

\textsuperscript{108} Section 6 CPPSCA.

\textsuperscript{109} Section 8(2) CPPSCA.

\textsuperscript{110} Section 9 CPPSCA.
(b) Mechanism for Prevention of Hoarding

49. In order to afford protection to consumers against unscrupulous traders, the CPPSCA provides for measures designed to prevent the hoarding of goods and the refusal to sell. As pointed out by Hon. Mr. S. Sunassee, then Minister of Industry and Commerce, during the 2nd reading of the Consumer Protection (Price and Supplies Control) Bill No. XVII of 1998 in the National Assembly:

“Measures to prevent the hoarding of goods and refusal to sell by making it mandatory for all traders to register his warehouse for an effective control over the movement of goods in which he is trading and to keep registers to record his purchases and sales on a weekly basis are provided for in Part III; hoarding to create artificial shortage, hoarding to generate windfall gains are known practices of unscrupulous traders. This Bill addresses this issue and provides stiff penalties to deal with such cases.”

50. According to section 10(1) CPPSCA, a trader who wishes to store any goods specified in the Third Schedule in any warehouse shall apply in writing to the Permanent Secretary for a certificate of registration of the warehouse. The Minister may, on receipt of an application, grant a certificate of registration on such terms and conditions

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112 Part I of the Third Schedule lists down goods to be stored in a warehouse in Mauritius and Rodrigues:
(1) Aerated Beverages; (2) Alcoholic Drinks; (3) Beer and Stout; (4) Biscuits; (5) Breakfast Cereals; (6) Building Materials; (7) Butter and Margarine; (8) Candles; (9) Canned Fish; (10) Canned Meat; (11) Cement; (12) Ceramic Tiles; (13) Cheese; (14) Cigarettes; (15) Coconut Oil; (16) Coffee; (17) Milk Powder; (18) Cooking Gas; (19) Detergents Soap Powder and Scouring Powder; (20); Edible Oil; (21) Exercise Books; (22) Fertilisers; (23) Flour including Whole Wheat Flour; (24) Frozen Fish; (25) Frozen Meat; (26) Frozen Poultry; (27) Fruit Juices; (28) Ghee; (29) Glass Panes; (30) Helmet; (31) Imported Fresh Fruits; (32) Infant Foods; (33) Infant Milk Powder; (34) Iron Steel Bar; (35) Jam; (36) Magazines and Periodicals; (37) Onions; (38) Paints; (39) Petroleum Products (including Kerosene); (40) Pharmaceutical Products; (41) Plywood; (42) Potatoes; (43) Pulses; (44) Rice; (45) Salt (46) Salted Fish; (47) Sanitary Wares; (48) School Textbooks; (49) Soap detergent and Scouring Powder; (50) Soap Powder for Washing Machines; (51) Sports Articles; (52) Sugar; (53) Tea; (54) Timber; (55) Toilet Paper; (56) Tooth Paste; (57) Tyres and Tubes; (58) Vinyl; (59) Water Heaters; and (60) Wine.

Part II of the Third Schedule lists down the goods which, in addition to the above list, must also be stored in Rodrigues:
(1) Canned Foods; (2) Canned Poultry; (3) Canned Sausages; (4) Corrugated Iron Sheets; (5) Dry Cell Batteries; (6) Electric Bulbs; (7) Food Preparations containing Cocoa; (8) Matches; (9) Mineral Water; (10) Nails; (11) Pasta and Noodles.

113 Section 10(2) CPPSCA provides an application shall be made in a prescribed form and shall specify (a) the name of the applicant; (b) the private address of the applicant; (c) the trading name of the applicant; (d) the address of his trading premises; (e) the nature of his trade; (f) the class of goods to be stored in the warehouse; and (g) the exact location of the warehouse.
as he thinks fit,\textsuperscript{114} the certificate shall be valid for a period of 3 years from the date of issue and may be renewed for any further period of 3 years.\textsuperscript{115}

Every certificate shall be kept by its holder on his trading premises, and produced on demand to an authorised officer;\textsuperscript{116} every certificate shall be valid only in respect of the warehouse specified in the certificate. Every holder of a certificate shall also, within 10 days from the date of issue of his certificate, affix a signboard at the main entrance of the warehouse bearing conspicuously the serial registration number of his certificate.\textsuperscript{117}

The law requires that no holder of a certificate shall keep in his warehouse any goods other than goods pertaining to the class of goods specified in his certificate;\textsuperscript{118} a person who fails to comply with this provision shall commit an offence.\textsuperscript{119} It is also an offence for a trader to keep any goods specified in the Third Schedule on any premises other than his trading premises or a registered warehouse.\textsuperscript{120}

No trader shall remove any goods from his warehouse except for sale in the normal course of his trade or transfer to his trading premises.\textsuperscript{121}

51. It is also a legal requirement that no trader shall, without sufficient cause and justification, close his trading premises at any time when the premises ought by virtue of

\textsuperscript{114} Section 10(4) CPPSCA.

\textsuperscript{115} Section 11(1) CPPSCA.

\textsuperscript{116} An “authorised officer”, according to sections 2 and 22 CPPSCA, means a public officer designated by the Permanent Secretary, of the Ministry to which responsibility for the subject of consumer protection is assigned, for the purpose of ensuring that the provisions of the Act are being complied with.

\textsuperscript{117} Section 15(1) CPPSCA.

\textsuperscript{118} Section 12(2) CPPSCA is to the effect that the Minister may by regulations, prescribe the manner in which the certificate may be amended or varied so as to include any additional class of goods to be kept in the warehouse.

\textsuperscript{119} Section 12(3) CPPSCA.

\textsuperscript{120} Section 13 CPPSCA.

\textsuperscript{121} Section 14 CPPSCA.
any enactment, to be normally open for the purpose of his trade; failure to comply with this provision of the law constitutes an offence.\textsuperscript{122}

52. According to section 17(1) CPPSCA, a trader must display in that part of his trading premises to which the public has access a specimen of every goods kept for sale and a specimen of every goods stored in the registered warehouse; failure to comply with this provision constitutes an offence.\textsuperscript{123}

Where the nature of the goods is such that it would not be reasonably practicable to expect a trader to expose a specimen of the goods in that part of the trading premises to which the public has access, the trader shall put up a notice which is accessible to the public.\textsuperscript{124} The notice shall (a) be in English or French; (b) be in the prescribed form;\textsuperscript{125} (c) set out the goods which have not been exposed for sale; and (d) set out the price of the goods. Failure to comply with this provision of the law constitutes an offence.\textsuperscript{126}

53. It is an offence for a trader to refuse to sell (a) any goods exposed or kept for sale on his trading premises, (b) any goods kept in his warehouse, and (c) at a price which is displayed for the goods.\textsuperscript{127}

54. By virtue of section 20(1) CPPSCA, every trader who imports or manufactures controlled goods is under an obligation to keep, in respect of those goods, at all times, a full and true

\textsuperscript{122} Section 16 CPPSCA.

\textsuperscript{123} Section 17(2) CPPSCA.

\textsuperscript{124} Section 18(1) CPPSCA.

\textsuperscript{125} Regulation 5 of the Consumer Protection (Price Label) Regulations 1998 provides that a notice shall be set out on a board which shall (a) be not less than 30 centimetres by 45 centimetres; (b) be made of wood, tin plate or similar material; and (c) have clear and legible characters not less than 25millimetres high. The notice shall also (a) indicate the goods and the wholesale or retail price, as the case may be, at which they are sold; (b) where VAT is chargeable on the goods, the selling price of the goods inclusive of VAT; and (c) where VAT is not chargeable on the goods, the selling price of the goods together with the words “VAT NIL”.

\textsuperscript{126} Section 18(3) CPPSCA.

\textsuperscript{127} Section 19 CPPSCA.
written record, whether electronically or otherwise, in the English or French language, showing (a) how the cost of the goods imported or manufactured has been arrived at; (b) the selling price of those goods and the mark-up; and (c) the stock of the goods. Failure to comply with this provision constitutes an offence.

Every trader is required to keep at all times the records available for inspection on his trading premises, and to produce on demand the records to an authorised officer. Failure to comply with those provisions of the law shall commit an offence.

It is also an offence for any person unlawfully to (a) alter the contents of the records, (b) make any false or misleading entry; (c) omit to make any entry.

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128 Section 20(2) CPPSCA is to the effect that every record shall be kept for a period of at least 5 years after the completion of the transaction to which it relates.

129 Section 20(3) CPPSCA.

130 Section 21(2) CPPSCA.

131 Section 21(3) CPPSCA.

132 Section 21(4) CPPSCA.
(c) Provisions for Effective Enforcement of the Law and the Prosecution of Offences

55. When moving that the Consumer Protection (Price and Supplies Control) Bill No. XVII of 1998 be read a 2nd time in the National Assembly, Hon. Mr. S. Sunassee, the then Minister of Industry and Commerce, stated that the power of the authorised officer was being strengthened for an effective enforcement of the legislation.\(^1\)

Section 24(1) CPPSCA is to the effect that, where VAT is chargeable by a trader in respect of any goods, the trader shall keep a price list indicating the price of the goods exclusive of VAT, the amount of VAT chargeable, and the total selling price of the goods, which he shall produce, on demand, to an authorised officer.

Section 23 CPPSCA provides that for the purpose of ensuring that the provisions of this Act are being complied with, an authorised officer may at all reasonable times enter any premises or place where any trade is carried on or anything is done in connection with the trade and examine any goods.\(^2\)

According to section 24(2) CPPSCA, an authorised officer may—

(a) require the trader or any person present on the premises to produce any information and may require any person, who has in his possession or custody or under his control any document, to produce that document;

(b) examine, make copies of, or take extracts from, any document which relates to the trade of such person.\(^3\)

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\(^1\)Hansard Debates (1998).

\(^2\)Section 26 CPPSCA also provides that the Magistrate may issue to an authorised officer for the discharge of his functions, a warrant in the prescribed form for—

(a) the inspection of any premises, in relation to which there is reasonable cause to suspect that an offence under this Act is being committed;

(b) the seizure of any goods or documents.

Under section 28 CPPSCA, no liability, civil or criminal, shall attach to the Permanent Secretary or an authorised officer in respect of anything done in good faith in the exercise of his powers under this Act.

\(^3\)The Permanent Secretary may, under section 24(3) CPPSCA, order any trader to furnish any information or
By virtue of section 25 CPPSCA, an authorised officer may seize and detain any goods (a) which he has reasonable cause to believe may be the subject matter of an offence under this Act; (b) in respect of which any representation which is false or misleading has been made; (c) in respect of which any document which is false or misleading has been delivered or produced.\textsuperscript{136}

56. During debates on the Consumer Protection (Price and Supplies Control) Bill No. XVII of 1998 in the National Assembly, Hon. Mr. S. Sunassee, the then Minister of Industry and Commerce, put emphasis on the setting up of a Special Division of the Supreme Court, to be known as the Profiteering Court, as an innovative measure regarding prosecution before the Courts:

“Another important provision of the Bill is the setting up of a Special Division of the Supreme Court to be known as the Profiteering Court which will deal exclusively and more expeditiously with offences committed under this Act. This will considerably reduce delays hitherto experienced in such cases before our Courts. Arrangements will also be made with the Director of the Public Prosecutions for the designing of a special desk officer to deal only with such cases. Last but not least, tougher penalties will be introduced and will undoubtedly make the dishonest traders think twice before daring to charge higher prices to the consumer or committing other offences mentioned in this legislation. Penalties for offences related to maximum price, maximum mark-up, illegal charging of VAT - non display and displaying of non appropriate price label - selling of a price higher than that displayed - refusing to sell, hoarding and other offences as provided for in the Bill, have been made stiffer and a new dimension to penalties have been introduced with the mandatory closure of premises. Apart from the stigma of such closure and the immediate loss of trade, this provision is expected to have a medium and long term effect since such bad publicity has severe repercussion on the image of the business and it is known that a lost customer is very hard to regain …”\textsuperscript{137}

\textsuperscript{136} Section 27 CPPSCA provides that no goods or documents shall be seized under section 25 or 26 unless such seizure is reasonably necessary for any examination or investigation and any goods or documents so seized shall be returned to the person from whom they were seized when no longer required.

\textsuperscript{137} Hansard Debates (1998).
The 1998 Act did provide that the Profiteering Division of the Supreme Court shall have exclusive jurisdiction to try any person charged with an offence under the Act and the Fair Trading Act.

We consider offences under this Act should be prosecuted before the District and Intermediate Courts, rather than before the Supreme Court, and we welcome the amendments to that effect made in 2005,\textsuperscript{138} whereby prosecution of an offence under this Act and the Fair Trading Act can take place, at the discretion of the Director of Public Prosecutions, before the Profiteering Court (as a Division of the Supreme Court), the Intermediate Court or a District Court.

\textsuperscript{138} Finance Act No. 14 of 2005.
(3) Essential Commodities Act

57. The Essential Commodities Act [ECA] provides the legal framework which ensures that general retailers (foodstuff), in respect of basic items [ration rice, sugar raw and white, flour, laundry soap, edible oil], and managers of petrol filling stations, in respect of white oil, do not cease to supply the general public with these essential commodities in order to avoid consumers the hardship of any disruption in supply. Non-complianc e with the provisions of the Act constitutes an offence.

When moving that the Essential Commodities Bill No. VIII of 1991 be read a 2nd time, Hon. Mr. D. Gungah, the then Minister of Trade & Shipping, had this to say about the rationale for the Bill:

“We understand fully well the positive role and services provided by general retailers to consumers. They have to wake up early in the morning, stand on their feet till late at night to serve customers. Very often with the shortage of manpower, the entire family has to join hands to run the shop. While appreciating the contribution of the majority of the retailers, I would like to point out that some complaints have been received to the effect that certain retailers have shown certain reluctance to sell certain basic commodities.

According to the provisions in the Bill, traders will be required to keep a minimum quantity of essential commodities on their trading premises and will not refuse to sell to any intending purchaser a reasonable quantity of such commodities …

Mr. Speaker, Sir, I have no doubt that this Bill will meet its objectives in so far as the entire population will have no difficulty in getting its supply of essential commodities. I am sure that traders will cooperate in meeting these desired objectives and that Government will not need to have recourse to prosecution to ensure compliance to the proposed measures. Members of this House are aware of the concern that the Government has always shown for the supply of the basic foodstuffs and of petroleum products to the population.”

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139 According to section 2 ECA, “white oil” includes motor gasoline (supergrade), gas oil ‘mazout’, and kerosene ‘pétrole lampant’.

140 Section 8(1) ECA.

58. Section 3(1) ECA is to the effect that no person who is licensed as a general retailer (foodstuff) shall fail or refuse (a) to keep on his trading premises a minimum quantity of essential commodities, other than white oil; or (b) to sell to any intending purchaser a reasonable quantity of such commodities.

According to section 3(2) ECA, no person who is licensed as a general retailer (non-foodstuff) and who operates a petrol filling station shall fail or refuse (a) to keep on his trading premises a minimum quantity of white oil; or (b) to sell to any intending purchaser a reasonable quantity of white oil.\(^\text{142}\)

59. Section 5(1) ECA provides that no person shall keep, in any place other than his trading premises, any essential commodity in such quantity as is not reasonably required by him for a domestic or other non-trading purpose.

According to section 5(2) ECA, every person who is licensed as a general retailer (foodstuff) shall notify the Minister, in such form as the Minister may determine, of any go-down or place other than his trading premises, where he keeps or stores essential commodities.

60. The Act also requires a trader to keep a register in which he shall enter the names of his regular clients.\(^\text{143}\)

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\(142\) Section 2 ECA defines “minimum quantity” as such quantity as may be prescribed, or ten per cent of the average weekly sale, whichever is the higher; “reasonable quantity” is defined as meaning such quantity as may be reasonable in all the circumstances.

When presenting the Essential Commodities Bill No. VIII of 1991 to the House, the then Minister pointed out that:

“Reasonable quantity is linked with the relationship between the shopkeeper and the customer. It is for the shopkeeper to decide how much additional quantity to be given to a customer in case the latter needs a quantity over and above his normal requirements…

I would like to clarify on the definition of essential commodities concerning sugar raw and white. It is not necessary for the shopkeeper to keep both types of sugar if there is demand for only one type. He can keep only one type of sugar depending on customer requirements.”

[Hansard Debates (1998) at p. 454]

\(143\) According to section 4(1) ECA, every general retailer (foodstuff) shall –

(a) keep a register in which he shall enter the names of his regular clients, if any;

(b) keep a second register in which he shall enter the quantity of essential commodities acquired by him together with –
Where the Minister\textsuperscript{144} is satisfied that any person is not complying with the provisions of the Act satisfactorily, he may, by notice in writing, order him to submit to him a monthly return in such form as he may determine.\textsuperscript{145}

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\begin{enumerate}
\item the price paid;
\item the person from whom he effected the purchase; and
\item the quantity of each commodity sold every week.
\end{enumerate}

Section 4(2) ECA is to the effect that every general retailer (non-foodstuff) who operates a petrol filling station shall keep a register in which he shall enter the quantity of white oil sold by him every week.

\textsuperscript{144} Minister is defined in section 2 ECA as meaning the Minister to whom the subject matter of supplies control is assigned.

\textsuperscript{145} Section 6 ECA.
(4) Fair Trading Act

61. The Fair Trading Act [FTA] aims at securing consumer confidence by ensuring fair markets for goods and services, through the prohibition of abusive and unethical trade practices. Non-Compliance with the provisions of the Act, as well as certain acts done for the purpose of or in connection with the Act, constitutes an offence.\(^\text{146}\)

When moving that the Fair Trading Bill No. XXX of 1979 be read a 2\(^{nd}\) time in the Assembly, Hon. Mr. S. Virahsawmy, the then Minister for Prices and Consumer Protection, had this to say about the objectives of the legislation:

“The Bill … must be seen as a significant step forward towards the establishment of a sound system of consumer protection which would safeguard the interest of the consumer and meet his need for more effective protection against trading malpractices. Such practices as are common today are numerous and include the making of false and misleading claims about the characteristics and qualities of goods, the offer of fictitious discounts, the sale of faulty goods, etc …”\(^\text{147}\)

62. The 1979 Act was amended in 1988 to provide that there shall be open competition between traders and that no monopoly of any kind shall be established. When moving that the Fair Trading (Amendment) Bill No. XXXVI of 1988 be read a 2\(^{nd}\) time in the Assembly, Hon. Mr. D. Gungah, the then Minister of Trade and Shipping, stated:

“The Act was basically meant to promote free competition and to prohibit monopolistic situation. However, it appears that the law has been so interpreted as to enable exclusive sale agreements to have binding effects. There is, therefore, the need to amend the law to specifically exclude the promotion, establishment or observance of any exclusive sales agreement or monopoly … The purpose of this law is to make consumers as well off as possible by ensuring a competitive market. Market competition enhances consumer welfare … If the law is not amended, traders who have exclusive sales agreements with suppliers for particular products will continue to dictate their prices and conditions of sale because they know that other traders cannot import the same

\(^{146}\) Section 13 FTA.

\(^{147}\) Hansard Debates (1979) pp. 5296-5297.
goods and offer them for sale at cheaper prices. Such a situation is unacceptable.\footnote{148}

The Competition Act No. 25 of 2007 now safeguards and promote competition in Mauritius by –
(a) creating a comprehensive competition regime to be administered by an independent Competition Commission;
(b) prohibiting the most serious anti-competitive restrictive agreements;
(c) providing for the investigation and control, where necessary, of other types of restrictive agreements, and of monopoly and merger situations; and
(d) promoting the role, and understanding, of competition in enhancing efficiency and adaptability in the economy.

63. Section 4 FTA provides that no person shall for the purposes of trade\footnote{149} or promotion\footnote{150} carry on a consumer trade practice\footnote{151} which has the effect or is likely to have the effect of:

\begin{itemize}
\item \footnote{148} Hansard Debates (1988) at pp. 4514, 4517.
\item \footnote{149} Section 2 FTA defines “trade” as meaning the production, distribution, sale, transfer, import, export, use or other dealing in goods and includes the provision of services.
“Goods” are defined as meaning any article which is the subject of trade or business; “services” are defined as (1) Advertising, (2) Building work, (3) Package holidays, (4) Dry cleaning, (5) Motor trade, including repairs and servicing, (6) Professional service, (7) Banking, (8) Insurance, and (9) Transport.
\item \footnote{150} According to section 2 FTA, “promotion”, in relation to the supply of goods [supply of goods includes supply by way of sale, lease, hire or hire purchase] and services, means promotion whether by way of advertising, canvassing, labelling, organising of prize competitions or otherwise.
\item \footnote{151} “Consumer trade practice” is defined in section 2 FTA as meaning any practice carried on in connection with the production and supply of goods whether by way of sale or otherwise to consumers or in connection with the supply of services for consumers and which relates to -
\begin{itemize}
\item \footnote{149} the terms and conditions, whether as to price or otherwise, on or subject to which goods or services are supplied;
\item \footnote{149} the manner in which those terms and conditions are communicated to consumers;
\item methods of promotion of the supply of goods and services;
\item methods of salesmanship employed in dealing with consumers;
\item the way in which goods are packed, bottled, canned, labelled, marked or otherwise prepared for the purpose of being supplied;
\item methods of demanding or securing payment for goods or services supplied; or
\item any matter connected with the practices specified in paragraphs (a) to (f).
\end{itemize}
“Consumer” is defined as an individual to whom goods or services are supplied.
(a) misleading consumers as to, or withholding from them adequate information as to, their rights and obligations under any consumer transaction;
(b) otherwise misleading or confusing consumers with respect to any matter in connection with any consumer transaction;
(c) subjecting consumers to undue pressure to enter into any consumer transaction;
(d) causing the terms or conditions on which consumers enter into any consumer transaction, to be so adverse to them as to be detrimental to their interests.

64. Section 5 FTA is to the effect that no trader shall, when supplying goods or services, impose any condition in connection with such supply except (a) the charging of cash payment at the current ruling rate or, as the case may be, at the price which is fixed by law; (b) any limitation, restriction or other condition provided for in any enactment or authorised by the Minister.\(^{152}\)

65. By virtue of section 10 FTA, the Minister may also, for purposes of analysis and control, require an authorised officer to purchase on his behalf such goods as may be necessary for the purpose of determining whether or not the Act is being complied with. According to section 3 FTA, the Minister may designate any public officer to be an authorised officer for the purpose of ensuring compliance with this Act.

In our opinion sections 3 and 10 FTA are in violation of section 68 of the Constitution\(^{153}\) as it is not the function of a Minister to assign responsibility to a particular public officer

\(^{152}\) Minister is defined in section 2 FTA as meaning the Minister to whom responsibility for the subject of consumer protection is assigned.

\(^{153}\) Section 68 of the constitution provides that where any Minister has been charged with responsibility for the administration of any department of Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister (including the office of the Prime Minister or any other Minister) shall be under the supervision of a Permanent Secretary or of some other supervising officer whose office shall be a public office.
or to require a public officer to do something; such functions should be performed by the Permanent Secretary or the supervising officer of a Ministry.

66. According to section 11 FTA, an authorized officer may –

(a) inspect any premises used for the purpose of a trade –
   (i) at any time during working hours; or
   (ii) at any time when the premises are open for the purpose of such trade;
(b) require any person, who has in his possession or custody or under his control or that of any other person on his behalf any document, to produce that document; and
(c) examine, make copies of, or take extracts from, any document, which relates to the trade of such person.

Section 12(1) FTA is to the effect that an authorised officer may also seize and detain any goods or document which he has reasonable cause to believe may be the subject matter of an offence under the Act.\textsuperscript{154}

67. The Fair Trading Act confers powers on the Minister to control, either by way of regulations\textsuperscript{155} or alternatively codes of practices,\textsuperscript{156} trade practices relating to the supply of goods and services to the consumers.

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\textsuperscript{154} Where any goods seized are of a perishable nature, the Minister may in such manner as he thinks fit, authorise the sale of such goods and shall cause the value of the proceeds of such sale to be deposited with the Accountant-General.

Where the person charged with an offence is convicted, the Court may order the forfeiture (a) of any goods or document seized; and (b) of any amount deposited.

Where a judgment is delivered in favour of the owner of goods seized and disposed, the amount deposited with the Accountant-General shall be refunded to the owner together with interest at the legal rate from the date of the seizure of the goods to the date the amount is refunded.

\textsuperscript{155} Section 8(1) FTA confers on the Minister power to make such regulations as he thinks fit for the purposes of the Act and for the purpose of regulating consumer trade practices. Any regulation made may provide for (a) the issue of licences and permits; (b) the registration of traders and traders’ warehouses; and (c) the levying of fees and charges. The Minister may also by regulations amend the Schedule to the Act, which provides the list of services to which the Act is applicable.

\textsuperscript{156} According to section 3 FTA, a “code of practice” means the rules relating to the methods to be adopted in connection with the promotion and conduct of trade or the provision of services.
68. The Trader's Warranty Regulations 1981\textsuperscript{157} provide that every trader who sells to a consumer any goods\textsuperscript{158} shall be deemed to have given a warranty that the goods sold are merchantable.\textsuperscript{159} The warranty does not, however, apply in respect of any defect in the goods which (i) a trader has specifically drawn to the attention of a consumer before the goods are sold; (ii) a consumer has seen or ought to have seen on a reasonable examination of the goods before he bought them; or (iii) a consumer knew of before he bought the goods.

The regulations provide that every trader who acts in breach of the warranty given shall commit an offence (the penalty applicable to the offence is not, however, specified!)

69. By virtue of the Commodities (Indication of Origin) Regulations 1981,\textsuperscript{160} it is a legal requirement that no trader shall sell a commodity,\textsuperscript{161} other than a second hand

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\textsuperscript{157} GN No. 238 of 1981.

\textsuperscript{158} Goods are defined as not including second-hand goods, and goods sold by auction, tender or under a hire-purchase agreement.

\textsuperscript{159} Merchantable, in relation to goods, is defined as meaning fit for the purpose for which the goods are bought, having regard to their nature, durability, trade description, advertisement and all other relevant factors.

\textsuperscript{160} GN No. 170 of 1981.

\textsuperscript{161} Commodity means the following items: (1) Bags, trunks, wallets and similar receptacles; (2) Clocks, clock cases and movements; (3) Conduit pipes; (4) Cosmetics; (5) Cutlery; (6) Cycles; (7) Dry cell batteries; (8) Food, including beverages; (8) Footwear; (9) Garments; (10) Glass; (11) Household appliances and utensils; (12) Lighters; (13) Matches; (14) Photographic and cinematographic cameras, projectors and accessories; (15) Radio receivers and
commodity, unless the commodity bears a conspicuous label\textsuperscript{162} indicating the country of origin of the commodity.\textsuperscript{163} It is also provided that no trader shall alter, erase, obliterate, remove or forge a label or mark indicating the country of origin of a commodity which is intended for sale.

The regulations also provide that no trader shall import a commodity for sale in Mauritius unless at the time of its importation, the commodity bears a conspicuous label indicating the country of origin of the commodity.\textsuperscript{164} Where a trader imports a commodity for sale in Mauritius for further processing or for re-packing, he is required to put a conspicuous label on the finished commodity or on the commodity which has been repacked; the label shall indicate the country of origin of the imported commodity and its mark, if any, and that the final process of manufacture of the imported commodity has taken place in Mauritius.\textsuperscript{165}

70. The Prepackaged Food Regulations 1989\textsuperscript{166} provides that no trader shall for the purpose of trade promotion-

(a) pass off the prepackaged food\textsuperscript{167} of one importer, manufacturer or supplier as those of another;

\textsuperscript{162}“Label” means any writing indelibly or otherwise permanently impressed upon, woven, sewn, or worked into, or affixed to, or otherwise marked on, a commodity or a container of a commodity.

\textsuperscript{163}“Country of origin”, in relation to a commodity, means the country in which the commodity was manufactured or in which the final process of manufacture took place; where the nature of the commodity is such that it does not permit compliance with this legal requirement, the container of the commodity shall bear a conspicuous label indicating the country of origin of the commodity.

\textsuperscript{164}Regulation 3(1A) provides that the Minister may, in case of non compliance with this requirement, authorise an importer to affix locally a label indicating the Country Origin of an imported commodity, provided a certificate of origin is produced; the label shall be affixed under the supervision of an authorised officer prior to clearance from customs.

\textsuperscript{165}It is also required that no trader shall manufacture a commodity unless at the completion of its manufacture the commodity bears a conspicuous label with the words "MADE IN MAURITIUS" or "PRODUCE OF MAURITIUS".

\textsuperscript{166}GN No. 174 of 1989.
(b) sell any free sample of food;  

(c) cause a price tag to be affixed on prepackage food otherwise than on a blank space.

It is also provided that no trader shall sell any prepackaged food or manufacture any food listed in the Schedule that is intended for sale, packed or canned, unless the container of the food bears a conspicuous label, in conformity with the requirements of the Standard for the Labelling of Pre-packaged Food MS 30 published by the Mauritius Standards Bureau and the Food Act and regulations made there under.

It is a legal requirement that no trader shall-

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167 “Prepackaged” means packaged or made up in advance in a container ready for retail sale to the ultimate consumer and sealed in such a manner that the contents cannot, in any way, be altered without the package being opened or undergoing perceptible modifications; “food” means any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drinks, bottled drinking water, chewing gum and any substance which has been used in the manufacture, preparation or treatment of food.

168 “Free sample” means any sample of food distributed free of charge by an importer, manufacturer or supplier for purposes of trade or promotion of the food, either in connection with the sale of the food or otherwise.

169 The following items are listed in the Schedule: (1) Butter; (2) Baby food [baby food means any food or food substitute formulated industrially to satisfy the normal nutritional requirements of babies up to 4 months of age, and adapted to their physiological characteristics] and infant food; (3) Breakfast cereals; (4) Biscuits; (5) Chewing-gum; (6) Chilled fish, cooked, pre-cooked or ready to cook or frozen [fish includes edible moluses and crustaceans]; (7) Cooking oil; (8) Dried fruits; (9) Flour (Whole wheat); (10) Preserved fruits & vegetables; (11) Fruit juices; (12) Ghee; (13) Homogenised composite food preparations of a kind used in infant feeding; (14) Margarine; (15) Milk products [“milk products” means cheese, butter, yoghurts, ice-creams or fresh cream locally prepared and imported]; (16) Meat of all description and their offals, including chilled animal blood; (17) Milk, plain or flavoured; (18) Milk, powdered [“milk” means fresh milk, sterilised milk, pasteurised milk or milk which has been reconstituted and flavoured, and includes milk powder]; (19) Poultry and offals; (20) Packed poultry; (21) Prepared food obtained by the swelling or roasting of cereals or cereals products; (22) Prepared mustard mayonnaise and sealed cream; (23) Rice (non-ration); (24) Salad dressing; (25) Snacks; (26) Sauces; (27) Yoghurt, curdled milk, kephir and other fermented or acidified milk.

It is to be noted that “chilled food” means any poultry or poultry products, meat and meat products, fish or fish products which has been maintained at a temperature of between 2°C and 8°C; “frozen food” means any poultry or poultry product, fish or fish product which has been maintained at a temperature of between -18°C and -25°C.

“Date of minimum durability” is defined as the date of the end of the period under any stated storage conditions during which the product will retain any specific qualities which have been claimed either tacitly or explicitly.

170 “Container” means any form of packaging of foods for sale as a single item whether by completely or partially enclosing the food in such a way that the contents cannot be altered without opening or changing the receptacle in which food is prepared or presented for sale.

171 “Label” includes any tag, brand, mark, pictorial, or other descriptive matter written, printed, stencilled, marked, embossed or impressed on, or attached to a container of food; “labelling” includes the label and any written printed or graphic matter relating to and accompanying the food when presented for sale to the ultimate consumer.
(a) sell any food whose sell-by-date\textsuperscript{172} best before date\textsuperscript{173} or use-by-date has expired;
(b) alter, erase, obliterate, remove, or forge the date marking of use limit of any food.\textsuperscript{174}

The Regulations do not provide it shall be an offence (and the penalty applicable) to act in breach of its requirements.

We wish also to point out that in the interpretation provision of the regulations, a number of terms are defined, such as “component”, “country of origin”, “date of minimum durability”, “food additive”, “ingredient”, “liquid medium”, which do not relate to any of the other provisions of the regulations.

71. Standards have been laid down regarding the importation, manufacture, and sale of steel bars and steel wires,\textsuperscript{175} as well as of hot dip galvanised articles.\textsuperscript{176} There is a legal requirement for these articles to comply with Mauritian Standard Specifications, as well as for routine inspection and testing of those articles; a purchaser is also entitled to receive a certificate showing the result of any test carried out on any sample. The regulations do not, however, establish as an offence failure to comply with the standards laid down.

72. The Motor Vehicle (Trade Practices) Regulations 1989\textsuperscript{177} lay down standards for motor vehicle dealers (that is traders who import and sell motor vehicles).\textsuperscript{178} It is required of

\textsuperscript{172} “Sell-by-date” means the last date of offer for retail sale, provided the product has been stored and handled property, after which there remains a reasonable storage period in the home.

\textsuperscript{173} “Best before date” in relation to food has the same meaning as the term “use by date”, which means the date of the end of the estimated period under any stated storage conditions, after which the product probably will not have the quality attributes normally to be expected by consumers generally.

\textsuperscript{174} Regarding standards applicable to food, vide Food Act and Food Regulations 1998, as subsequently amended.

\textsuperscript{175} Bars and Steel Wires (Mauritian Standard Specifications) Regulations 1988 [GN No. 59 of 1988].

\textsuperscript{176} Hot Dip Galvanised Articles (Mauritian Standard Specifications) Regulations 1989 [GN No. 51 of 1989].

\textsuperscript{177} GN No. 105 of 1989.

\textsuperscript{178} Motor vehicle includes motor car, lorry, van, bus, motorcycle and moped.
every dealer that it shall (a) carry out a standard pre-delivery inspection as instructed by the manufacturer; (b) provide a copy of the pre-delivery inspection check list to the purchaser; (c) ensure the motor vehicle is delivered in a clean condition; (d) set out clearly in a document the terms and conditions of the transaction between the dealer and the consumer (which shall be fair and reasonable); (e) specify in the document details of all charges additional to the price of the motor vehicle so that the consumer may understand clearly the total price he has to pay in respect of the motor vehicle on the road; (f) ensure that the manufacturer’s handbook relating to the model of motor vehicle being sold is available to the consumer at the time of sale of the motor vehicle; and (g) provide the consumer with a copy of the document embodying the terms of the manufacturer’s guarantee.

It is further provided that the terms of the guarantee shall be clearly set out in writing at the time of sale and be easily understandable particularly in relation to any items specifically included in or excluded from its provisions.  

A dealer is also required to ensure the reasonable availability of spare parts for models marketed by him.

Where major repairs are to be effected, every dealer shall offer a firm quotation for the cost of the repairs, or, where this is not possible, make clear to the consumer that an estimate is being made.

Every invoice should be clearly written or typed and give full

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179 The regulations provide, however, that the guarantee shall not extend to cover defects arising from a failure by the consumer to have the motor vehicle serviced in accordance with the manufacturer’s recommendation or from abuse or misuse. But it is required of a dealer that it shall permit the transfer of the unexpired portion of any guarantee to a second or subsequent owner, and that a dealer shall operate fair and equitable policies to permit the extension of guarantee in the event of a motor vehicle being off the road for a period of not less than 15 days for rectification of guarantee faults.

180 In determining the reasonable availability of spare parts, regard shall be had to all the circumstances and, more particularly, to whether the dealer is carrying on this trade without regard for servicing needs.

181 The regulations provide that (1) the dealer shall, before accepting repairs work, notify the consumer of the method of payment required; (2) the repairer shall give the estimated time for the repair of a motor vehicle and shall make every effort to inform the owner where this estimated time cannot be met; (3) the contract of repairs shall specify whether the repairer or the consumer will provide the spare parts, and the repairer shall ensure that the necessary spare parts are available before starting the repairs; (4) Repairs shall be properly and efficiently carried out and, in case of repeated breakdown, they shall be done at the expense of the repairer.
details of the work carried out and materials used. Moreover all parts replaced during service or repair shall be made available for return to the consumer.\textsuperscript{182}

The regulations do not make it an offence not to comply with its requirements.

73. The Electrical and Electronic Domestic Appliances (Trade Practices) Regulations 1989\textsuperscript{183} lay down obligations on any dealer in electrical and electronic appliances [a person who imports or sells, by wholesale or retail, electrical and electronic domestic appliances].

Every dealer in electrical and electronic appliances shall:

(1) indicate, by means of a clear and conspicuous notice displayed in his shop the cash price at which any domestic appliance is offered for sale and the discount, if any, offered in respect of the appliance;

(2) when accepting an advance payment or deposit for any domestic appliance offered for sale, indicate in writing the period, not exceeding 15 days, within which delivery will be made to the customer, and where a dealer fails to make delivery within the period specified, the customer shall be entitled at his option to an immediate refund of the amount paid or deposited;

(3) give the customer as much information as possible about the goods, including the correct pre-usage checks, the correct method of installation, the correct usage and details of guarantee and service contracts;

(4) provide the manufacturer’s handbook or instructions in English or French;

(5) state the exact terms of the contract for the goods, including any additional costs for delivery and installation;

(6) provide customers with documentary evidence of proof of purchase and the date of purchase, including the amount paid and any discount granted;

\textsuperscript{182} The regulations also provide that where repairs have been effected they shall be guaranteed by the dealer, for a specific mileage or time period as specified by the repairer, against failure due to workmanship.

\textsuperscript{183} GN No. 106 of 1989.
(7) clearly set out in writing at the time of the sale the terms of any guarantee given by a dealer to a customer;

(8) during the guarantee period and within 10 days of the notification of a defect by the customer, repair the appliance;\(^{184}\)

(9) clearly specify the exact terms of the contract for any repairs or servicing work to be carried out; and shall indicate on the invoice the details of the work carried out and the materials used;

(10) where any appliance is handed in or collected for repair or service, provide the customer with a receipt;

(11) provide service and spares to the best of his ability;

(12) where a request for service is received from a customer, advise the customer of any minimum service charge which is to be made;

(13) where a customer requests a service visit, arrange to provide the service within 3 working days of receiving the request;\(^{185}\) and

(14) keep a comprehensive stock of commonly used parts.\(^{186}\)

Non-Compliance with the requirements of the regulations does not, however, constitute an offence.

\(^{184}\) It is provided that, where the dealer is unable to comply with this requirement, he shall—

(a) send to the customer a similar appliance for his use until the repair is effected;

(b) be liable to make good to the customer a sum of money representing 5% of the cash price of the appliance every month during which the customer has foregone the use of the appliance; or

(c) refund to the customer the cash price of the appliance or replace the appliance by a new one, if the repairs have not been properly completed within 3 months of the notification of the defect.

\(^{185}\) It is also provided that:

(a) Where the fault is not repaired, either in the workshop or in-situ, the technician shall inform the customer of the suspected fault and the reasons why a repair has not been effected;

(b) Where an appliance is handed in for service or repairs the person accepting the appliance shall, when requested, arrange for the user to be provided with an estimate of the cost and a date for collection or delivery after completion;

(c) Where a promised completion date cannot be honoured, the customer shall be advised in writing and as quickly as possible;

(d) Where the equipment is beyond economic repair the customer shall be advised in writing and as quickly as possible.

\(^{186}\) The regulations are to the effect that spares shall be made available within two months from the time an appliance is first offered for sale to the public, and that every dealer shall ensure the reasonable availability of spare parts for the models marketed by him unless he can show that the manufacturer has stopped manufacturing the spare parts anywhere.
(5) Hire Purchase and Credit Sale Act

74. The Hire Purchase and Credit Sale Act [HPCSA] draws a distinction between hire purchase agreements\(^\text{187}\) and credit sale agreements\(^\text{188}\) in respect of transactions for the supply of certain goods and services.\(^\text{189}\)

The Act applies to all hire purchase agreements and, wherever specified, to credit sale agreements.\(^\text{190}\)

Any sale of goods or any transaction, other than a leasing contract,\(^\text{191}\) involving the transfer, or of any option or agreement for the transfer, of property in goods, where the

\(^\text{187}\) Section 2 of the Act defines a “hire purchase agreement” as (a) meaning an agreement for the sale of goods under which the property in the goods shall pass to the hirer upon payment by instalments of the whole amount due; and (b) as including any credit or financing agreement with a lending and financing agency for the purchase of goods. The “lending and financing agency” is defined as a body corporate whose business is that of money lending or financing of hire purchase and credit sale transactions or similar transactions.

\(^\text{188}\) “Credit sale agreement” is defined in section 2 of the Act as meaning an agreement for the sale of goods on credit and under which the dealership in the goods passes to the buyer upon the sale.

\(^\text{189}\) Section 2 taken together with the Fourth Schedule HPCSA provides that the goods and services to which the Act applies to the provision of the following goods and services: (1) Air conditioners and parts and accessories thereof; (2) Air tickets; (3) Appliances and apparatus [whether electrical or not] of a kind designed exclusively for domestic use and parts and accessories thereof; (4) Articles and equipment for general physical exercises, gymnastics, athletics and other sports; (5) Audio Cassette/Hifi – Recorder/Player, Player; (6) Bicycles and tricycles; (7) Ceramic tiles; (8) Chandelier and other electric ceiling and wall lighting fittings and parts and accessories thereof; (9) Clocks and watches; (10) Compact disc players; (11) Computers and parts and accessories thereof; (12) Decoding units providing television services; (13) Electrical tools and parts and accessories thereof; (14) Encyclopaedias and dictionaries; (15) Floor coverings; (16) Furniture [including mattresses] and parts and accessories thereof; (17) Generators and parts and accessories thereof; (18) Glasswares and porcelain wares; (19) Jewellery [gold and silver]; (20) Kitchen wares and articles of cutlery; (21) Lawn mowers; (22) Musical instruments and parts and accessories thereof; (23) Outboard motors and marine engines; (24) Photocopying apparatus and parts and accessories thereof; (25) Photographic cameras and parts and accessories thereof; (26) Pool tables and accessories thereof; (27) Radio receiving and transmitting sets; (28) Record players; (29) Sanitary wares and fittings [including sink units and bathroom fittings]; (30) Sewing and embroidery machines [whether electrical or not] and parts and accessories thereof; (31) Television receiving sets; Television aerials and parts and accessories thereof; (32) Telephone sets (including cellular phones and cordless telephones), facsimile apparatus and parts and accessories thereof; (33) Travelling bags, suitcases, executive-cases and briefcases; (34) Typewriters, calculating and accounting machines; (35) Video apparatus; (36) Video camera; (37) Video games of a kind used with a television receiver; (38) Water storage tanks; (39) Wheeled toys [including tricycles, scooters and cars whether propelled by pedals or batteries].

Air tickets cannot be the subject-matter of a hire purchase agreement.

\(^\text{190}\) Section 3(1)(a) HPCSA.
term of payment is by instalment, is deemed to be a hire purchase or a credit sale under the Act.\footnote{192}

Where an agreement in respect of a bailment\footnote{193} provides for the transfer, or any option or agreement for the transfer, of property in the goods, to the bailee, such agreement is deemed to be a hire purchase agreement.\footnote{194}

75. Section 3(2) HPCSA lays down the conditions which must be stipulated in a hire purchase or credit sale agreement; these are imperative norms “d’ordre public”.

It is provided that there shall be stipulated in every hire purchase agreement or credit sale agreement the following:

(a) the cash price of the goods;\footnote{195}
(b) the downpayment;\footnote{196}
(c) the total charges and the monthly charges;\footnote{197}
(d) the hire purchase price\footnote{198} or the credit price\footnote{199} as the case may be;

\footnote{191} According to section 2 HPCSA, a “leasing contract” means a leasing contract entered into by a company providing lease financing and which is approved as a tax incentive company under the First Schedule of the Income Tax Act.

\footnote{192} Section 3(1)(b) HPCSA.

\footnote{193} “Bailment” means an agreement, other than a leasing contract, under which goods are rented to a bailee on a temporary basis in consideration for a monthly rental and property in the goods remains with the bailor (the “bailor” is the person who rents goods to a bailee under a bailment).

\footnote{194} Section 3(4) HPCSA.

\footnote{195} “Cash price” is defined in section 2 HPCSA as meaning the price at which goods are sold on a cash sale basis, where such price, after deduction of any discount, is paid at the time of the purchase.

\footnote{196} Section 4(3)(a) HPCSA is to the effect that in any hire purchase agreement, the downpayment shall be an amount of not less than the percentage of the cash price specified in the first column of Part I of the First Schedule; the minimum down payment is currently fixed at 0% of cash price.

According to section 4(4)(a) HPCSA, in any credit sale agreement, the downpayment shall be an amount of not less than the percentage of the cash price specified in the first column of Part II of the First Schedule; the minimum down payment is currently fixed at 50% of cash price.

\footnote{197} “Total charges” means the total charges payable over the whole of the repayment period; “monthly charges” means the charges for any given month within the repayment period.
(e) the payment of the balance due by way of monthly instalments over a prescribed period;\(^{200}\)

(f) the annual percentage rate;\(^{201}\)

(g) the monthly flat rate;\(^{202}\) and

(h) any surcharge.\(^{203}\)

Pursuant to section 3(3) HPCSA, the Minister, to whom responsibility for the subject of trade is assigned, has prescribed in the Hire Purchase and Credit Sale (Charges) Regulations 2000\(^{204}\) the total charges and the monthly charges, the annual percentage rate, the monthly flat rate, and the surcharge.

The Regulations provide that (1) no dealer shall claim total charges or monthly charges, as the case may be, which exceed the appropriate amounts reached after computation of the respective charges; (2) every dealer shall affix with the goods, or display at a conspicuous

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198 According to section 2 HPCSA, the “hire purchase price” means the total sum payable by the hirer under a hire purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement, and it should not exceed the sum of the cash price and charges accrued.

199 The “credit price” means the total sum, not being in excess of the sum of the cash price and charges accrued, payable by the buyer under a credit sale agreement in order to complete the purchase of goods to which the agreement relates.

200 The respective periods shall not exceed those specified in the second column of Parts I and II of the First Schedule; the maximum repayment period is 30 months in respect of a hire purchase agreement, and 12 months in respect of a credit sale agreement.

201 The “annual percentage rate” is the one prescribed by the Minister; currently the annual percentage rate shall be not more than 24.8 per cent of the chargeable price (the chargeable price being the amount on which charges are imposed and which is equal to the difference between the cash price and the down payment) [Regulation 4 of Hire Purchase and Credit Sale (Charges) Regulations 2000 (GN No. 112 of 2000)].

202 The “monthly flat rate” is the one prescribed by the Minister. Regulation 5 of the Hire Purchase and Credit Sale (Charges) Regulations 2000 (GN No. 112 of 2000) provides that for the purposes of determining the monthly charges or the total charges for the repayment period, the dealer shall apply the annual percentage rate on the chargeable price on a diminishing balance method.

203 The “surcharge” means an amount payable for the late payment of an instalment; the maximum surcharge that a dealer may claim for the late payment of an instalment shall not exceed an amount representing a rate of 8 per cent per annum above the annual percentage rate, of the amount overdue [Regulation 7 of Hire Purchase and Credit Sale (Charges) Regulations 2000 (GN No. 112 of 2000)].

204 GN No. 112 of 2000.
place on his licensed premises, a label stating the annual percentage rate; (3) no dealer shall, in respect of the goods subject-matter of the hire purchase or credit sale agreement, claim charges at a rate which exceeds the annual percentage rate stated on the label affixed with the goods or displayed at his licensed premises; (4) Every dealer shall provide a hirer or buyer together with the hire purchase agreement or the credit sale agreement, as the case may be, with a schedule of payment in the form specified in the Second Schedule to the Regulations, in respect of the goods subject-matter of the agreement.

Non-compliance with the provisions of the Regulations constitutes an offence.

76. Section 4(1) HPCSA further provides that no hire purchase or credit sale agreement shall be entered into unless-

(a) the dealer\(^\text{205}\) has affixed or displayed, with the goods a label stating the –

(i) cash price;
(ii) hire purchase or credit price;
(iii) downpayment;
(iv) chargeable price;
(v) charges;
(vi) repayment period;
(vii) monthly installment;
(viii) annual percentage rate; and
(ix) monthly flat rate;

(b) the hirer or buyer has been allowed to inspect the goods;

(c) the hirer or buyer has effected the down payment specified under section 2; and

\(^{205}\) Section 2 HPCSA defines the “dealer” as a person who lets or has let goods to a hirer under a hire purchase agreement, who sells or has sold goods to a buyer under a credit sale agreement, to whom the dealer’s rights and liabilities under a hire purchase or credit sale agreement have passed by assignment or by operation of law. Dealer includes a lending and financing agency but does not include a bailor.
(d) the agreement is incorporated in a deed in the form or in a form, not inconsistent with the form set out in the Second or Third Schedule to the Act, as the case may be.

Unless the requirements specified have been complied with -

(a) no dealer shall be entitled to enforce a hire purchase agreement or a credit sale agreement or any contract of guarantee relating to any of those agreements or, in the case of a hire purchase agreement, any right to recover the goods from the hirer;

(b) no security given by the hirer or buyer in respect of money payable under the hire purchase or credit sale agreement or given by a guarantor in respect of money payable under a contract of guarantee shall be enforceable against the hirer or buyer or guarantor by any holder.

77. A hirer can determine an agreement at any rate before final payment is made by giving notice of termination to the dealer by registered post. If the goods are damaged then the hirer will be liable for them. The hirer will have to give the goods back but if the hirer has terminated the agreement but has retained possession of same, the dealer may bring an action for recovery. The Courts will normally favour the hirer paying the rest of sum due but depending on the circumstances the courts may also order that the goods be delivered to the dealer. The sum that the hirer would be liable, if he has kept the goods,

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206 “Contract of guarantee” means, in relation to a hire purchase or a credit sale agreement, a contract made at the request, express or implied of the hirer or buyer, to guarantee the performance of the hirer’s or buyer’s obligations under the agreement.

207 Section 5(1) HPCSA.

208 Section 5(2) HPCSA.

209 Section 5(3) HPCSA.

210 Section 5(4) HPCSA.
will be for the rest of the unpaid balance. He will not however be liable for any remaining charge.\textsuperscript{211}

78. With regards to a credit sale agreement, where the buyer decides to pay all of the unpaid balance due, the agreement is determined.\textsuperscript{212} The dealer is entitled to obtain payment of the unpaid balance but not entitled to payment of any other charges.\textsuperscript{213}

79. Section 6 lays down the transactions that cannot be made under the Act and would render an agreement void:

6. \textit{Avoidance of certain provisions}

\textit{Subject to section 11 (1),}\textsuperscript{214} any provision in a hire purchase or credit sale agreement whereby -

(a) a dealer or any person acting on his behalf is authorised to enter upon any premises for the purposes of -

(i) claiming payment of an installment; or

(ii) taking possession of goods which have been let under a hire purchase agreement or sold under a credit sale agreement;

(b) a dealer or any person, acting on his behalf is relieved from liability for any entry specified in subsection (1);

(c) the right conferred on a hirer or a buyer by this Act to determine the hire purchase or credit sale agreement is excluded or restricted, or whereby any liability in addition to the liability imposed by this Act is imposed on a hirer or a buyer by reason of the termination of the hire purchase or credit sale agreement by him under this Act;

(d) a hirer, after the determination of the hire purchase agreement or the bailment in any manner is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Act;

\textsuperscript{211} Section 5(5) HPCSA.

\textsuperscript{212} Section 5A(1) HPCSA.

\textsuperscript{213} Section 5A(2) HPCSA.

\textsuperscript{214} Section 11(1) HPCSA provides that where goods have been let under a hire purchase agreement and one half of the hire purchase price has been paid, whether in pursuance of a judgment or otherwise, or tendered by or on behalf of the hirer or any guarantor, the dealer shall not enforce any right to recover possession of the goods or to claim payment of an instalment from the hirer otherwise than by court action.
(e) any person acting on behalf of a dealer in connection with the formation or conclusion of a hire purchase or credit sale agreement is treated as or deemed to be the agent of the hirer or buyer; or

(f) a dealer is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire purchase or a credit sale agreement,

shall be void.

80. There is a duty of information on the dealer. The duty arises anytime before the final payment is made by the hirer when the latter has made a written request to the dealer for information. The dealer must provide the information within 14 days and upon payment of Rs 1 for expenses.\(^{215}\) The information that the dealer must provide are:

- amount already paid;
- amount which has become due under the agreement but remains unpaid, date upon which unpaid installment became due, and amount of each such installment;
- amount which is to become payable under the agreement, and the date or the mode of determining the date upon which each future instalment is to become payable, and the amount of each such instalment.

If the dealer fails to comply with these requirements, the consequence is that no person may enforce the contract against the hirer; the dealer cannot also enforce any right to recover the goods from the hirer. No security given by the hirer in respect of money payable under the agreement or given by a guarantor in respect of money payable under such a contract of guarantee shall be enforceable against the hirer or the guarantor by any holder of it. Where the default continues for a period of one month, the defaulter shall be liable, on conviction, to a fine not exceeding 100 rupees.\(^{216}\)

81. Section 8 HPCSA provides that, where by virtue of a hire purchase agreement a hirer is under a duty to keep the goods comprised in the agreement in his possession or control,

\(^{215}\) Section 7(1) HPCSA.

\(^{216}\) Section 7(2) HPCSA.
the hirer shall, on receipt of a request in writing from the dealer, inform the dealer where
the goods are at the time when the information is given or, if it is sent by post, at the time
of posting. Where a hirer fails without reasonable cause to give the information requested
within 14 days of the receipt of the notice, he shall commit an offence and shall, on
conviction, be liable to a fine not exceeding 1,000 rupees.

82. Section 9(1) HPCSA provides for implied conditions and warranties. These are:

(a) an implied warranty that the hirer shall have and enjoy quiet
possession of the goods;

(b) an implied condition on the part of the dealer that he shall have a
right to sell the goods at the time when the property is to pass;

(c) an implied warranty that the goods shall be free from any charge or
encumbrance in favour of any third party at the time when the
property is to pass;

(d) an implied condition that the goods shall be of merchantable
quality, except where the hirer has examined the goods or a sample
of them, as regards defects which the examination ought to have
revealed.

Section 9(2) HPCSA is to the effect that if the hirer expressly or by implication made
known the particular purpose for which the goods are required, then another implied term
would be that the goods shall be reasonably fit for such purpose.\textsuperscript{217}

There can be no derogation under section 9(1) by virtue of any agreement but with
regards to section 9(2) that can be so if the dealer proves that he has notified the hirer of
same and explained the consequences to him.\textsuperscript{218}

83. A dealer may seize the court to initiate an action.

\textsuperscript{217} Section 9(2) HPCSA.

\textsuperscript{218} Section 9(3) HPCSA.
In respect of a hire purchase agreement, any claim for unpaid installment must be started by sending notice by registered post before entering the claim. The dealer can then initiate a court case but in the event that half or more of the hire purchase price has already been paid the dealer shall not move for possession of the goods.

By virtue of section 11(2) HPCSA, where a dealer recovers possession of goods in respect of which half or more of the hire purchase price has already been paid, the hire purchase agreement, if not previously determined, shall determine, and –

(a) the hirer shall be released from all liability under the agreement and shall be entitled to recover from the dealer by action all sums paid by the hirer under the agreement or under any security given by him in respect of it; and

(b) any guarantor shall be entitled to recover from the dealer by action all sums paid by him under the contract of guarantee or under any security given by him in respect of it.

With regards to a credit sale agreement, the procedure is the same i.e. a dealer can only claim an unpaid installment through court action if he has sent a notice first through registered post.

84. According to section 19(1) HPCSA, where any agreement is reached between the dealer and a hirer or buyer in respect of any installment, the installation charges, if any, shall not be included in the hire purchase price or credit price.

85. Section 20A(1) HPCSA provides that no person shall, in any manner whatsoever, publish, broadcast or cause to be published or broadcast, an advertisement relating to the hire purchase or credit sale of any goods which -

(a) is, or is likely to be, misleading to readers, viewers or listeners;

(b) indicates, or tends to indicate, that a hire purchase or credit sale agreement may be entered into in contravention of this Act; or

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219 Section 11(4) HPCSA.

220 Section 11(1) HPCSA.

221 Section 11A HPCSA.
(c) does not indicate that no hire purchase or credit sale agreement shall be entered into with a person where it causes him to be over-indebted.

Any person who contravenes this provision shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees.
(6) Prices and Consumer Protection Advisory Committee Act

86. Section 3 of the Prices and Consumer Protection Advisory Committee Act establishes the Advisory Committee on Prices and Consumer Protection.

The duties of the Committee are to advise the Minister, to whom the responsibility for the subject of consumer protection is assigned, on (a) any matter relating to the price and supply of consumer goods and services which the Minister may refer to it; (b) the formulation and implementation of policies relating to consumer protection; and (c) ensure the co-operation and participation of consumers in matters which affect their interest.\(^\text{222}\)

87. The Committee comprises representatives of Government, Members of the National Assembly, Consumer Associations, Women’s Associations, Trade Unions and Traders’ Associations.\(^\text{223}\)

It is required to meet at least once every two months\(^\text{224}\) and to submit an Annual Report on its activities to the Minister.\(^\text{225}\)

\(^{222}\) Section 4 of the Act.

\(^{223}\) According to section 5(1) of the Act, the Committee shall consist of –

(a) a Chairman;
(b) a representative of the Ministry responsible for the subject of industry;
(c) a representative of the Ministry responsible for the subject of finance;
(d) a representative of the Ministry responsible for the subject of economic planning and development;
(e) a representative of the Ministry responsible for the subject of health;
(f) a representative of the Ministry responsible for the subject of women’s rights;
(g) a representative of the Ministry responsible for the subject of co-operatives;
(h) 2 representatives of consumers’ associations;
(i) 2 representatives of women’s associations;
(j) 4 representatives of trade unions;
(k) 4 representatives of traders’ associations; and
(l) 3 members of the Assembly.

The chairman and the members, other than the representatives of ministries, are appointed by the Minister. Section 5(2) of the Act requires of the Chairman that he shall have administrative experience, be well versed in consumer matters, and not hold a public office.

\(^{224}\) Section 6(1) of the Act.
88. We are aware that in 1988 the Advisory Committee was entrusted by Government the preparation of consumer safety legislation. The draft Bill submitted in November 1988 was examined by a Ministerial Committee in April 1990. It is this Bill, as amended, which later was introduced in the Assembly as the Consumer Protection Bill No. XII of 1991.\footnote{Hansard Debates (1991) at pp. 1274-1275.}

We understand the Committee has not over the past years been constituted.

\footnote{Section 7 of the Act.}
(IV) Benchmarking the Mauritius Consumer Protection Regime through Comparison with Other Regimes

89. With a view to assess which aspects of our consumer law call for reform, the Mauritius framework is bench-marked through comparison with other consumer regimes on specific issues, such as scope of consumer laws, fair contractual terms, disclosure and labelling, safety of goods and services, product liability, guarantees and warranties, advertising and other business practices, consumer protection in electronic commerce, consumer credit, consumer education and advocacy, redress and enforcement mechanism.

(1) Legislative Scheme and Scope of Consumer Laws

(a) Meaning of Consumer, Manufacturer and Supplier

90. The scope of consumer legislation is determined by identifying the target group of people that have to be protected. This is often achieved in most jurisdictions by accurately defining the words “consumers”, “suppliers” or “manufacturers/producers” or “dealers”, in legislation in order to isolate transactions and individuals that deserve to be protected.

91. In our law there is no uniform definition given to the “consumer”. Under the Consumer Protection (Prices and Supplies Control) Act, “consumer” is defined as “a person to whom goods are supplied”, by way of trade whether for money or money’s worth. In the Fair Trading Act “consumer” is defined as “an individual to whom goods or services are supplied” (by way of trade or business or for professional services). The Competition Act

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227 No definition of “consumer” is provided for in the Consumer Protection Act, which lays general standards regarding the safety and quality of goods supplied by way of trade whether for money or money’s worth.
2007\textsuperscript{228} defines a “consumer” as “any direct or indirect user of a product or service supplied by an enterprise in the course of business” (“business” includes a professional practice or any other activity which is carried out for gain or reward); a consumer is also defined as including (a) another enterprise that uses the product or service thus supplied as an input to its own business, and (b) a wholesaler, a retailer and a final consumer.

92. Our legislation does not regulate instances when products are used by a third party.

93. In India, the word “consumer” is defined in section 2(d) of the Consumer Protection Act 1986 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 other commercial purpose; or (ii) hires or avails any other 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 service 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 but does not include a person who avails of such services for any commercial purposes.”

\textsuperscript{228} The object of the Act is to safeguard and promote competition in Mauritius by –

(a) creating a comprehensive competition regime to be administered by an independent Competition Commission;
(b) prohibiting the most serious anti-competitive restrictive agreements;
(c) providing for the investigation and control, where necessary, of other types of restrictive agreements, and of monopoly and merger situations;
(d) promoting the role, and understanding, of competition in enhancing efficiency and adaptability in the economy.
It is noteworthy that the definition given by the Indian statute includes third parties, who use goods or services that were offered to the primary consumer. The definition of the consumer also requires that there must have been some consideration exchanged for the goods or services. This consideration may be a part or deferred payment, or a promise or part promise to pay.

The Indian Act makes a clear distinction between a manufacturer of goods and a trader, which in our view is an important distinction because there are different liability consequences that attach to manufactures and traders. The Act defines a “manufacturer” as “… 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”. A trader is defined as a person “… who sells or distributes any goods and includes the manufactures thereof, and where such goods are sold or distributed in package form, includes the packer thereof”.

94. Directives of the EU that relate to consumer protection do not adopt a uniform approach in the definition of consumers. Often, the Directives specify that the definition applies to the specific Directive and is therefore not of a general nature.

The most general definition however defines a consumer as a natural person who transacts not for business purposes. For instance Article 2 of the Council Directive on Unfair Terms in Consumer Contracts\footnote{Directive 93/13/EEC.} defines a consumer as “… any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”. A similar definition is adopted by the Council Directive to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises.\footnote{Article 2 of Directive 85/577/EEC.}
There are however other Directives that do not adopt this general definition. The Directive on Package Travel, Package Holidays, and Package Tours\textsuperscript{231} adopts a broader definition of a consumer; it extends protection not only to individuals that agree to purchase a package but also to individuals on whose behalf a purchase is made or any individuals to whom a package is transferred by the initial owner or a person on whose behalf a package is purchased.

Unlike some jurisdictions that specify that a consumer must have consideration for a product, EU directives do not have this requirement. For instance the definition of product in the Directive on General Product Safety expressly provides that a consumer need not pay consideration in order to be protected.\textsuperscript{232}

There is also no uniform definition of manufacturers and suppliers. A “producer” is defined in Article 3 of the Directive on Liability for Defective Products\textsuperscript{233} as the manufacturer of a finished product or a component part of the product, or the producer of raw material or any person who represents himself as a producer by using his name, trademark or any other distinguishable feature. A producer can also be any person who imports a product into his community. In the instance where a producer cannot be identified, the supplier is presumed to be the producer. The Directive on General product safety almost offers a similar definition of a producer, but it also extends the net to cover representatives of manufacturers and any other professionals in the supply chain whose activities may affect the safety of a product.

The word “supplier” in most directives is defined as natural or legal persons who transact with consumers for purposes that are for trade or relate to their profession.\textsuperscript{234} Article 2 of

\textsuperscript{231} Article 3 of Directive 90/314/EEC.

\textsuperscript{232} Article 2 of Directive 92/59/EEC.

\textsuperscript{233} Directive 85/374/EEC.

\textsuperscript{234} Article 2 of Directive on Unfair Terms.
the Directive in Respect of Contracts that are negotiated away from Business Premises follows a similar definition but it also covers representatives of suppliers.  

The EU also does not adopt a uniform approach in defining the word “product”. Products are defined in a way that fits the context of the particular Directive. Article 2 of the Directive on Liability for Defective Products defines a product as “… all movables … even though incorporated into another movable or immovable”. Article 2 of the Directive on General Product Safety defines a “product” as “… any product intended for consumers or likely to be used by consumers, supplied whether for consideration or not, used or reconditioned”. Article 2 of the Directive on the Indication of the Prices of Non-Food Products breaks down products into the following categories: “products sold in bulk” (products that are not pre-packaged and which are only weighed in the presence of the consumer), “products sold by individual item” (products which cannot be broken down without changing their nature), “pre-packaged products” (products that are packaged in the presence of the consumer), “products pre-packaged in pre-established quantities” (refers to products that are packaged in a way that the quantity is the same as a previously selected value) and “products pre-packaged in variable quantities” (refers to products that are packaged in a way that they don’t correspond to a previously selected value).

95. In Canada, section 1 of the Ontario Consumer Protection Act 2002 adopts a uniform and simple approach in defining the words “consumer”, “supplier” and “goods”. It defines a consumer as “… an individual acting for personal, family, or household purposes”. This definition differs from the definitions that are offered by statutes of most jurisdictions, in the sense that, by stating that a product has to be for personal, family and household purposes, it indirectly prescribes that a consumer has to be a natural person. The approach, in essence, limits protection to a natural person’s transactions that are not of a business nature, this is similar to the one taken by most jurisdictions. It differs, however, because it specifies the instances when a non-business related transaction will qualify for

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235 Directive 85/577/EEC

236 Directive 88/314/EEC.
A supplier is defined by the Ontario Act as “… a person who is in the business of selling, leasing, or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds [himself] out to be a supplier or an agent of the supplier”. “Goods” are defined simply as any type of property. The Act does not define manufacturers.

96. In Australia, according to Section 4B of the Trade Practices Act 1974, for the purposes of the Act, unless the contrary intention appears, a person shall be taken to have acquired particular goods or services as a consumer if, and only if (i) the price of the goods or services did not exceed the prescribed amount; or (ii) where that price exceeded the prescribed amount the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle. Moreover, for goods, the person should not have acquired the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land. As such, this definition of ‘consumer’ does not appear to be limited to ‘end-users’ or ‘final consumers’; outside the areas specified in Section 4B, a trader who purchases goods for use in a business, can be a ‘consumer’.237

97. In UK under Part 8 of the Enterprise Act 2002, the definition of consumer was deliberately worded to include individuals setting up a business, in order to ensure that operations such as scam home-working schemes and vanity publishers would be caught by the Part 8 enforcement mechanism.

237 A similar definition of a consumer is adopted by section 3 of the Australian Consumer laws, which shall commence on 1 January 2011.
98. The 2003 Consumer Guarantees Act of Barbados defines a “consumer” as an individual who (a) acquires from a supplier goods or a service of a kind ordinarily acquired for personal, domestic or household use or consumption; and (b) does not acquire the goods or service, or hold himself out as acquiring the goods or service, for the purpose of resupplying them or it in trade, or consuming them or it in the course of a process of production or manufacture, or (c) in the case of goods, does not acquire them, or hold himself out as acquiring them, for the purpose of repairing or treating other goods or fixtures on land.

The Act defines a “supplier” as a person who in trade (a) supplies goods to a consumer by transferring the ownership or the possession of the goods pursuant to a contract of sale, exchange, lease, hire or hire-purchase to which that person is a party; or transferring the ownership of the goods pursuant to a gift from that person; or (b) supplies a service to a consumer. The word “supplier” includes, where the rights of the supplier have been transferred by assignment or by operation of law, the person for the time being entitled to those rights; a person who, in trade, assigns or procures the assignment of goods to a financier to enable the financier to supply those goods, or goods of that kind, to the consumer; and a person who, in trade, is acting as agent for another where that other is not supplying in trade.

The “manufacturer” is defined as a person who carries on the business of assembling, producing or processing goods, and includes (a) any person who holds himself out to the public as the manufacturer of goods; (b) any person who attaches his brand or mark, or causes or permits his brand or mark to be attached, to the goods; (c) where goods are manufactured outside Barbados and the foreign manufacturer of the goods does not have an ordinary place of business in Barbados, a person who imports or distributes those goods.

99. The Singapore Consumer Protection (Fair Trading) Act 2004 provides that a “consumer” means an individual who, otherwise than exclusively in the course of business (a) receives or has the right to receive goods or services from a supplier; or
(b) has a legal obligation to pay a supplier for goods or services that have been or are to be supplied to another individual.

The “supplier” is defined as a person who, in the course of the person’s business (a) provides goods or services to consumers; (b) manufactures, assembles or produces goods; (c) promotes the use or purchase of goods or services; or (d) receives or is entitled to receive money or other consideration as a result of the provision of goods or services to consumers, and includes any employee or agent of the person.

100. The 1998 Consumer Protection Act of Botswana defines a consumer as a person who does not transact for business purposes. It differs from some jurisdictions in that it specifies transactions that may be classified as business transactions. The Act defines a consumer as any person or non-profit organisation to whom a commodity is “offered, supplied or made available, where such a person or organisation does not intend to apply the commodity for the purposes of resale, lease, rendering of services or the manufacture of goods for gain”. The definition of a consumer also includes individuals who are solicited or supplied with any investments.

The Act does not define a supplier but it defines a “business” as “(a) offering, supplying, or making available any commodity or services for a stated consideration or (b) soliciting or receiving any investment”.

The Botswana Act provides a broad definition of a “commodity”, it includes “… (a) any property, whether corporeal or incorporeal and whether fixed or movable, including any make or brand…(b) any service, excluding services in terms of a contract of employment”.

101. The South African Protection Act of 2008 adopts a somewhat broad definition of a consumer, who encompasses (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s
business; (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services. The “supplier” is defined as a person who markets any goods or services (a person who promotes or supplies any goods or services).

102. As can be seen from the above:

(1) Although most jurisdictions define consumers broadly to include both natural and legal persons, some jurisdictions, however, limit the definition to natural persons who transact for personal, family and household reasons. Consumer law in our view should protect both natural persons and legal entities, especially those which may be considered vulnerable.

(2) Almost all jurisdictions require that consumer protection legislation should only protect transactions that are not of a business nature e.g. they should not resell or hire any of the commodities that they buy.

(3) Another concern that arises with regard to the definition of a consumer is that it is not clear whether consideration has to be paid before a transaction can qualify for protection. Countries like India require that there must have been some consideration exchanged. We do not consider this should be a requirement of our law.

(4) In many jurisdictions a supplier should be a person that is in the business of providing goods or services. We note, however, that such an approach may create an unnecessary burden for complainants to prove not only that they have satisfied the requirements created for consumers but that the person they transacted with was in the business of providing goods or services.

(5) Another issue that requires consideration is whether to extend protection to third parties. As already indicated, the present position in our law is that suppliers have no contractual obligation to third parties. If a third party suffers damage he would have to seek redress through the laws of delict. Indian legislation and the EU Directive on Package Travel, Package Holidays, and Package Tours stipulates that a third party can be included in the definition of a consumer if he
acts on behalf of the consumer and if the consumer has transferred the goods to the third party. In our view, this is good law. We consider that it is reasonable that third parties like agents of the consumer or individuals to whom the goods are transferred to by the consumer, are able to assume the rights of the consumer in so far as the protections of consumer laws are concerned.
(b) The Notion of the Vulnerable Consumer

103. Consumer protection rules are generally designed for the ‘average consumer’. But where it is felt necessary the law provides additional protection for those who might be deemed ‘vulnerable’. Some type of direct and additional protection for ‘vulnerable’ consumers is provided by law in Denmark, Spain and the UK. The factors that result in the consumer being identified as ‘vulnerable’ are to a large extent common in all jurisdictions: age; income; physical/metal disability; level of literacy and some cultural characteristics, such as language, ethnicity and religion which result in the consumer’s belonging to a minority in the jurisdiction.

238 In Denmark, special protection for certain classes of consumers can be found in Part 3 of the Marketing Practices Act. For example, the Act contains provisions regarding marketing directed at children and young people.

239 For instance, according to Article 21 of the Statute of Consumer (Ley 3/1993 of 5 March) of the region of Cataluña, the regional government has the duty to grant special protection to (i) children and adolescents, (ii) pregnant women, (iii) persons aged above sixty-five years old and (iv) the sick and physically impaired persons. Article 22 of the Statute lists particular actions directed to protect these groups, like the security of toy products or the regulation of advertisements that may result in harm to children.

240 In the UK, for example, section 12 of the Consumers, Estate Agents and Redress Act 2007 provides for special investigation of complaints made by ‘vulnerable’ designated consumers to the National Consumer Council. For that purpose, a person is ‘vulnerable’ if the Council is satisfied that it is not reasonable to expect that person to pursue the complaint on that person’s own behalf. Vulnerable consumers and the additional help to be provided to them is also included in the relevant criteria for the OFT approval of codes of practice [OFT ‘Consumer Codes Approval Scheme: Core Criteria and Guidance’ OFT390 November 2006]. ‘Vulnerable consumers’ are defined as those whose circumstances put them at risk of making an incorrect or inappropriate decision or who are at risk of receiving inferior goods or services [OFT Consumer Codes Approval Scheme]. They include those: with a disability that may put them at risk of making an incorrect or inappropriate decision; with poor literacy skills; with a lack of knowledge about a complex product or service; who are purchasing something at a time of particular stress or distress; where English is not the first language and English is the only language in which material is available [OFT Consumer Codes Approval Scheme (n 66)].

241 The Australian Productivity Commission (APC), in its Review of Australia’s Consumer Policy Framework - Draft Report (Volume 2, 2007), considers that a distinction needs to be drawn between the vulnerable and the disadvantaged consumer. Disadvantage can be defined as a set of individual characteristics which increase the risk of consumer detriment and/or intensify its impact. Such characteristics include poverty, low levels of education and disability. Vulnerability is a broader term based on a consumer’s susceptibility to detriment resulting from their personal characteristics (which may include, but is not limited to, disadvantage) and the specific market context concerned. Disadvantage and vulnerability are distinct. A consumer may well be disadvantaged but may be empowered (and vice versa). While the scale and significance of vulnerability will depend upon the market at issue, in general, we may say that a group of consumers is vulnerable if they are prevented as a result of their characteristics from realizing the full potential of competitive markets with respect to certain essential commercially provided services that are vital for economic and social inclusion.
Similarly, although the EC *Unfair Commercial Practices Directive* in general takes the ‘average consumer’ as the benchmark, according to Article 5(3) commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

104. Our law does not specifically deal with the issue of the ‘vulnerable consumer’ and we consider it is highly desirable that it does so.
(c) The different types of Contracts covered by Legislation

105. Apart from the definition of specific terms like “consumer” or “supplier” the scope of consumer legislation is also determined by the different types of contracts that are covered by the legislation. There are two approaches taken by various jurisdictions concerning this. Some define a consumer contract in a broad manner as including any contract that involves a consumer and that is intended for private, personal or domestic and for household purposes. Some jurisdictions have gone beyond this broad definition and have actually listed the types of contracts that are covered by legislation. These contracts can either be general in nature, for instance direct sales contracts, distance contracts and hire purchase contracts. They can also be specific, for instance timeshare contracts and consumer credit contracts. Most jurisdictions prescribe terms that are specific to the type of contract that is specified.

106. Under our current legislation [the Fair Trading Act and the Consumer Protection (Price and Supplies Control) Act], it is provided that goods may be supplied to a consumer, inter alia, by way of “sale, lease, hire, hire purchase or credit sale”. Although this definition is satisfactory, we consider any new legislation should expressly define what constitutes a consumer agreement (which should include all types of contracts).
(d) Nature of rights enjoyed by Consumers

107. In India the Consumer Protection Act expressly states that the purpose of the Act is to protect the rights of consumers. Section 2 of the Act expressly lays down that it intends to protect particularly the following rights: (a) the right to be protected against the marketing goods which are hazardous to life and property, (b) the right to be informed about the quality, quantity, potency, purity standard and price of goods and services and to be protected against unfair trade practices, (c) the right to be assured access to a variety of goods at competitive prices, (d) the right to be heard and that any complaints will receive the necessary attention by appropriate forums, (e) the right to seek redress against unfair practices and unfair exploitation, and (f) right to consumer education.

108. Most African countries have copied almost verbatim the consumer rights that have been provided by the Consumers International Model law for African states. The Uganda Act, for instance, recognizes the following rights: (a) the right to protection of the consumer’s life, (b) the right to true, sufficient, clear and timely information concerning goods and services, (c) the right to fair, nondiscriminatory treatment by suppliers of goods and services, (d) the right to prompt, timely and adequate compensation for any damages caused by the supply of goods and services, (e) the freedom and right to associate and join or form consumer unions and associations, and (f) access to appropriate or competent authorities for the protection of legitimate rights.

109. The South African Consumer Protection Act 2008 recognizes the following fundamental consumer rights: (a) the right of equality in consumer market (and protection against discriminatory marketing); (b) the right to privacy (and to restrict unwanted direct marketing); (c) the right to choose (and to return unsafe or defective goods); (d) the right to disclosure and information (right to information in plain and

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understandable language, and to disclosure of price of goods or services); (e) the right to fair and responsible marketing; (f) the right to fair and honest dealing (freedom from false, misleading or deceptive representations); (g) the right to fair, just and reasonable terms and conditions; and (h) the right to fair value, good quality and safety.

110. It is noteworthy that in civil law jurisdictions Codes for Consumer Protection almost invariably provide for a comprehensive bill of rights for consumers, which in fact is a blueprint of the rest of the Consumer Code.

Article 6 of the Brazilian Code lays down the following basic rights for consumers: the consumer’s rights to health, safety, education and disclosure, protection against misleading and unfair advertising or unfair business practices, protection against the amendment of contractual clauses, effective prevention and redress against damages, access to the judiciary and consumer administrative bodies, adequate and effective rendering of public services. Article 7 provides that these rights are in addition to any other rights that are given to consumers by international treaties and conventions, to which Brazil is a signatory.\(^{243}\)

The Chilean Code enacts the following consumer rights: (a) the right to a free selection of goods and services, (b) the right to truthful and timely information concerning goods and services, (c) right to equality and non-discrimination, (d) the right to security in the consumption of goods and services, (e) the right to adequate compensation in the instance of non-fulfillment of a duty by the provider and (f) the right to education regarding consumer protection.\(^{244}\)

The Code of Uruguay provides for the following consumer protection rights: (a) the right to legal and administrative and technical protection, (b) the right to the

\(^{243}\) Ibid., at pp. 22-23. Vide also L.R.M. Pinto, “Consumer Protection in Brazil: A General View” [George Washington University, 2002].

\(^{244}\) Vide South African Department of Trade and Industry, Consumer Law Benchmark Study [May 2004] at p. 23.
protection of legitimate economic and social interests, (c) the right to sufficient and truthful information concerning goods and services, (d) the right to education concerning goods and services, (e) the liberty to choose and receive equitable treatment without any pressure, (f) the right to be protected against risks that affect consumer health and safety and (g) the right to indemnity and reparation for damages and injuries suffered.\textsuperscript{245} These rights do not exclude rights that are provided by international treaties and conventions that have become part of the law of Uruguay.

111. Whilst our legislation recognizes certain basic rights to consumers, these are not expressly guaranteed in the form of a consumer bill of rights. It is important, in our view, that it should be so. This would assist in defining the scope of consumer legislation and would also work as a blueprint of the issues that will be included in the legislation. In addition, it isolates consumer rights from the bulk of consumer laws, which makes it easy for consumers to identify and enforce them.

\textsuperscript{245} Ibid., at p. 23.
(e) Nature of Duties imposed on Provider of Goods and Services for the purposes of Protecting Consumers

112. Duties are generally imposed on businesses, and generally on provider of goods and services, for the purpose of protecting consumers.

113. In UK, the EC Unfair Commercial Practices Directive imposes a general duty on traders not to treat consumers unfairly. Although until the very recent transposition of the EC Unfair Commercial Practices Directive into national law, there has not been a general duty to trade fairly, various pieces of legislation have imposed duties on businesses for the purpose of protecting consumers.\textsuperscript{246} The legislation includes: (a) the Consumer Protection Act 1987 which provides that a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available; (b) the Price Marking Order 2004 which requires the selling price of products to be clearly displayed; (c) the Accommodation Agencies Act 1953 which makes it an offence to demand or accept payment from prospective tenants or landlords under certain conditions; (d) the Administration of Justice Act 1970 (section 40) which renders it an offence to coerce another person to pay money claimed from the other as a debt due under a contract, by harassment and various types of false representation; (e) the Business Names Act 1985 which requires businesses which trade under a name other than the proprietor’s true name to prominently display the names and addresses of the proprietor at business premises; (f) the Control of Misleading Advertisements Regulations 1988 [as amended by the Control of Misleading Advertisements (Amendment) Regulations 2000 and the Control of Misleading Advertisements (Amendment) Regulations 2003] which place a duty on the Office of Fair Trading to consider any complaint that an advertisement is misleading or which does not

\textsuperscript{246} Vide Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich. December 2008] at pp. 219-220.
comply with the conditions under which comparisons are permitted in advertisements; (g) the Trade Descriptions Act 1968 which makes it an offence for a trader to apply, by any means, false or misleading descriptions, or to knowingly or recklessly make such statements about goods and services; (h) the Consumer Protection (Distance Selling) Regulations 2000 [amended by the Consumer Protection (Distance Selling) (Amendment) Regulations 2005] which impose information disclosure duties on suppliers and provides the consumer with a cooling-off period of seven days for distant contracts.

114. In Australia, the general duty imposed on businesses for the purposes of protection of consumers is currently found in Sections 52 and 51AB of the Trade Practices Act [TPA]. Section 52 of the TPA provides that ‘a corporation shall not, in trade, or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’ and as such imposes strict liability on undertakings in that it is not necessary that there should have been an intention to mislead or deceive. Nor does any person have had to suffer loss or damage as a result of the conduct or even in fact have been misled or deceived; engagement in misleading or deceptive conduct suffices for responsibility. The test on which the deceptive or misleading character of conduct is decided is that of ‘an ordinary purchaser’, including purchasers who fail to take reasonable care of their own interests, but not to the level of ‘unusual stupidity.’ There are no criminal sanctions for violation of section 52, but only civil remedies, namely injunction and statutory damages. Section 51AB of the TPA, on the other hand, prohibits ‘unconscionable’ conduct in business-to-consumer dealings and stipulates that ‘a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable’. In this respect, the Court may have regard to: the relative strengths of the bargaining positions of the corporation and the consumer; whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation; whether the consumer was able to understand any documents relating to the supply or possible
supply of the goods or services; whether any undue influence or pressure was exerted on, or any unfair tactics were used against the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.\footnote{247}{Vide \textit{Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries} [Report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich. December 2008] at pp. 220-221.}

The Trade Practices Act allows for Codes of Conduct to be prescribed.\footnote{248}{Vide UK Department of Trade and Industry, \textit{Comparative Report on Consumer Policy Regimes} (2003) at pp. 8-9.} The TPA empowers the Minister to prescribe a Code, which makes compliance mandatory. A breach of a prescribed Code is unlawful and can be enforced through the courts. The Minister may pursue this route in response to complaints from members of the industry, consumers or reports from government authorities. However the Minister will only consider initiating a proposal for prescription of a code of conduct if:

- the code would remedy an identified market failure or promote a social policy objective; and
- the code would be the most effective means for remedying that market failure or promoting that policy objective; and
- the benefits of the code to the community as a whole would outweigh any costs; and
- there are significant and irremediable deficiencies in any existing self-regulatory regime-for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems; and
- a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and
- a range of self regulatory options and 'light handed' quasi-regulatory options has been examined and demonstrated to be ineffective.
The Australian Consumer Law, which shall come into operation on 1 January 2011, provides both general protections to consumers [in respect of misleading or deceptive conduct, unconscionable conduct, and unfair contract terms] as well as specific protections: (a) protection against unfair practices (false or misleading representations, unsolicited supplies, pyramid schemes, pricing, referral selling, harassment and coercion); (b) protection of consumer transactions (consumer guarantees, and protection in respect of unsolicited consumer agreements and lay-by agreements); (c) safety of consumer and product related services (including bans and recall of consumer goods); (d) information standards.\textsuperscript{249}

115. In Denmark, a general duty to trade fairly applicable to all industries is found in the Marketing Practices Act.\textsuperscript{250} Moreover, the seller shall be liable to pay damages to consumers if, in a sale of specific goods, the goods are not delivered to the consumer by the agreed time.\textsuperscript{251} Except for generic goods, the seller is exempted from paying damages only if it is established that the delay is not his fault. This is not the case, however, if the seller has reserved the right to be exempted from paying damages or the performance of the contract must be deemed impossible by reason of circumstances that are not the fault of the seller. Similarly, Part 3 of the Marketing Practices Act contains provisions regarding consumer protection. For example, in relation to sales promotions, the firm offering the promotion must be presented in such a way that the terms of offer are clear and easily accessible to the consumer.

According to the Danish Contracts Act,\textsuperscript{252} if the consumer agreement is a written agreement, the trader must ensure that the agreement is clear and the agreement must also set out the terms so these are understandable to the consumer. If the consumer

\textsuperscript{249} Vide Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010.

\textsuperscript{250} Vide Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich. December 2008] at p. 222.

\textsuperscript{251} Danish Sale of Goods Act.

agreement is misleading and unfair towards the consumer, the agreement can be set aside partially or fully. In case of misunderstanding as to what has been agreed, the agreement will be interpreted in favour of the consumer’s understanding. The Act on Actions for Injunctions\(^{253}\) makes it possible for the courts and administrative authorities to issue an injunction against actions violating consumer interests.

116. In the United States, Section 5 of Federal Trade Commission [FTC] Act imposes a general duty to trade fairly by declaring ‘unfair methods of competition’ as well as ‘unfair and deceptive acts or practices’ unlawful. Any firm violating the FTC Act and other federal consumer protection statutes may face administrative penalties, restitution and other monetary remedies to make good any harm done to the consumer and even criminal charges depending on the nature of the violation. Federal agencies and particularly the FTC enjoys a wide discretion in terms of its decision as to whether or not pursue formal action against any violation and what kind of remedies to impose. Additionally, Trade Regulation Rules regarding specific industries sometimes define very specific courses of conduct which the businesses must follow.\(^{254}\)

117. Under our law, a trader is inter alia under an obligation (a) not to supply goods which suffer from any fault,\(^{255}\) (b) not to sell a good at a price higher than that which is affixed,\(^{256}\) nor to give to a consumer an indication which is misleading as to the price at which any goods are sold or supplied,\(^{257}\) nor to refuse to sell goods exposed

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\(^{254}\) Vide *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* [Report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich. December 2008] at p. 225.

\(^{255}\) Section 3(1) of the Consumer Protection Act.

\(^{256}\) Section 8(1) Consumer Protection (Price and Supplies Control) Act.

\(^{257}\) Section 9 Consumer Protection (Price and Supplies Control) Act.
or kept for sale on his trading premises,\textsuperscript{258} (c) not to carry on a consumer trade practice which has the effect of misleading consumers or confusing consumers with respect to any matter in connection with any consumer transaction.\textsuperscript{259} The Minister may make compulsory code of practice regarding methods to be adopted in connection with the promotion and conduct of trade or the provision of services.\textsuperscript{260}

Our legislation compares favourably with the best practices in other jurisdictions, but that does not mean that there is no room for improvement.

\textsuperscript{258} Section 19 Consumer Protection (Price and Supplies Control) Act.

\textsuperscript{259} Section 4 Fair Trading Act.

\textsuperscript{260} Section 9(1) Fair Trading Act.
(2) Fair Contractual Terms

118. Standard contracts are contracts that do not allow a consumer the opportunity to negotiate its terms, hence, are imposed on the consumer. Standard contracts are prevalent in the market and have the potential to be abused by unscrupulous dealers. It is therefore not surprising that most jurisdictions deal with them in their consumer protection statutes. Most jurisdictions prohibit abusive terms in contracts, these terms will often either give the supplier an unfair advantage or they create an unjustified burden for the consumer. Abusive terms may be stipulated in standard contracts, in which case, the consumer cannot negotiate out of them. There are various words that are used for abusive contracts. Some legislation refers to them as “unfair terms”, others refer to them as “unconscionable terms”.

119. In the European Union, Standard contracts and abusive terms are regulated by the Directive on Unfair Terms in Consumer Contracts, which by far is the most comprehensive guideline on the subject. Article 3 of the Directive stipulates that an unfair term is a term that has not been negotiated which causes a significant imbalance on the rights and responsibilities of the parties. The imbalance of power between consumers and suppliers makes it difficult for consumers to genuinely negotiate terms of a contract. Article 3 further stipulates that a contract should not be contrary to good faith. Article 4(1) of the Directive stipulates that when determining whether a particular term is unfair the following have to be considered: the nature of the goods and services, the time of the conclusion of the contract, all other circumstances attendant to the conclusion of the contract. Article 4(2) of the Directive is to the effect that the assessment of unfairness should not relate to the definition of the main subject matter or the adequacy of the price or the goods that were supplied.

261 Sometimes referred to as “adhesion contracts”.

262 Unfair Contract Terms Directive (93/13).
The Directive provides a list of terms that can be considered abusive, and these include the following: (a) limiting liability of the seller in respect conduct that harms the consumer, (b) excluding the rights of consumers in the instance of non-performance or inadequate performance by the supplier, (c) inserting clauses that create a conditional liability only for the supplier, which depend on the will of the supplier, (d) requiring a consumer who fails to comply with his obligations to pay disproportionately high compensation, (e) allowing only the seller the right to cancel an agreement and (f) allowing the seller to unilaterally change the terms of the contract.

Article 7 of The EU Directive requires member states to have adequate means to deal with abusive terms, which may include provisions which permit an aggrieved party to seek relief in national courts or administrative bodies.

120. In UK, the main legislation that deals with the unfair terms is the Unfair Contract Terms Act and the Regulations made there under. This Act provides comprehensive legislation, which closely follows the EU Directive. The Act is limited to adhesion contracts. The English Act follows the EU Directive with regard to the test for unfair terms. The test has three requirements: (a) it should be contrary to good faith requirements, (b) it must create a significant imbalance with respect to the rights and obligations of the parties and (c) it must be to the detriment of the consumer. As required by the EU Directive, the fairness test does not cover clauses that relate to the definition of the main subject matter of the contract or clauses that deal with adequacy of the price or remuneration. In applying the fairness test, the following should be considered: the nature of the contract at the time that it was concluded, and all the circumstances attending to conclusion of the contract. Schedule 2 of the Unfair Contract Terms in Contracts Regulations provide a non-exhaustive list of clauses that can be considered prima-facie unfair and these include clauses that allow the unilateral alteration of the terms of a contract, exempt the seller from liability cases where the consumer is killed or injured, that compel the consumer to comply with the obligations of contract where the seller or supplier fails to do the same.
Apart from instances where there is an individual complaint concerning the fairness of a term of the contract, Regulation 10 permits the Director General of Fair Trading to consider the trends of complaints that are made to him to determine whether there is a general use of an unfair term. If he is of the view that a general term is unfair he may seek an injunction against its use. The Regulations also allow the consumer bodies to apply to courts against the general use of unfair terms.

121. In Finland, Chapter 4 of the Consumer Protection Act permits the use of standard contracts provided they do not contain clauses that are unfair on the consumers, when one considers price of the goods/services and other relevant circumstances. The prohibition of abusive clauses is not however limited to standard contracts but applies to all transactions. The test that is used in determining whether a contract is abusive is the “reasonable man” test. Chapter 4 requires the following to be considered: the whole contract, the circumstances under which the contract was concluded, any change of circumstances, and any other relevant points. The Market Court and the Consumer Ombudsman are permitted to issue injunctions or vary or alter unfair contractual terms.

122. In Australia, there is currently no federal legislation that deals with unfair contractual terms. This is a matter that is dealt with at state level. New South Wales for instance has the Contracts Review Act that is intended to address abusive contracts. Section 7(1) of this Act permits the courts to set aside terms of a contract that are unfair. The test that is used is one of “public interest”. In determining whether a clause is in the interest of the public the following inter alia have to be considered: (a) material inequality of the parties, (b) statements made by the parties or their agents, (c) terms that are unreasonable to comply with and which do not assist any of the parties, (d) the individual idiosyncrasies of the parties, (e) the physical form of the document and the language used and (f) undue influence and unfair pressure.

263 Vide South African Department of Trade and Industry, Consumer Law Benchmark Study [May 2004] at p. 34.
123. Sections 23 to 28 of the Australian Consumer Law, which shall come into operation on 1 January 2011, deal with “Unfair contract terms".\(^{264}\) Section 23(1) provides that an unfair term of a standard form contract is void.\(^{265}\)

According to section 24(1), a term of a consumer contract is unfair if (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;\(^{266}\) and (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.\(^{267}\)

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\(^{265}\) Section 27(1) provides that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise. In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
- (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction.

\(^{266}\) Section 24(4) prescribes that a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

\(^{267}\) Section 25(1) provides examples of the kinds of terms of a consumer contract that may be unfair:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
In determining whether a term of a consumer contract is unfair, a court may take into account such matters as it thinks relevant, but must take into account the following: (a) the extent to which the term is transparent;\(^{268}\) (b) the contract as a whole.

124. In Brazil, adhesion contracts are defined as contracts where clauses have been approved by the competent authority or where a supplier unilaterally determines the terms of the contract without the consumer being given an opportunity to negotiate them.\(^{269}\) The Brazilian Code stipulates that standard contracts have to be clearly worded and should be easy to read. Article 51 of the code is to the effect that an adhesion contract is not invalid by virtue of being a standard contract, provided there is no unfair clause which may render it invalid by operation of law. The Code further provides that if there is a clause that is detrimental to a consumer it has to be clearly stated. Unfair clauses include clauses that prevent or exonerate a supplier from liability, or deprive a consumer from getting a refund for a cancelled transaction or establish obligations that can be considered inequitable or abusive against the consumer. Article 24 of the Code expressly stipulates that a written legal guarantee of a product or service cannot exonerate a supplier from liability. A general contractual term that attempts to exonerate or reduce the liability of a supplier or that attempts to indemnify him/her is prohibited.

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\(^{268}\) Section 24(3) is to the effect that a term is transparent if the term is (a) expressed in reasonably plain language, (b) legible, (c) presented clearly, and (d) readily available to any party affected by the term.

\(^{269}\) Article 34 of the Consumer Protection Code.
125. Section 7 of the Barbados Consumer Protection Act 2003 provides that a contract term in a consumer transaction is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer. In determining whether a contract term is unfair, consideration is to be given to the following: (a) the nature of the goods or services for which the contract was concluded; (b) all the other terms of the contract or of another contract on which it is dependent; (c) the interests of the supplier; (d) the interests of the particular class of consumers who are likely to adhere to the contract; and (e) all the circumstances attending the conclusion of the contract at the time of its conclusion.

126. Section 19 of the Ugandan Consumer Protection Act provides that a standard contract must be drafted in clear and understandable language and should not refer to text that is not made available to the consumer. Section 20(3) of the Act defines an unfair agreement as one that (a) results in unreasonably, unequal exchange of value or benefits, (b) is oppressive, (c) imposes liabilities on one party that are unreasonable for the protection of the other party, (d) unreasonably excludes or limits the obligations of a party or (e) is contrary to commonly accepted standards of fair dealing. A court or tribunal that is requested to consider the fairness of a contract is permitted to cancel or vary the agreement.

127. Section 48(1) of the South African Consumer Protection Act provides that a supplier must not (a) offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust, or on terms that are unfair, unreasonable or unjust; (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, or assume any obligation, or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
Section 48(2) of the Act is to the effect that a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if inter alia (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; (c) the consumer relied upon a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.

According to section 49(1) of the Act, any notice to consumers or provision of a consumer agreement that purports to (a) limit in any way the risk or liability of the supplier or any other person, (b) constitute an assumption of risk or liability by the consumer, (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer.

128. Under our legislation, section 4 of the Fair Trading Act expressly prohibits a consumer trade practice which has the effect or is likely to have the effect of causing the terms or conditions on which consumers enter into any consumer transaction to be so adverse to them as to be detrimental to their interests. Our legislation, however, does not expressly provide for unfair or abusive terms in consumer agreements and is silent about use of standard contracts.

129. Standard contracts seem to pose a concern for most countries. All jurisdictions do not prohibit them but they require them not to have unfair or abusive terms. The EU only prohibits abusive terms that are contained in standard agreements. We consider abusive terms must always be prohibited regardless of whether or not they are stated in standard contracts. We are also of the opinion that the test of unfairness should be an objective test.\textsuperscript{270}

\textsuperscript{270} Although the EU Directive is silent on whether the test is a subjective or an objective one, the UK position seems to require a subjective approach that is based on the principles of good faith. We do not agree with this approach, the
(3) Disclosure & Labelling

130. Disclosure creates competition between suppliers which results in a more efficient market and improves the quality of products. It also lessens the need for state intervention in the market in order to protect consumers. In most jurisdictions, the market has failed to provide proper disclosures to consumers and this has resulted in the promulgation of statutes that are intended to ensure that there is proper disclosure. Disclosures can be general in nature in that they apply to all consumer contracts. They can also apply to contracts that relate to specific industries or specific types of contracts. Disclosure in the form of the labelling of goods is important for various reasons: (a) it identifies the product by name and description, (b) it presents goods to consumers to ensure that they are not deceived, (c) it allows for the comparison of products, (d) it provides information to consumers concerning the uses of the product, and (e) it provides consumers with necessary information concerning the product to assist them in deciding whether the goods are appropriate for their needs.\(^{271}\)

131. In Canada, the Consumer Protection Act of the province of Manitoba prescribes legislative disclosure requirements for credit agreements,\(^{272}\) direct sales,\(^{273}\) and prepaid contract.\(^{274}\) Direct sales have to comply with disclosure requirements that are

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individual thoughts and weaknesses of a party should be irrelevant when determining the fairness of a contract. The test should be that of a reasonable person. The approach taken by some African States is objective and it requires that unfairness be determined according to commonly accepted standards of fair dealing. Most jurisdictions provide a comprehensive list of conduct that can be considered prima facie unfair. This in our view should merely be a guideline that is provided in addition to the general objective test.


\(^{272}\) Section 4(1)

\(^{273}\) Section 59(1) refers to retail sales and retail hire purchase agreements. It excludes contracts like sales of water, gas petroleum, farm produce etc.

\(^{274}\) Section 121.
prescribed in Ministerial Regulations. With regard to pre-paid services contracts section 123 provides for the following disclosures: the names and addresses of the seller and the buyer, a description of the services to be provided under the contract, the total fee to be paid, date of performance of the service, statement pertaining to the “cooling-off period”, and the schedule of payments.

The Consumer Protection Act of British Colombia generally requires the Minister to prescribe regulations that provide disclosure requirements for direct sale agreements and executor contracts. Section 56 of the Act requires that a supplier, who provides an unsolicited service to a consumer, should provide the consumer within 60 days of the transaction a disclosure notice that states the following: (a) the description of the service, (b) the price of the service, (c) the timing of the payments for the service, (d) information on the cancellation of the transaction and (e) a statement that in terms of section 55 of the Act, a person is not bound to pay for services unless he has specifically consented and may within 2 years demand a refund.

132. Article 30 of the Brazilian Code for Consumer Protection provides that any information circulated, in whatever form, binds the supplier and forms part of the agreement. Article 31 expressly lays down that any offer to consumers must be done in a clear and accurate manner. Similar requirements also apply to service contracts. The information that must be provided includes service characteristics, price and warranties. In the case of an offer that is made by telephone or by postal order, the manufacturers name has to be shown on the packaging, advertising and all printed material in connection with the transaction. Article 40 of the Code requires of a service supplier that he should provide an estimate which states the value of the labour, materials and equipment used, payment conditions and the date when the services will start and be concluded. This quote is valid for 10 days after receipt by the consumer.

275 Section 14.
Food labelling is covered by Chapter IV of the Code. Article 9 of this chapter provides that suppliers of goods and services that are potentially harmful have to provide information that is visible and adequate concerning the harmfulness of the products. Article 10 prohibits suppliers from selling any products that they know to be extremely harmful. Any supplier who becomes aware of the harmful effect of a product that he sold has to immediately inform consumers and the competent authority about this fact. Article 31 of the Code also creates a general responsibility on suppliers to ensure that their goods and services are presented in an accurate manner, that can be easily read and should provide the nature of the product or service characteristics, its quality, quantity, composition, price, warranties and any other information with regard to risks that it may cause to consumers’ health and safety.

133. The French ‘Code de la Consommation’ imposes a duty on sellers/manufacturers/suppliers to inform.\(^{276}\) The duty to inform is to notify the buyer or consumer of the essential qualities of the goods or services,\(^{277}\) and delivery dates. Furthermore an importer of goods must notify the seller the duration for which the essential parts of the goods will be available on the market. This information will then be subsequently delivered to the buyer/consumer before the contract is entered into. Again in the case of a disagreement the burden to show that the consumer was aware is on the seller\(^ {278}\). The products themselves must contain information. For example, tradmarked cheese must be labelled with the name and address of the manufacturer.\(^ {279}\) All patented agricultural food or foodstuff must contain the trademark logo of the product except for wine, spirits and ‘produits

\(^{276}\) The “Titre Premier” of the “Livre Premier” of the French “Code de la Consommation” relates to “Information des consommateurs”.

\(^{277}\) It is up to the seller to prove that he has fulfilled the obligation: vide Article L 111-1.

\(^{278}\) Article L111-2

\(^{279}\) Article L112-1
intermédiaires’. Furthermore, goods sold under a brand name must contain the name and address of the manufacturer if he so wishes. All sellers or service providers must make use of labelling, price tags, or other appropriate means to inform the consumer as to the price and other relevant information such as limitation on contractual liability and other conditions of sale.

134. The Sarajevo Consumer Protection Act 2001 provides different disclosure requirements for different types of contracts. These contracts can mainly be split into general contracts and specific contracts. General contracts include direct sales, sales at a distance and purchases on installments. Specific contracts include contracts like consumer credit, insurance, package holidays and tours and timesharing. According to section 49 of the Act, direct sales contracts have to stipulate some of the following information: (a) suppliers name, vat number, full address, (b) name, surname and address of the consumer, (c) name description and quantity of the product, (d) terms of delivery, (e) date of contract and (f) price of the product and any other additional charges. All important clauses of the contract must be clearly written. Sales at a distance are contracts where there is no direct contact with the consumer. Suppliers in these agreements have to provide pre-contractual disclosures that stipulate inter alia the following; major properties and benefits of the product, price and additional charges, information on after sale service, conditions with regard to payment or delivery of the service, cooling-off right and the competent court in the case of a dispute.

135. Section 23(3) of the South African Consumer Protection Act 2008 provides that a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods. A supplier is under the obligation not to require a consumer to pay a price for any goods or services that is higher than the displayed price for those goods or services.

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280 Article L112-2

281 Article L 112-6; Bakers are governed by Articles L121-80 to L121-82.

282 Article L113-3
Under section 24(2)(a) of the Act, a person must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description. A retailer of goods must not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description, or a trade description or trade mark applied to those goods has been altered.

136. Sections 27 and 28 of the New Zealand Fair Trading Act 1986 provide for regulations creating consumer information standards for goods and services.

The regulations can relate to all or any of the following matters:
(a) the disclosure of information relating to the kind, grade, quantity, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of the goods or services:
(b) the form and manner in which that information must be disclosed on or in relation to, or in connection with, the supply or resupply, or possible supply or resupply, or promotion of the supply of the goods or services.

Currently there are five consumer information standards, covering:
(a) country of origin clothing and footwear;\(^{283}\)
(b) fibre content labelling,\(^{284}\)
(c) care labelling,\(^{285}\)
(d) customer information notices for used vehicles,\(^{286}\) and

\(^{284}\) Consumer Information Standards Fibre Content Labelling Regulations 2000.
\(^{285}\) Consumer Information Standards Care Labelling Regulations 2000.
\(^{286}\) Consumer Information Standards Used Motor Vehicles Regulations 2008.
137. Sections 134-137 of the Australian Consumer Law, which shall come in operation on 1 January 2011, prescribe “information standards”.

According to section 134(1), the Commonwealth Minister may, by written notice published on the internet, make an “information standard” for one or both of the following: (a) goods of a particular kind; (b) services of a particular kind. 288

By virtue of section 136, a person must not, in trade or commerce, manufacture, supply or offer for supply, possess of have control of, goods of a particular kind if (a) an information standard for goods of that kind is in force; and (b) the person has not complied with that standard. The same prohibition applies in respect of the supply or offer for supply of services.

138. As can be seen from the above, most jurisdictions have provided for minimum disclosure of matters like: (a) the description and specifications of the good, (b) the name and domicile of the vendor, (c) the name and domicile of the manufacturer, distributor, or importer, (d) the characteristics of any guarantee, and (e) the price and conditions of payment.

139. There is globally growing awareness of the need for sustainable patterns of consumption and production. 289 To that end, the use of labels with a logo that

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287 Consumer Information Standards Water Efficiency Regulations 2010.

288 Section 134(2) is to the effect that an information standard for goods or services of a particular kind may:

(a) make provision in relation to the content of information about goods or services of that kind; or
(b) require the provision of specified information about goods or services of that kind; or
(c) provide for the manner or form in which such information is to be provided; or
(d) provide that such information is not to be provided in a specified manner or form; or
(e) provide that information of a specified kind is not to be provided about goods or services of that kind; or
(f) assign a meaning to specified information about goods or services.

289 Since the 2002 United Nations World Summit on Sustainable Development (WSSD) held in Johannesburg, Sustainable Consumption and Production (SCP) has become a central theme in the international environmental
identifies environmentally sound products has been implemented in various countries. The information on green labels is often based on life-cycle analyses, which track the environmental impacts of products through production, distribution, consumption and disposal. Independent certification or verification of manufacturers’ environmental claims is generally required for eco-labelling.

As pointed out by the International Organization for Standardization (ISO), the overall goal of these labels and declarations is:

"...through communication of verifiable and accurate information, that is not misleading, on environmental aspects of products and services, to encourage the demand for and supply of those products and services that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement".

The ISO has undertaken efforts to attempt to standardize the principles, practices and key characteristics relating to three major voluntary environmental labelling types: (a) Type I - environmental labelling (i.e. eco-labels), (b) Type II - self-declaration claims, and (c) Type III – environmental declarations (e.g. report cards/information labels).

It has been felt that Governments should (a) promote the provision of truthful information about the environmental profile and/or impact of products and services through means such as eco-labelling schemes, product information hotlines, product profiles, environmental reports by industry and information centres for consumers; (b) they should also promote accords on internationally-recognized symbols for environmental labelling. Vide Global Eco-Labelling Network (GEN), Information Paper: Introduction to Eco-Labelling [2004].

Vide T. Rotherdam, Selling Sustainable Development: Environmental Labelling and Certification Programs [The Dante B. Fascell North-South Center, University of Miami, 1999]. See also Global Eco-Labelling Network (GEN), Information Paper: Introduction to Eco-Labelling [2004].
Eco-labelling has become a useful tool for governments in encouraging sound environmental practices, and for businesses in identifying and establishing markets (i.e. domestic and sometimes international) for their environmentally preferable products. Many countries now have some form of eco-labelling in place. Three core objectives are generally pursued: (a) protecting the environment; (b) encouraging environmentally sound innovation and leadership; and (c) building consumer awareness of consumer issues.

In Mauritius, the Mauritius Standards Bureau has adopted those standards.

140. By and large, our law is in conformity with best practices.

A trader is required to affix a trade label on any good and no trader may sell any good at a price which is higher than the price shown on the label affixed. The commodity should also bear a conspicuous label indicating the country of origin.

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293 For instance the EU Eco-label Award Scheme (EU region), the Nordic Swan (Norway, Sweden, Finland, Iceland and Denmark), the Bra Miljoval (Sweden), the Blue Angel (Germany), the Stichting Milieukeur (The Netherlands), the Eco-Mark (India), the GreenLabel (Singapore), Environmental Choice (Australia), Zimbabwe’s Environment 2000 initiative.

294 Vide (a) MS ISO 14020:2000 on ‘Environmental labels and declarations – General principles’: it establishes guiding principles for the development and use of environmental labels and declarations, and is not intended for use as a specification for certification and registration purposes;
(b) MS ISO 14024:1999 on ‘Environmental labels and declarations – Type I environmental labelling – Principles and procedures’: it establishes the principles and procedures for developing Type I environmental labeling programs, including the selection of product categories, product environmental criteria and product function characteristics; and for assessing and demonstrating compliance; it also establishes the certification procedures for awarding the label;
(c) MS ISO 14021: 1999 on ‘Environmental labels and declarations – Self-declared environmental claims (Type II environmental labelling)’: it specifies requirements for self-declared environmental claims, including statements, symbols and graphics, regarding products;
(d) MS ISO 14025:2006 on ‘Environmental labels and declarations – Type III environmental declarations – Principles and procedures’: it establishes the principles and specifies the procedures for developing Type III environmental declaration programs and Type III environmental declarations. It specifically establishes the use of the ISO 14040 series of standards in the development of Type III environmental declaration programs and Type III environmental declarations. MS ISO 14025:2006 establishes principles for the use of environmental information, in addition to those given in MS ISO 14020:2000 Type III environmental declarations as described are primarily intended for use in business-to-business communication, but their use in business-to-consumer communication under certain conditions is not precluded.
In the case of any pre-packaged food that is intended for sale, packed or canned, the container should bear a conspicuous label which is in conformity with “Standard for the Labelling of Pre-Packaged Food MS 30” and Food Regulations enacted under the Food Act.297

Every trader who sells to a consumer any goods shall be deemed to have given a warranty that the goods sold are merchantable.298

In respect of electrical and electronic domestic appliances every dealer shall inter alia give as much information about the good, and the terms of any guarantee should be set out in writing at the time of the sale.

As regards motor vehicles, every dealer shall ensure that the manufacturer’s handbook relating to the model of motor vehicle being sold is available to the consumer at the time of sale of the motor vehicle, the terms of the manufacturer’s guarantee; the terms of the guarantee shall be clearly set out in writing at the time of sale and easily understandable particularly in relation to any items specifically included in or excluded from its provisions.299

We consider nonetheless that provision can be made for “information standards”.

295 Sections 7 and 8 Consumer Protection (Price and Supplies Control) Act.


297 Vide Prepackaged Food Regulations 1989 as well as Food Regulations 1999.

298 Regulation 3 of Trader’s Warranty Regulations 1981.

(4) **Safety of Goods and Services; Product Liability**

141. Safety standards are generally laid down in respect of goods and services; provision is also made regarding product liability.\(^{300}\)

142. Under section 29 of the New Zealand Fair Trading Act 1986, regulations may be made in respect of goods of any description or any class or classes of goods, prescribing for the purpose of preventing or reducing the risk of injury to any person, product safety standards relating to all or any of the following matters:
(a) The performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;
(b) The testing of the goods during or after manufacture or processing;
(c) The form and content of markings, warnings, or instructions to accompany the goods.

It is an offence under the Fair Trading Act 1986 to supply, or offer to supply, or advertise to supply any goods that do not comply with the requirements set out in the Product Safety Standard. Currently there are six Product Safety Standards under the Fair Trading Act. They relate to: (a) Baby walkers;\(^{301}\) (b) Children's toys – for the under three age group;\(^ {302}\) (c) Children’s nightwear;\(^ {303}\) (d) Cigarette lighters;\(^ {304}\) (e) Household cots;\(^ {305}\) and (f) Bicycles.\(^ {306}\)

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\(^{300}\) Product liability generally refers to any liability that is placed on a manufacturer, distributor, retailer or an importer in respect of harm that is occasioned by the use of a product. A product can be considered defective for various reasons: for instance, it may have a harmful ingredient, or it may have deteriorated before it was sold or as a result of poor preparation, or lack of proper instructions as to its use.

\(^{301}\) Product Safety Standards (Baby Walkers) (Amendment) Regulations 2005.

\(^{302}\) Product Safety Standards (Children's Toys) Regulations 2005.


\(^{305}\) Product Safety Standards (Household Cots) Regulations 2005.
Under section 31, the Minister can declare goods to be unsafe if the good may cause an injury to any person. Such notices are effective for 18 months; the period of the notice can be extended for a specified period or indefinitely. If goods do not comply with product safety standards, or may cause injury to any person and the trader has not recalled the goods, the Minister may pursuant to section 32 compulsorily require the goods to be recalled.

Section 34 provides for regulations prescribing safety standards in respect of services.

143. In the United Kingdom, the Consumer Protection Act 1987 provides for regulations for the purpose of securing (a) that goods are safe; (b) that goods which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and (c) that appropriate information is, and inappropriate information is not, provided in relation to goods.\(^\text{307}\)

The General Product Safety Regulations 2005 [SI 2005 No. 1803] have introduced an obligation on businesses to only place safe product on the market. The Regulations also require businesses to provide consumers with relevant information to assist them in assessing the risks of using the product, and manufacturers must adopt measures so that they are informed of risks and can take action if necessary.\(^\text{308}\)

144. Under the Australian Trade Practices Act 1974, section 65B includes provisions for issuing warning notices to the public, where the Minister may publish in the Gazette a notice outlining when a good is under investigation in order to determine whether

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\(^{308}\) Vide “The General Product Safety Regulations 2005: Notification guidance for producers and distributors”. 

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it will or may cause injury and/or the possible risks involved in the use of the specified good.

The Australian Consumer Law, which shall come into operation on 1 January 2011, empowers the Commonwealth Minister to declare safety standards for consumer goods and product related services. It is an offence to supply goods or product related services which do not comply with safety standards. There can be bans – interim or permanent – if it appears that a consumer good will or may cause injury to any person, or a reasonably foreseeable use (including a misuse) of the consumer good will or may cause injury to any person.\(^{309}\) Provision is also made for recall – compulsory or voluntary – of consumer goods or product related services.\(^{310}\)

145. Section 19(1) of the Malaysian Consumer Protection Act 1999 provides for safety standards to be prescribed in respect of any goods or class of goods, and any services or class of services. It is an offence for any person to supply, or offer to or advertise for supply, any goods or services which do not comply with the safety standards.

According to section 68(1) of the Act, where any damage is caused wholly or partly by a defect in a product,\(^{311}\) the following persons shall be liable for the damage: (a) the producer of the product; (b) the person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; and (c) the person who has, in the course of his business, imported the product into Malaysia in order to supply it to another person. Where damage is caused wholly or partly by a defect in a product,

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\(^{309}\) Sections 109 to 121.

\(^{310}\) Sections 122 to 128.

\(^{311}\) According to section 67(1) of the Act, there is a defect in a product if the safety of the product is not such as a person is generally entitled to expect. In determining what a person is generally entitled to expect in relation to a product, all relevant circumstances shall be taken into account including (a) the manner in which, and the purposes for which, the product has been marketed; (b) the get-up of the product; (c) the use of any mark in relation to the product; and (d) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product; (e) what may reasonably be expected to be done with, or in relation to, the product; and (f) the time when the product was supplied by its producer to another person.
the person who suffered the damage may, within a reasonable period after the damage occurred, request the supplier to identify the producer or the importer. Should the supplier fail to comply with that request, he shall be held liable for the loss or damage. By virtue of section 71 of the Act, the liability of the manufacturer, importer or supplier shall not be limited or excluded by any contract term, notice or other provision.

146. Under the Barbados Consumer Protection Act 2003, it is an offence to supply any consumer good which fails to comply with the general safety requirement.\footnote{Section 37(2) of the Act provides that consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including (a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods; (b) any standards of safety published by any person or authority, and having legal effect as published, either for goods of a description which applies to the goods in question or for matters relating to goods of that description; and (c) the existence of any means by which it would have been reasonable for the goods to have been made safer.} Provision is also made for compulsory recall of goods of a kind which will or may cause injury to any person.\footnote{Section 40 of the Act.}

Section 29 of the Barbados Consumer Protection Act 2003 provides that where any damage is caused wholly or partly by a defect in a product, the following persons shall be held liable for the damage: (a) the producer of the product; (b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; (c) any person who has imported the product into Barbados in order, in the course of any business of his, to supply it to another.

Where any damage is caused wholly or partly by a defect in a product, any person who supplied the product, whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person, is liable for the damage if (a) the person who suffered the damage
requests the supplier to identify the producer or the person who imported the product into Barbados; (b) that request is made within a reasonable time after the damage occurs; and (c) the supplier fails, within a reasonable time after receiving the request, either to comply with the request or to identify the person who supplied the product to him.

According to section 30 of the Act, there is a defect in a product if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product, includes safety with respect to products comprised in that product and safety in the context of risks of damage to property as well as in the context of risks of death or personal injury. In determining what persons generally are entitled to expect in relation to a product, all the circumstances shall be taken into account, including (a) the manner in which and purposes for which the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; (b) what might reasonably be expected to be done with or in relation to the product; and (c) the time when the product was supplied by its producer to another.

By virtue of section 33 of the Act, the liability to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by any other provision.

It is to be noted, however, that in respect of a defect in a product it is a defence, under section 34 of the Act, to show (a) that the defect is attributable to compliance with a requirement imposed by or under any enactment; (b) that the person proceeded against did not at any time supply the product to another; (c) that the only supply of the product to another by the supplier was otherwise than in the course of a business of the supplier; (d) that the defect did not exist in the product at the relevant time; (e) that the state of scientific and technical knowledge at the relevant time was
not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control; or (f) that the defect constituted a defect in a product in which the product in question has been comprised (subsequent defect) and it was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

147. Article 12 of the Brazilian Code for Consumer Protection creates strict liability for Brazilian and foreign manufacturers, producers, builders, and importers for damages that are caused as a result of defects in design, manufacture, construction, assembly, formulas, handling, presentation and packing of their products. A product is considered unsafe if it does not offer safety that is expected from it, taking into account the relevant circumstances which include the following: (a) the presentation of the product, (b) use and risks reasonably expected from it and/or (c) the time when it was distributed. A product is not merely defective because there is another better quality product that has been placed on the market. Liability of the above persons does not arise only in the following circumstances: (a) that they did not place the product on the market, (b) that the product does not have any defect and/or (c) that the consumer or a third party was exclusively liable.

According to article 13 of the Code, the merchant is held liable if: (a) it is not possible to identify the manufacturer, builder, producer or importer, (b) the product is supplied without clear identification of the manufacturer, builder, producer or importer and/or (c) if he/she does not adequately preserve perishable goods.

Under article 14 of the Code, strict liability applies to suppliers of services (except liberal professionals) which cause harm to consumers of the service that is provided or where there is insufficient information concerning harm that can arise as a result of the services. A defective service is defined as a service that fails to comply with
the safety that the consumer could expect from it, taking into account the relevant circumstances including the following: (a) the manner in which it was provided, (b) the results and risks that can be reasonably expected from it and/or (c) the time when it was provided. A supplier of services is not held liable only in the following circumstances: (a) there were defects in the performance of the service or (b) if he can show that the exclusive liability is of a third party.

Article 18 of the Code provides that in the case where a consumer becomes aware of a defective product, that he is entitled to demand replacement of the defective part of the product. If the defective part is not corrected within 30 days, unless the duration may compromise the quality of the product, in which case the demand to correct the defect can be immediate. The consumer may demand that: (a) the whole product be replaced, (b) demand a refund or (c) demand a proportionate reduction that takes into account the defect. Article 18(6) states the following goods as unsuitable for use and consumption: (a) products where the terms of validity have expired or (b) products that have deteriorated or have been altered, adulterated, damaged, falsified, spoiled, harmed, or those that do not comply with manufacturing, distribution or packaging regulations.

Article 19 of the Code is to the effect that suppliers can be held jointly liable for any defects in the quantity of a product which is as a result of a variation of the goods and when the net content is less than that which is indicated in the container, packaging, labelling or advertisement. The consumer is entitled to demand in these situations: (a) proportionate price deduction, (b) supplemental of the weight and measure, (c) replacement of the product or (d) an indexed refund of the price paid. The immediate supplier shall be held liable if the instrument of weight and measure does not comply with official standards. Under article 20 of the Code, a service supplier is liable for any defects that render services unsuitable for consumption or results in the decrease of their value and for services that do not comply with the standards stipulated in an advertisement of an offer. If services are defective, the consumer is entitled to demand: (a) re-execution of the services, which may be done
by a third party at the expense of the supplier, (b) an indexed refund for the paid for the services or (c) proportionate reduction of the price. Article 21 of the Code states that in the case when services are rendered for the repair of goods, it is assumed that the supplier will use adequate, new, original replacement parts or parts that meet the manufacturer’s specifications.

According to article 22 of the Code, Government entities are also obliged to provide adequate, efficient, safe and continuous essential services. Article 23 of the Code provides that the lack of knowledge of a supplier as to the quality of goods or services is not an excuse and does not discharge him from liability. Article 25 states that if there is more than one party that is liable for damages, all the parties are considered jointly liable for the damages. Article 25 expressly prohibits any contractual stipulations that are intended to exonerate or to reduce the extent of liability of a person who is ex lege liable for any damages that may caused to a consumer. In the event there is more than one party liable for the damages, all parties can be held jointly liable for any damages caused.

148. Section 61(1) of the South African Consumer Protection Act 2008 provides that the producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

Section 61(4) of the Act, however, lays down that liability of a particular person does not arise if (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation; (b) the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person or was wholly attributable to
compliance by that person with instructions provided by the person who supplied the goods to that person; (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers.

149. Our law, by and large, is in conformity with best practices. There is a general requirement that no person shall supply any goods which suffer from any fault with regard to any prescribed quality, quantity, potency, purity or standard or, in the case of any machinery or motor vehicle, with regard to the quality, nature or manner of its performance. A prohibition notice may also be served by the Enforcement Authority on any person prohibiting that person from supplying any goods which in its opinion are not safe for use or consumption.

The Code Civil Mauricien affords protection to the buyer in respect of the “défauts de la chose vendue ou les vices rédhibitoires”. The provisions in the Code Civil Mauricien need, however, to be supplemented by provisions in our consumer legislation, which would lay down in greater detail the remedies available against a supplier, manufacturer or importer in respect of defects in goods.

314 Section 3(1) Consumer Protection Act. The Minister may, under section 4(1), make such safety regulations as he thinks fit for the purposes of the Act.

315 Article 1641 of the Code is to the effect that «le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l’usage auquel on la destine, ou qui diminuent tellement cet usage, que l’acheteur ne l’aurait pas acquise, ou n’en aurait donné qu’un moindre prix, s’il les avait connus.» Article 1642, however, provides that «le vendeur n’est pas tenu des vices apparents et dont l’acheteur a pu se convaincre lui-même.» Article 1643 lays down that « Il [le vendeur] est tenu des vices cachés, quand même il ne les aurait pas connus, à moins que dans ce cas il n’ait stipulé qu’il ne sera obligé à aucune garantie.» According to article 1644, «l’acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de se faire rendre une partie du prix, telle qu’elle sera arbitrée par experts.» In the event that «le vendeur connaissait les vices de la chose», Article 1645 provides that «il est tenu, outre la restitution du prix qu’il en a reçu, de tous les dommages et intérêts envers l’acheteur ». When «le vendeur ignorait les vices de la chose», Article 1646 provides that «il ne sera tenu qu’à la restitution du prix, et à rembourser à l’acquéreur les frais occasionnés par la vente».
(5) **Guarantees, Warranties and Conditions**

150. In most jurisdictions the terms of a consumer agreement – like the terms of any contract - are generally subjected to conditions and warranties. In a few jurisdictions, the guarantees that are available to consumers upon the supply of goods and services are expressly laid down in statute.

151. Section 5 of the New Zealand Consumer Guarantees Act 1993 provides that the following guarantees apply where goods are supplied to a consumer: (a) The supplier has a right to sell the goods; (b) The goods are free from any undisclosed security; (c) The consumer has the right to undisturbed possession of the goods, except in so far as that right is varied pursuant to a term of the agreement for supply in any case where that agreement is a hire purchase agreement.

Section 6 of the Act is to the effect that where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality; where the goods fail to comply with this guarantee, the consumer have a right of redress against the supplier and against the manufacturer. According to section 7(1) of the Act, goods are of acceptable quality if – having regard the nature of the goods, the price (where relevant), any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or the manufacturer, and all other relevant circumstances of the supply of the goods - they are as (a) fit for all the purposes for which goods of the type in question are commonly supplied; (b) acceptable in appearance and finish; (c) free from minor defects; (d) safe; (e)

316 Conditions refer to clauses in a contract that are fundamental and whose non-fulfillment either terminates the contract (‘resolutoires’) or prevents the coming into being of the contract (‘suspensives’). Warranties often refer to terms of a contract that are not so fundamental and their breach does not necessarily result in the nullification of the contract but may result in the payment damages.

317 This means that the supplier has a right to dispose of the goods by selling them to the consumer at the time of sale.

318 This means that no other person has a claim on the goods.
durable, as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable.

Section 7(2) of the Act provides that where any defects in goods have been specifically drawn to the consumer’s attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.

Section 7(4) of the Act also provides that goods will not fail to comply with the guarantee of acceptable quality if (a) the goods have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and (b) the goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.

According to section 8 of the New Zealand Act, where goods are supplied by description to a consumer, there is a guarantee that the goods correspond with the description.

Section 11 of the Act provides that where goods are supplied to a consumer there is a guarantee that the consumer is not liable to pay to the supplier more than a reasonable price for the goods.

By virtue of section 12 of the Act, there is the guarantee that the manufacturer shall take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

Where goods do not comply with guarantees, the consumer has a right of redress against the supplier, as well as the manufacturer, such as having the good repaired or
replaced or a refund of price paid or still being compensated for any reduction in value of the goods below the price paid or payable by the consumer for the goods. The right to reject goods which are not of an acceptable quality would normally be lost if not exercised within a reasonable time.

Section 28 of the Act is to the effect that where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill, and completed within a reasonable time. Section 31(1) provides the consumer with the guarantee that he is not liable to pay to the supplier more than a reasonable price for the service.

152. In Australia, the current law on implied conditions and warranties, in the Trade Practices Act 1974 and state and territory fair trading and sale of goods laws, was recently reviewed.\(^{319}\)

The Commonwealth Consumer Affairs Advisory Council in its Final Report concluded that:

(a) The current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law;
(b) In developing the Australian Consumer Law, current laws on implied conditions and warranties should be amended to increase consumer and business understanding and to harmonize differences between existing national, state and territory laws;
(c) The Australian Consumer Law should include a single set of consistent statutory consumer guarantees that are simple and clear;

(d) The new law should, at a minimum, provide, in respect of goods: a guarantee that the supplier has the right to sell the goods; a guarantee that the goods are free from any undisclosed security; a guarantee that the consumer will have undisturbed possession of the goods; a guarantee that goods are of ‘acceptable quality’, which would replace the concept of ‘merchantable; a guarantee that the goods are fit for a particular purpose made known to the supplier by the consumer; where goods are sold by description, a guarantee that goods comply with that description; where goods are sold by sample, a guarantee that goods comply with that sample; where goods are first supplied to a consumer in Australia, a guarantee that the manufacturer/importer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for goods are reasonably available for a reasonable period after the goods were supplied;

(e) These guarantees should be enforceable against both the manufacturer/importer and the retailer of any goods supplied;

(f) In respect of services: a guarantee that they will be carried out with reasonable care and skill; a guarantee that, where the actual purpose of the services and any associated goods is made clear to the seller, the goods and services are fit for the particular purpose; and a guarantee that the services will be completed in a reasonable time, unless otherwise addressed by the contract for the supply of those services;

(g) Clear remedies for each statutory consumer guarantee, including a right to recover loss or damage suffered as a result of failure to comply with a guarantee, which distinguish between remedies for major and minor defects; and remedies against suppliers and manufacturers/importers.

These proposals have been endorsed by the Australian Government: sections 51 to 68 of the Australian Consumer Law (to come in operation on 1 January 2011) contain guarantees relating to the supply of goods and services.

153. The Barbados Consumer Guarantees Act 2003 also provides for guarantees in respect of goods [guarantees as to title, guarantee as to acceptable quality, guarantees
as to fitness, guarantee as to correspondence with description, guarantees as to compliance with sample, guarantee as to prior use, guarantee as to price, and guarantees as to repairs and spare parts] as well in respect of services [guarantee as to reasonable care and skill, guarantee as to fitness, guarantee as to time of completion, and guarantee as to price.]  

The consumer is afforded a right of redress against a supplier or manufacturer where goods do not comply with guarantees. A right of redress is also available where service does not comply with guarantees.

154. The Argentinean Code for Consumer Protection deals comprehensively with guarantees with regard to goods and contracts of services.

Article 14 of the Code requires manufactures, importers and vendors to provide a certificate of guarantee to provide for the following: (a) identification of the vendor, manufacturer, importer or distributor, (b) identification of the good with the necessary technical specifications, (c) conditions of use, of installation and of maintenance for its functioning (d) conditions and length of validity of the guarantee and (e) conditions of repair.

When a product has been repaired under the guarantee, the guarantor has to provide the following information: (a) the nature of the repair, (b) the parts replaced or repaired, (c) the date on which the consumer made delivery of the good and (d) the date of the return of the good to the consumer.

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320 Part II of the Act deals with guarantees in respect of goods.

321 Sections 29 to 32.

322 Part III of the Act relates to redress against suppliers, and Part IV deals with redress against manufacturers, where goods do not comply with guarantees.

323 Part VI of the Act.
Article 16 provides that the time when the consumer has no possession of the good due to repair is added to the duration of the guarantee. If the repair is unsatisfactory; the consumer is permitted in terms of Article 17 to (a) ask for a substitution of the goods for identical goods, (b) the return of the goods and a return of the money paid and/or (c) obtaining a proportional rebate in the price.

Article 24 of the Argentinean Code stipulates that a supplier of services must provide a consumer of such services with a written guarantee. The guarantee must stipulate the following: (a) the proper specifications of the work being performed, (b) the duration of the guarantee and (c) the name of the person that will perform the task.

Sections 27 to 33 of the Sarajevo Consumer Protection Act deal with guarantees. Section 27 provides that goods and services, in order to be fully functional and flawless must be accompanied by a guarantee certificate, which has to be provided by manufacturers and traders. By virtue of section 28(2) of the Act, guarantees must be for a period of at least 1 year for simple products and 2 years for technically complex products. Technically complex products have to be accompanied by technical instructions and a list of the trader’s own or other authorized after-sales services. These instructions must be printed and written in the official languages of Bosnia and Herzegovina. The manufacturer is required by section 31 to deliver all necessary parts concerning a product to the after-sales workshop. A guarantee certificate has to stipulate the following information: (a) company name and registered seat of the manufacturer, (b) product identification data, (c) duration of guarantee period and (d) the name and registered seat of the trader and the delivery date.

The European Union Directive on Certain Aspects of the Sale of Consumers’ Goods lays down the requirements with regard to compliance with contractual obligations. Consumer goods are presumed to be in conformity with the contract if the following conditions are met: (a) they comply with the description given by the seller and possess the qualities that have been represented by the seller, (b) they are fit for any
particular purpose for which the consumer made known to the supplier at the point of the conclusion of the contract, (c) they are fit for the purpose for which goods of the same type are normally used and (d) they show the quality and performance that is reasonably expected of goods of the same type and which the consumer can reasonably expect, taking into account any public statements on the specific characteristics of the goods made by a producer or his representative in labelling and advertising.

157. The UK position is largely similar to the EU Directive.\textsuperscript{324} The development of the UK law pertaining to implied terms of contract has mostly developed independently from the Directive that was only drafted in 1999. During the nineteenth century the approach to the law of contract in the UK was that of \textit{caveat emptor} (buyer beware) which means that consumers could not be assisted by the government and they were expected to protect themselves.\textsuperscript{325} This motivated the doctrine of \textit{Laissez-faire} that was prevalent at the time. As a result of hardships that occurred as a result of the unrestrained liberty to contract, the state later intervened to protect the consumers. This came in the form of compulsory terms (implied terms) that had to be read into contracts.

The two main statutes that deal with implied terms are the Sale of Goods Act, and the Supply of Goods and Services Act. The following conditions and warranties have been adopted as compulsory terms for the sale of goods and services: (a) the seller is presumed to have the right to sell the goods – this right also implies that the property is unencumbered and that the consumer will have a right of quiet possession,\textsuperscript{326} (b) Section 13 of the Sale of Goods Act creates an implied term that the goods that are given to the consumer will be similar to the description that is given prior to the conclusion of the contract; it is not sufficient that the goods are similar to a sample

\textsuperscript{324} Vide South African Department of Trade and Industry, \textit{Consumer Law Benchmark Study} [May 2004] at pp. 87-89.

\textsuperscript{325} Vide B. Harvey, \textit{The Law of Consumer Protection and Fair Trading} (Butterworths, 2000) at 86.

\textsuperscript{326} Section 12 (2) of the Sale of Goods Act.
that was given, they have to be same as the description that was given, and (c)
Section 14(2) of the Sale of Goods Act provides that there is an implied term that
goods that are supplied to consumers are of a satisfactory quality. According to
section 14 (2A) goods are of a satisfactory quality if they meet the standard that a
reasonable person would consider satisfactory. In determining whether the goods
meet the standard of the reasonable person, section 14(2B) provides that the
following should be considered: the fitness of the goods for the purposes for which
they are normally supplied, their appearance and finish, freedom from minor defects,
safety and durability. Section 14 (2C) lays down the following as circumstances
that will not constitute implied terms concerning quality: issues that were brought to the
attention of the consumer before the conclusion of the contract, where the buyer has
been given the opportunity to inspect the goods before purchasing them and defects
that are obvious from a sample of the goods.

Section 11 of the Sale of Goods Act allows an aggrieved consumer to repudiate a
contract which fails to comply with a condition. Alternatively, the buyer can treat the
breach as a breach of warranty and therefore claim compensation for the damage
caused by the infraction without necessarily terminating the contract. If however, the
consumer has accepted the goods he has no option but to claim compensation on the
basis of a breach of warranty. Section 35 (1) of the Sale of Goods Act provides that
the following consumers will be deemed to have accepted the goods: (a) when he
intimates to the supplier that he accepts the goods, (b) if goods have been delivered
to him and he acts as owner of the goods or (c) if he keeps the goods for a reasonable
time without informing the seller that he has rejected them.

The Common law position in the UK concerning representations is that a distinction
has to be drawn between conduct of a supplier that can be seen as not constituting a
promissory term but a mere “puff” and representations that are fraudulently intended
to induce a consumer to contract. A consumer could only have a remedy against the
supplier if the representation was fraudulent. A fraudulent representation was
defined as a representation that was made by the supplier either knowingly or
without believing in its truth or was made recklessly regardless of whether it was true or false.  

Section 2(1) of the Misrepresentation Act has altered this position and a person can now be held liable regardless of whether or not there was fraudulent misrepresentation, provided that it can be shown that the supplier had reasonable grounds to believe and did believe up to the time of the contract that the facts represented were true.

158. Section 9(1) of the Consumer Protection Act of Ontario provides that a supplier is deemed to warrant that the services supplied under a consumer contract are of a reasonably acceptable quality. Section 9(2) of the Act states that the warranties and conditions that apply to the terms of the Sales of Goods Act also apply to the necessary modifications to goods that are traded, leased or otherwise supplied in terms of a consumer contract. According to section 9(3) clauses in a contract that attempt to negate or vary any implied condition are invalid.

159. Section 12(1) of the Indian Sale of Goods Act provides that a stipulation in a contract with reference to goods, which are the subject thereof, may be a condition or a warranty. Section 1 defines a condition as a stipulation that is essential to the main purpose of the agreement and a breach of which may result in the repudiation of the contract. Section 12(3) defines a warranty as a stipulation that is collateral to the main purpose the breach of which results in a claim for damages but does not result in the cancellation of the contract. Whether a stipulation in contract of sale amounts to a condition or warranty, generally, depends on the circumstances of each contract.

The Act provides for the following implied conditions: (a) that the seller has proper title with regard to the selling of the goods that form the subject matter of a contract of sale, (b) that the goods that are sold will be similar to a description or sample that was provided before the conclusion of the contract, (c) if the seller makes known, expressly or by implication to the purchaser the purpose of goods and the purchaser

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327 *Derry v Peek* (1889) 14 App Cas 337, HL.
relies on the sellers skill or judgment, there is an implied condition that the goods are reasonably fit for that purpose, (d) that if goods are bought from a seller in the course of his business there is an implied condition that the goods will be of merchantable quality, unless the purchaser examined the property before buying it and (e) in the case where a sample is provided there is an implied condition the bulk will be similar to the sample, that the purchaser will be given an opportunity to examine the goods and that the goods are free from defects that would render them “unmerchantable”.

The Act also provides for the following implied warranties: (a) that the buyer will enjoy undisturbed possession, and (b) that the goods bought by consumers will be free from any encumbrance in favour of third parties. An express condition or warranty cannot set aside implied conditions and warranties.

160. Section 55(2) of the South African Consumer Protection Act 2008 provides that every consumer has a right to receive goods that (a) are reasonably suitable for the purposes for which they are generally intended; (b) are of good quality, in good working order and free of any defects; (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and (d) comply with any applicable standards set under the Standards Act or any other public regulation.

Section 55(3) further provides that if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier (a) ordinarily offers to supply such goods; or (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

According to section 56 of the Act, in any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or
importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

If the goods fail to satisfy the requirements and standards contemplated in section 55, the consumer may, within six months after the delivery of any goods to a consumer, return the goods to the supplier, without penalty and at the supplier’s risk and expense, and the supplier must, at the direction of the consumer, either (a) repair or replace the failed, unsafe or defective goods; or (b) refund to the consumer the price paid by the consumer, for the goods. Furthermore, if a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must (a) replace the goods; or (b) refund to the consumer the price paid by the consumer for the goods.

Section 57 of the Act further provides that a service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required for installing it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.

161. Our law provides for some form of guarantee or warranty in respect of goods sold.\textsuperscript{328}

\textsuperscript{328} Regulation 3 of the Trade Warranty Regulations 1981 provides that every trader who sells to a consumer any goods shall be deemed to have given a warranty that the goods sold are merchantable, save (a) when the trader has specifically drawn the defect to the attention of the consumer before the goods are sold, (b) the consumer has seen or ought to have seen the defect on a reasonable examination of the goods before he bought them, and (c) the consumer knew of the defect before he bought the goods. Vide also Regulation 5 of the Electrical and Electronic Domestic Appliances (Trade Practices) Regulations 1989, as well as Regulation 4 of the Motor Vehicle (Trade Practices) Regulations 1989.

Section 9(1) of the Hire Purchase and Credit Sale Act provides that in every hire purchase or credit sale agreement there shall be (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods; (b) an implied condition on the part of the dealer that he shall have a right to sell the goods at the time when title to the property is to pass; (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when title to the property is to pass; and (d) an implied condition that the goods shall be of merchantable quality, except where the hirer has examined the goods or a sample of them, as regards defects which the examination ought to have revealed. Furthermore, section 9(2) of that Act is to the effect that, where the
In our view, this is far from sufficient for consumers to trade in confidence. There should be express provisions in our consumer legislation as to the guarantees and warranties afforded to consumers upon the supply of goods and services.

hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose.
(6) Advertising and Other Business Practices

162. Advertising and marketing are usually one of the first bridges between suppliers and consumers. Misleading advertising and representations, as well as other forms of commercial practices,\(^{329}\) are therefore potentially devastating to both the consumers and the competitors of the supplier. Most jurisdictions provide comprehensive norms, in their general consumer protection laws, which are intended to curb such practices.

163. The EU has various Directives that target misleading advertising, the most comprehensive of which pertain to the advertising and marketing of foodstuffs.\(^{330}\) The main Directive on advertising, with regard to consumer protection, is the Directive on Misleading and Comparative Advertising.\(^{331}\) Its aim is to control misleading advertising in the interests of consumers, competitors and the general public.\(^{332}\) In addition, it also lays down the conditions under which comparative advertising is permitted.\(^{333}\) In order to combat misleading advertising and illicit

\(^{329}\) A commercial practice is an activity linked to the promotion, sale or supply of a product to consumers. It covers any act, omission, course of conduct, representation or commercial communication – including advertising and marketing – which is carried out by a trader.


\(^{331}\) Directive 2006/114/EC. This Directive repeals and codifies (i.e. consolidates) Directive 84/450/EEC and all the amendments to it in a single legal act.

\(^{332}\) Misleading advertising is advertising which, potentially or actually, misleads or affects the judgment of the consumer or which, for these reasons, is detrimental to a competitor. In order to determine whether advertising is misleading in nature, the following factors are taken into account: the characteristics of the goods or services; the price; the conditions governing the supply of the goods or the provision of services; the nature, qualities and rights of the advertiser.

\(^{333}\) “Comparative advertising” is defined as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. The need was felt to establish criteria to determine whether a comparative advertisement is permitted since comparative advertising, when it is not misleading, can be a legitimate means of informing consumers of what is in their interest. Comparative advertising is permitted if the following conditions are met: it is not misleading; it compares goods or services meeting the same needs or intended for the
comparative advertising, Member States are required to ensure that those persons or organisations with a legitimate interest may bring a court action against such advertising and bring such advertising before a competent administrative body to rule on the complaints or to institute the appropriate legal proceedings. The Directive also requires that Member States give the courts or administrative bodies powers authorizing them to order the withdrawal of misleading advertising or illicit comparative advertising, or institute the appropriate proceedings to that end, and to prohibit misleading advertising or illicit comparative advertising whose publication is imminent or institute the appropriate proceedings to that end, even without proof of actual loss or damage or of intentional negligence on the part of the advertiser.\textsuperscript{334}

The EU Unfair Commercial Practices Directive\textsuperscript{335} contains a general ban on unfair commercial practices. Two main categories of unfair commercial practices – “misleading” and “aggressive” practices are dealt with; such practices are assessed in light of the effect they have, or are likely to have, on the average consumer. The Directive establishes a Black List, which contains the list of those practices – such as bait advertising, advertising products which cannot be legally sold, pyramid schemes - which shall, in all circumstances, be regarded as unfair and thus banned without applying the average consumer test.

Certain commercial practices, such as doorstep selling has also been regulated. The 1985 Directive on Doorstep Selling\textsuperscript{336} protects consumers in respect of contracts


\textsuperscript{335} Directive No. 2005/29/EC.

with traders for goods and services, negotiated away from business premises and which are concluded during an excursion organized by the trader away from his business premises, or during a visit by a trader (i) to the consumer's home or to that of another consumer; (ii) to the consumer's place of work; where the visit does not take place at the express request of the consumer. It provides for a withdrawal period of no less than seven days enabling the consumer to cancel the contract.  

Traders are required, when there is a transaction, to give consumers written notice of their right of cancellation together with the name and address of a person against whom that right may be exercised.


The Directive on Doorstep Selling has been transposed in UK law by the Consumer Protection (Cancellation of contracts concluded away from business premises)

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337 The Directive does not apply to: (a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property; (b) contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen; (c) certain contracts concluded on the basis of a trader’s catalogue when the following conditions are met: (i) the contract is concluded on the basis of a trader’s catalogue which the consumer has a proper opportunity of reading in the absence of the trader’s representative, (ii) there is intended to be continuity of contact between the trader’s representative and the consumer in relation to that or any subsequent transaction, (iii) both the catalogue and the contract clearly inform the consumer of his right to return goods to the supplier within a period of not less than seven days of receipt or otherwise to cancel the contract within that period without obligation of any kind other than to take reasonable care of the goods; (d) insurance contracts; (e) contracts for securities.

338 Part 2 of the Regulations set out the prohibition on unfair commercial practices. The prohibition relates to commercial practices that contravene the requirements of professional diligence, misleading actions, misleading omissions, aggressive commercial practices and other commercial practices which are specified in Schedule 1. Part 2 also imposes a prohibition on the promotion of unfair commercial practices by persons responsible for codes of conduct for traders. Part 3 provides that, with limited exceptions, breaches of the prohibition on unfair commercial practices will be criminal offences. Part 4 places a duty to enforce the Regulations on the Office of Fair Trading.

339 Part 1 prohibits advertising which misleads traders. This Part also sets out the conditions under which comparative advertising (namely advertising which identifies a competitor or a competitor’s product) is permitted. In addition this Part requires code owners (namely traders and bodies responsible for codes of conduct or monitoring compliance with such codes) not to promote misleading advertising and comparative advertising which is not permitted. Part 2 provides for criminal offences and defences that apply where a trader engages in misleading advertising. Part 3 places a duty to enforce the Regulations on the Office of Fair Trading.
Regulations 1987, which has since been revoked and replaced by the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008 [SI 2008/1816].

Under the Unsolicited Goods and Services Act 1971 (as amended in 1975), it is an offence to demand payment for goods known to be unsolicited, that is goods which were sent to a person without any prior request made by them or on their behalf. Someone who receives goods in these circumstances may retain them as an unconditional gift, and does not have to pay for or return any unwanted goods.

165. In accordance with the EU Directives, misleading and aggressive commercial practices (including advertising) have been prohibited in the Republic of Ireland.

Section 43(1) of the Consumer Protection Act 2007 provides that a commercial practice is misleading if it includes the provision of false information that would be likely to cause the average consumer to be deceived or misled; and that

340 These regulations extend the law on cooling-off periods and cancellation rights for consumers; they cover contracts made both during solicited visits made by traders – that is visits made at the consumer’s request - and unsolicited visits by traders.

Part 4 gives the enforcement authorities powers to investigate whether there has been a breach of the Regulations including a power to make test purchases and powers to enter premises with or without a warrant.

341 False information in respect of the following matters:
(a) the existence or nature of a product;
(b) the main characteristics of a product, including, without limitation, any of the following:
(i) its geographical origin or commercial origin;
(ii) its availability, including, without limitation, its availability at a particular time or place or at a particular price;
(iii) its quantity, weight or volume;
(iv) its benefits or fitness for purpose;
(v) the results to be expected from it;
(vi) the risks it presents to consumers;
(vii) its usage or prior history;
(viii) its composition, ingredients, components or accessories;
(ix) the specifications of the product, including, without limitation, the grade, standard, style, status or model of the product;
(x) the after-supply customer assistance available to consumers in relation to the product;
(xii) the handling of consumer complaints in relation to the product;
(xii) the method or date of—
(I) the product’s delivery, supply or provision, or
(II) in the case of goods, the product’s manufacture;
(xiii) the results and material features of tests or checks carried out on the product;
information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

According to section 44(1) of the Act, a commercial practice involving marketing or advertising is misleading if it would be likely to cause the average consumer (a) to confuse a competitor’s product with the trader’s product, or a competitor’s trade name, trade mark or some other distinguishing feature or mark with that of the trader, and (b) to make a transactional decision that the average consumer would not otherwise make. In determining whether a commercial practice is misleading, the commercial practice is to be considered in its factual context, taking account of all of its features and the circumstances.  

(xiv) in relation to a service, its execution or performance;
(c) the price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage;
(d) the need for any part, replacement, servicing or repair in relation to the product;
(e) the existence, extent or nature of any approval or sponsorship (direct or indirect) of the product by others;
(f) the nature, attributes or rights of the trader, including, without limitation, the following:
(i) the trader’s identity, qualifications, assets or status;
(ii) the trader’s affiliation or connection with others;
(iii) the existence, extent or nature of—
(I) any industrial, commercial or intellectual property rights the trader may have, or
(II) any award, distinction, approval or sponsorship (direct or indirect) the trader has or has received;
(g) the extent of the trader’s commitments;
(h) the trader’s motives for the commercial practice;
(i) the nature of the trader’s supply process;
(j) the legal rights of a consumer (whether contractual or otherwise) or matters respecting when, how or in what circumstances those rights may be exercised.

342 If a commercial practice is or includes an invitation to purchase, each of the following constitutes material information, unless already apparent to the consumer in the context of the commercial practice: (a) the main characteristics of the product, to an extent appropriate to the medium and the product; (b) the geographical address of the trader, the identity of the trader (such as his or her trading name) and, if the trader is acting in a consumer transaction as an agent of another trader, the geographical address and the identity of that other trader; (c) the price of the product (inclusive of taxes) or, if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated; (d) any freight, delivery or postal charges that apply in relation to the product or, if such charges cannot reasonably be calculated in advance, a statement of the fact that such charges will apply and be payable by the consumer; (e) the handling of consumer complaints in relation to the product or the arrangement for payment, delivery or performance, if such handling or arrangement does not meet or accord with the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers, or the general principle of good faith in the trader’s field of activity; (f) if applicable, the legal rights of a consumer (whether contractual or otherwise) to withdraw from or cancel the consumer transaction.
Section 45 of the Act also provides that a commercial practice is misleading if (a) it involves a representation that the trader abides, or is bound, by a code of practice, (b) the representation referred would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make, and (c) the trader fails to comply with a firm commitment in that code of practice.

Section 46(1) of the Act further provides that a commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. The commercial practice is also regarded as misleading if (a) the trader provides material information in a manner that is unclear, unintelligible, ambiguous or untimely, or fails to identify the commercial intent of the practice (if such intent is not already apparent from the context), and (b) such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

Section 53(1) of the Act provides that a commercial practice is aggressive if by harassment, coercion or undue influence it would be likely to (a) cause significant impairment of the average consumer’s freedom of choice or conduct in relation to the product concerned, and (b) cause the average consumer to make a transactional decision that the average consumer would not otherwise make.\textsuperscript{343}

\textsuperscript{343} In determining whether a commercial practice is aggressive, the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances. In determining whether the commercial practice employs harassment, coercion or undue influence, the following shall be taken into account: (a) the timing, location, nature or persistence of the commercial practice; (b) the use of threatening or abusive language or behaviour by the trader; (c) the exploitation of a consumer’s misfortune or circumstance when the trader is aware that the consumer’s judgment is impaired as a result of the gravity of the misfortune or circumstance, in order to influence the consumer’s transactional decision; (d) the imposition of onerous or disproportionate non-contractual barriers by the trader when the consumer wishes to terminate the contract, exercise a contractual right or switch to another product or trader; (e) the use of threats by the trader to take action or initiate proceedings against the consumer when the trader has no legal basis for taking such action or initiating such proceedings, or do something unlawful.

“Undue influence” means exploiting a position of power in relation to a consumer so as to apply pressure (without necessarily using or threatening to use physical force) in a way that significantly limits the consumer’s ability to make an informed choice in relation to the trader’s product.
Section 55(1) of the Act makes it an offence for a trader to engage in certain commercial practices (the “Black List” of the EU Unfair Commercial Practices Directive): (a) a representation that the trader has an approval, authorisation or endorsement that the trader does not have, or making such a representation when the trader is not in compliance with that approval, authorisation or endorsement; (b) a representation that the trader is signatory to a code of practice, if the trader is not; (c) a representation that the trader is about to cease trading or move premises, if the trader is not; (d) a representation that a product has an approval, authorisation or endorsement that it does not have, or making such a representation when the trader is not in compliance with that approval, authorisation or endorsement; (e) a representation that a product is able to facilitate winning in games of chance; (f) a representation that supply of a product is legal, if it is not, or creating such an impression; (g) a representation that a product is able to cure an illness, dysfunction or malformation, if it cannot; (h) a representation that describes a product as “gratis”, “free”, “without charge” or anything similar, if a consumer has to pay anything other than the necessary and reasonable cost of responding to the representation, and collecting the product or having it delivered; (i) a representation that a commercial practice of the trader has an approval, authorisation or endorsement that it does not have, or making such a representation when the trader is not in compliance with the approval, authorisation or endorsement; (j) a representation that a code of practice has an approval or other endorsement that it does not have; (k) displaying a quality, standard or trust mark or symbol, or some equivalent type of mark or symbol, without having obtained necessary authorisation to do so; (l) making an invitation to purchase a product without disclosing the existence of any reasonable grounds the trader may have for believing that the trader will not be able to supply, or procure another trader to supply, the product or an equivalent product at the price specified in the invitation, or to do so for a reasonable period of time or in reasonable quantities, having regard to the scale of any marketing or advertising of the product and the price specified (bait advertising); (m) making an invitation to purchase a product, then demonstrating a defective sample of the product, or refusing to show or display
the product to the consumer, take an order from the consumer for the product, or deliver the product to the consumer within a reasonable period of time, with the intention of promoting a different product (bait and switch); (n) making a false representation that a product is available only for a limited time, or on particular terms for a limited time, in order to elicit an immediate decision from a consumer, depriving the consumer of sufficient opportunity or time to make an informed choice in relation to the trader’s product; (o) providing after-supply service to a consumer in a language that is not an official language of the relevant State in which the trader is located, nor is it the language in which the trader and consumer communicated prior to the agreement to supply; (p) making a representation or creating an impression that a right given to consumers under an enactment is a distinctive feature of the trader’s promotion or supply; (q) using editorial content in the media to promote a product (if a trader has paid for that promotion) if it is not made clear that the promotion is a paid promotion, whether in the content itself or in any oral, written, visual or descriptive representation in the promotion (r) making a representation to a consumer that is materially inaccurate in respect of the nature and extent of risk to the consumer’s personal security, or that of other members of the consumer’s household, if the consumer does not purchase the trader’s product; (s) promoting a product (similar to that of another manufacturer) in such a manner as to deliberately mislead or deceive a consumer into thinking that the product is manufactured by that manufacturer, when it is not; (t) making a representation to a consumer that is inaccurate to a material degree in respect of market conditions, or in respect of the possibility of finding a product, with the intention of inducing the consumer to purchase a product at conditions less favourable than normal market conditions; (u) operating, running or promoting a competition or prize promotion without awarding the prizes described or reasonable equivalents; (v) making a representation or creating an impression that a consumer has won or will win a prize or other equivalent benefit, if there is no prize or equivalent benefit, or in claiming the prize, the consumer has to make a payment or incur a loss; (w) including in marketing material an invoice or any similar document seeking payment from a consumer for a product that the consumer has not ordered; (x) making a representation or creating an
impression that the trader is not acting for purposes related to the trader’s trade, business or profession, when the trader is so acting, or is acting as a consumer, when the trader is not; (y) making a representation or creating an impression that after-supply service in relation to a product is available in a relevant State other than the one in which the product is supplied, when it is not so available.  

Section 65 of the Act makes it an offence for a person to (a) establish, operate or promote a pyramid promotional scheme, (b) knowingly participate in such a scheme, or (c) induce or attempt to induce another person to participate in such a scheme. A “pyramid promotional scheme” is defined as a scheme by which a person gives consideration in money or money’s worth, or gives a gift in money or money’s worth, for an opportunity to receive compensation derived primarily from the introduction of other persons into the scheme rather than from the supply or consumption of a product.

166. The French ‘Code de la Consommation’ regulates inter alia “les pratiques commerciales trompeuses et publicité”, «les loteries publicitaires», and «les

344 Section 55(3) further provides that (a) making a representation or creating an impression that a consumer cannot leave the premises until a contract is formed; (b) failing to comply with a consumer’s request to leave the consumer’s residence or to not return (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation); (c) persistently failing to comply with a consumer’s request to cease communicating or initiating unwanted or unsolicited contact with, or (ii) making or sending unwanted or unsolicited representations to, the consumer by telephone, fax, email or any other electronic means or remote media (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation); (d) in relation to a consumer’s claim on an insurance policy, doing either or both of the following: requiring the consumer to produce documents irrelevant to the validity of the claim; persistently failing to respond to the consumer’s correspondence on the matter, in order to dissuade the consumer from exercising contractual rights in respect of that claim; (e) including in an advertisement a direct exhortation to children to purchase a product, or (ii) persuade a parent or adult to purchase the product for them; (f) in relation to any product that a consumer does not solicit, demanding that the consumer make immediate or deferred payment for the product, or (ii) return or keep the product safe; (g) explicitly informing a consumer that if the consumer does not purchase a product, the trader’s job or livelihood will be in jeopardy.

345 Articles L 121-1 to L 121-15-3. Article L 121-8 provides that:

“Toute publicité qui met en comparaison des biens ou services en identifiant, implicitement ou explicitement, un concurrent ou des biens ou services offerts par un concurrent n’est licite que si:
1° Elle n’est pas trompeuse ou de nature à induire en erreur;
2° Elle porte sur des biens ou services répondant aux mêmes besoins ou ayant le même objectif ;
3° Elle compare objectivement une ou plusieurs caractéristiques essentielles, pertinentes, vérifiables et représentatives de ces biens ou services, dont le prix peut faire partie. Toute publicité comparative faisant
ventes ou prestations avec primes». The Code also prohibits «les ventes et prestations de services sans commande préalable», «les ventes ou prestations ‘à la boule de neige’», and «les pratiques commerciales agressives».

167. In Finland advertising is dealt with in chapter 2 of the Consumer Protection Act. Section 2 of this chapter prohibits the use of misleading advertising. Section 8 provides that an injunction may be issued against a person who makes a misleading advert; the injunction can be granted by the Market Court or the Consumer Ombudsman. The Consumer Ombudsman, in terms of section 10(1) of this chapter is responsible for supervising and monitoring advertisements.

346 By virtue of Article L 121-36 :
« Les opérations publicitaires réalisées par voie d'écrit qui tendent à faire naître l'espérance d'un gain attribué à chacun des participants, quelles que soient les modalités de tirage au sort, ne peuvent être pratiquées que si elles n'imposent aux participants aucune contrepartie financière ni dépense sous quelque forme que ce soit.
Le bulletin de participation à ces opérations doit être distinct de tout bon de commande de bien ou de service.»

347 The first alinéa of Article L 121-35 provides that «Est interdite toute vente ou offre de vente de produits ou de biens ou toute prestation ou offre de prestation de services faite aux consommateurs et donnant droit, à titre gratuit, immédiatement ou à terme, à une prime consistant en produits, biens ou services sauf s'ils sont identiques à ceux qui font l'objet de la vente ou de la prestation.»

348 Articles L 122-3 to L 122-5.

349 Article L 122-6 to L 122-7. It consists inter alia «à offrir des marchandises au public en lui faisant espérer l'obtention de ces marchandises à titre gratuit ou contre remise d'une somme inférieure à leur valeur réelle et en subordonnant les ventes au placement de bons ou de tickets à des tiers ou à la collecte d'adhésions ou inscriptions».

168. Part VIII of the Consumer Protection Act of Sarajevo regulates the advertising of goods and services. Adverts are defined broadly to include any offer of goods and services in any form including flyers, placates, and posters. Section 1 provides that adverts of products and services must not contravene general law and must not offend or violate basic human, economic, social and cultural rights. Section 2 of the Act provides that advertisements cannot contain any statements which directly or indirectly mislead consumers by omission, uncertainty, or overstatements. Advertisements are also prohibited from illegally using results of research projects or quotes from professional publications. Advertisements may also not be improper, fraudulent, or ambiguous. Advertisements have to be in one of the official languages of Bosnia and Herzegovina. Improper advertising includes adverts that are insulting, unethical or undignified, fraudulent or those that might cause mental and other damage to children, and those that might abuse children’s lack of knowledge and experience. Fraudulent advertising includes the following: unclear, ambiguous and false statements as well as overstatements and understatements. The Act also prescribes that advertisements should state the name and address of the company of the advertiser.


Section 30 of the Act is to the effect that no person shall, in the course of trade or business, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services—

(a) falsely represent that—

(i) the goods or services are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use;

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351 Section 28(1) of the Act provides that no person shall, in the course of trade or business, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 29(1) further provides that no person shall, in the course of trade or business, engage in conduct that is likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose or quantity of goods or services, as the case may be.
services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade or business, qualification, or skill;

(iii) a particular person has agreed to acquire goods or services;

(iv) goods are new, reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time;

(v) goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits; or

(vi) a person has any sponsorship, approval, endorsement, or affiliation;

(b) make a false or misleading representation—

(i) with respect to the price of any goods or services;

(ii) concerning the need for any goods or services;

(iii) concerning the existence, exclusion, or effect of a condition, warranty, guarantee, right or remedy; or

(iv) concerning the place of origin of goods.

According to section 31(1) of the Act, where it can be proven that a provider (a) has contracted to provide goods or services; (b) pursuant to that contract, has received a deposit in cash or kind; and (c) on the contracted delivery date, has failed without reasonable cause to deliver such goods or services or demonstrate that such goods or services are in a reasonably advanced state of production, that provider shall be deemed to have acted in a fraudulent manner and is liable to be prosecuted in relation thereto.

Section 32 of the Act provides that no person shall in the course of trade or business, advertise for supply at a specified price, goods or services which (a) he does not intend to offer for supply; or (b) he does not have reasonable grounds for believing can be supplied by him at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the advertisement. Furthermore, it is a requirement that any person who has advertised goods or services for supply at a specified price shall offer such
goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the advertisement.

Section 34(1) of the Act requires that no person shall demand or accept payment or other consideration for goods or services, if at the time of the demand or acceptance, that person (a) does not intend to supply the goods or services; (b) intends to supply goods or services which are materially different from the goods or services in respect of which the payment or other consideration is demanded or accepted; or (c) does not have reasonable grounds to believe that the goods or services will be supplied within any specified period, or if no period is specified, within a reasonable time.

By virtue of section 33 of the Act, where a provider fails without reasonable cause to meet the advertised delivery date the provider shall refund to the consumer all moneys paid, plus interest on any amount not refunded, as respects the period beginning with the date of deposit of the amount and ending on the date of its refund, at an annual rate ten percentage points above the Treasury Bill rate applicable at the former date. Any provider who has advertised a completion or delivery date, and has obtained from the consumer a deposit in cash or kind or both, against the provision of the goods or service, may elect to terminate the contract within seven days after the receipt of the deposit and in such case, shall refund the full value of the deposit.

170. Part III of the Barbados Consumer Protection Act 2003, which deals with unfair trade practices, provides inter alia that (1) a person shall not, in trade or commerce as a supplier, advertise for supply at a special price goods or services that he does not intend to offer for supply, or that he has no reasonable grounds for believing that he can supply, at that price, for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the supplier carries on business and the nature of the advertisement; \(^{352}\) (2) a person shall not, in trade or commerce

\(^{352}\) Section 19(1).
as a supplier, induce a consumer to acquire goods or services under a contract by representing that the consumer will, after the contract is made, receive a rebate, commission or other benefit in return for giving the first-mentioned person the names of prospective customers or otherwise assisting that person to supply goods or services to other consumers, if receipt of the rebate, commission or other benefit is contingent on an event occurring after the contract is made;\(^{353}\) (3) a person shall not promote or operate a pyramid selling scheme.\(^{354}\)

171. Article 36 of the Brazilian Code for Consumer Protection provides that advertisements should be transmitted in such a way that it enables the consumer to readily identify it as such. It also creates an obligation on the advertiser to keep records on which he bases any advertisements for the use of interested parties. Article 37 prohibits any advertisements that are misleading or unfair. An advert is considered misleading when it is entirely or partially false in any way, including by way of omission, and it is capable of misleading consumers. An advert is considered unfair if it is inter alia discriminatory, incites violence, exploits fear or superstition, takes advantage of immaturity of children or fails to respect environmental values, and results in consumers behaving in a manner that is harmful to their health or safety. By virtue of article 38, the burden of showing that an advert is not abusive or misleading lies on the advertiser. Article 30 of the Brazilian Code provides that any information that is provided in advertisements binds the supplier and is considered part of the contract. Article 35 permits the consumer the following options in the instance when a supplier refuses to comply with representations that are made in an advertisement, offer or presentation: (a) he may require specific performance of the obligation in accordance with the advertisement, (b) he may accept another product or an equivalent service or (c) he may rescind the contract with the right to an indexed refund and any losses or damages.

\(^{353}\) Section 20.

\(^{354}\) Section 23(1).
172. The Australian Trade Practices Act 1974, the Australian Securities and Investments Commission Act 2001 (in relation to financial services) and state and territory fair trading legislation require that businesses:
(a) not engage in conduct that is misleading or deceptive or is likely to mislead or deceive;
(b) not make false or misleading representations about the goods or services they supply;
(c) not harass or coerce consumers either when seeking to sell goods and services or when seeking to obtain payment;
(d) not engage in unconscionable conduct, including ensuring that contractual terms are reasonably necessary to protect the supplier’s legitimate interests. 355

The Australian Consumer Law, which shall come into operation on 1 January 2011, provides general protections to consumers [in respect of misleading or deceptive conduct, and unconscionable conduct] as well as specific protections against unfair practices [false or misleading representations, unsolicited supplies, pyramid schemes, referral selling, harassment and coercion]. 356

173. The New Zealand fair Trading Act 1986 protects consumers and businesses from unfair business practices. It covers prohibitions against: (a) misleading and deceptive conduct generally (section 9); (b) false or misleading representations (section 13); (c) offering gifts and prizes (and not providing them) (section 17); (d) bait advertising (section 19); (e) referral selling (section 20); (f) demanding or accepting payment without intending to supply as ordered (section 21); (g) misleading representations about certain business activities (section 22); (h) harassment and coercion (section


356 Vide sections 18 to 22, 29 to 50.
23); (i) pyramid selling schemes (section 24), and (j) importation of goods bearing false trade description (section 26).

The Door to Door Sales Act 1967 regulates agreements for the sale of goods and services on credit entered into at places other than appropriate trade premises. The Act only covers sales initiated by the seller. It applies to sales in the home that result from uninvited traders calling with goods or services for sale. It provides consumers faced with this type of selling method with legal protection in the form of a cooling-off period. The Act allows the consumer seven days after the making of an agreement to cancel the contract by notice in writing. The Act also provides that the seller must disclose to the consumer the rights of cancellation in a written statement and that the contract is unenforceable if the disclosure requirement is not met.

The Unsolicited Goods and Services Act 1975 afford protection to consumers who receive unsolicited goods or invoices for unordered goods or services. The Act establishes that unsolicited goods sent to a person remain the property of the sender until the consumer accepts them, does something contrary to the sender’s ownership (i.e. disposes of them), or the sender recovers them. If the sender does not recover the goods within times specified in the Act, the goods become an unconditional gift to the consumer. These provisions limit the person receiving the goods’ liability for goods sent to them without prior request. There is a prohibition on sending invoices to people for goods or services they have not ordered unless the sender has a reasonable belief that they are entitled to payment. This limits a sender’s ability to seek payment for unordered goods or services. The Act also prohibits senders from demanding or using threats to elicit payment for unsolicited goods unless they have reasonable cause to believe they have a right to payment, for example, senders cannot threaten or take legal action or debt collection processes for payment for unsolicited goods. The Act also enables certain services to be specified by regulations so prior written consent must be obtained by the service provider before the service can be charged for.
174. Part II of the Malaysian Consumer Protection Act 1999 deals with “Misleading and Deceptive Conduct, False Representation and Unfair Practice”. Misleading conduct,\(^{357}\) false or misleading representation,\(^ {358}\) as well as “bait advertising”,\(^ {359}\) is prohibited. According to section 12(1) of the Act, a trader commits an offence (a) if he gives to a consumer an indication which is misleading as to the price at which any goods or services are available; or (b) if an indication given by him to a consumer as to the price at which any goods or services are available becomes misleading and he fails to take reasonable steps to prevent the consumer from relying on the indication.\(^ {360}\)

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\(^{357}\) Section 9 of the Act provides that no person shall engage in conduct that (a) in relation to goods, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity, of the goods; or (b) in relation to services, is misleading or deceptive, or is likely to mislead or deceive, the public as to the nature, characteristics, suitability for a purpose, or quantity, of the services.

\(^{358}\) Section 10 of the Act is to the effect that no person shall make a false or misleading representation that – (a) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model; (b) the goods have had a particular history or particular previous use; (c) the services are of a particular kind, standard, quality or quantity; (d) the services are supplied by any particular person or by any person of a particular trade, qualification or skill; (e) a particular person has agreed to acquire the goods or services; (f) the goods are new or reconditioned; (g) the goods were manufactured, produced, processed or reconditioned at a particular time; (h) the goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits; (i) the person has any sponsorship, approval, endorsement or affiliation; (j) concerns the need for any goods or services; (k) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or (l) concerns the place of origin of the goods.

\(^{359}\) Section 13(1) of the Act provides that no person shall advertise for supply at a specified price goods or services which that person (a) does not intend to offer for supply; or (b) does not have reasonable grounds for believing can be supplied, at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

\(^{360}\) It shall be immaterial (a) whether the person who gives the indication is acting on his own behalf or on behalf of another; (b) whether or not the person who gives the indication is the person or included among the persons from whom the goods or services are available; (c) whether the indication is or becomes misleading in relation to all the consumers to whom it is given or only in relation to some of them. The indication given to a consumer is misleading as to a price or a method of determining a price if what is conveyed by the indication, or what the consumer may reasonably be expected to infer from the indication or any omission from it, includes any of the following: (a) that the price or method is not what in fact it is; (b) that the applicability of the price or method does not depend on facts or circumstances on which it does in fact depend; (c) that the price covers or the method takes into account matters in respect of which an additional charge is in fact made; (d) that a person who in fact has no such expectation, expects i) the price to be increased or reduced, whether or not at a particular time or by a particular amount; ii) the price, or the price as increased or reduced, as the case may be, to be maintained, whether or not for a particular period; iii) the method to be altered, whether or not at a
Section 14 of the Act makes it unlawful for any trader to offer any gift, prize or other free item (a) with the intention of not providing it; or (b) with the intention of not providing it as offered. Furthermore, where any gift, prize or other free item with the purchase of any goods or services is offered, whether or not contingent on the purchase of other goods or services, the provider of goods or services cannot charge more than the regular price for the goods or services to be purchased, nor reduce the quantity or quality of the goods or services to be purchased.

Section 15 of the Act provides that no person shall, in supplying or offering to supply goods for sale to consumers, describe the goods as limited unless their edition, printing, minting, crafting or production is restricted to (a) pre-determined maximum quantity; or (b) the actual quantity ordered or subscribed to within a specified and reasonably short period of time. A claim that goods are limited shall state clearly (a) the maximum quantity of goods which are offered for sale; and (b) the specific time period or dates for which the goods are offered for sale.

Section 16 of the Act makes it an offence for a person to demand for or accept, any payment or other consideration for goods or services, if at the time of the demand or acceptance that person (a) does not intend to supply the goods or services; (b) intends to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is demanded for or accepted; or (c) does not have reasonable grounds to believe he will be able to supply the goods or services within any specified period, or where no period is specified, within a reasonable time.

175. Section 31 of the Ugandan Consumer Protection Act creates a duty on all suppliers of goods, technology and services to provide consumers with information that is particular time or in a particular respect; or iv) the method or the method as altered, as the case may be, to remain unaltered, whether or not for a particular period; (e) that the facts or circumstances by reference to which the consumer may reasonably be expected to judge the validity of any relevant comparison made or implied by the indication are not what they in fact are.
true, adequate clear and prompt in order for them to make informed decisions. According to section 32 of the Act, advertisements have to conform to standards of decency, sincerity, and truth and should not exploit consumer ignorance or fear or superstition. False and misleading advertising is prohibited and it is punishable as the crime of fraud. A misleading advertisement is defined as an advert that causes consumers to be confused or to make mistakes, or to misunderstand with regard to inter alia: the components of ingredients of goods offered, the consequences of hiring goods, the date of manufacture and the period of life of the goods, terms of warranties etc. Section 33 of the Act also introduces the concept of abusive advertisements. This is defined as advertisements that are abusive, unfair or discriminatory, which are likely to incite violence, exploit fears, profit from lack of maturity from children, infringe environmental values, or is capable of leading consumers to behave in a manner that is detrimental or hazardous to their health or safety. Where an abusive advertisement results in any damage to a consumer, the consumer is entitled to claim compensation.

176. Section 29 of the South African Consumer Protection Act 2008 provides that producer, importer, distributor, retailer or service provider must not market any goods or services (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services; or (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of the nature, properties, advantages or uses of the goods or services; the manner in or conditions on which those goods or services may be supplied; the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor’s price for comparable or similar goods or services; the sponsoring of any event; or any other material aspect of the goods or services.

Section 40 of the Act deals with “Unconscionable Conduct”; it requires of a supplier or an agent of the supplier that he must not inter alia use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any marketing of any goods or
services, or the supply of goods or services to a consumer. According to section 41(1) of the Act, in relation to the marketing of any goods or services, the supplier must not, by words or conduct (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.

Commercial practices, such as “bait marketing”, “promotional offers”, “promotional competitions”, “pyramid and related schemes” are also covered by the Act.

With respect to “unsolicited goods” - when a supplier or person acting on behalf of a supplier has left any goods with, or performed any service for, a consumer without requiring or arranging payment for them, those goods or services - section 21(7) of the Act provides that a person has no obligation to pay a supplier for unsolicited goods or services, or a deliverer for the cost of delivery of any unsolicited goods; of course, the supplier or deliverer has a right to recover the goods in case these goods were delivered in error.

177. Under our law, section 4 of the Fair Trading Act prohibits a consumer trade practice which has the effect or is likely to have the effect of misleading consumers, or subjecting them to undue pressure to enter into any consumer transaction. Section

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361 Section 30(1) of the Act provides that a supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.

362 Section 34 of the Act.

363 Section 36 of the Act.

364 Section 43 of the Act.
20A of the Hire Purchase and Credit Sale Act, as added by Act No. 2 of 2007, provides that no person shall, in any manner whatsoever, publish, broadcast or cause to be published or broadcast, an advertisement relating to the hire purchase or credit sale of any goods which (a) is, or is likely to be, misleading to readers, viewers or listeners; (b) indicates, or tends to indicate, that a hire purchase or credit sale agreement may be entered into in contravention of the provisions of the Act; or (c) does not indicate that no hire purchase or credit sale agreement shall be entered into with a person where it causes him to be over-indebted.

We are of the opinion that our law lacks detailed provisions as to what amounts to misleading or aggressive marketing, and that it should also spell out what constitutes other forms of unfair commercial practices. There is also the need to regulate unsolicited supplies of goods and services, as well as doorstep selling.
(7) Consumer Protection in Electronic Commerce

178. The Internet has provided consumers with a powerful tool for searching for and buying goods and services. Benefits have included increased competition and lower prices, more choice in products and services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time. The internet has also given rise to the challenge of protecting customers against unsolicited goods and communication: illegal or harmful goods, services and content; dangers resulting from the ease and convenience of buying on-line; insufficient information about goods or about their supplier; the buyer not being in a position to inspect the goods; invasion of privacy; inadequate or conflicting foreign laws; and cyber fraud. The international community has thus laid down standards for businesses and for the empowerment of consumers, by providing what information they need to have on the practices that businesses should adopt when engaging in business to consumer electronic commerce. In many jurisdictions e-commerce is regulated.

179. The United Nations Commission on International Trade Law (UNCITRAL) has developed rules for raising confidence in e-commerce: the 1996 Model Law on Electronic Commerce and the 2001 Model Law on Electronic Signatures. The UNCITRAL Model Laws establish rules and accepted practices that define the characteristics of a valid electronic contract, provide guidelines for the acceptable use of digital signatures for legal and commercial purposes, and support the use of computer evidence in legal disputes over the validity of a contract. In addition, the

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Model Laws defines the default rules for contract formation and the governance of contract performance.\(^{368}\)

180. The OECD has been active in promoting international co-operation concerning numerous electronic commerce issues.\(^{369}\) In 1999, the OECD established a set of guidelines, the Guidelines for Consumer Protection in the Context of Electronic Commerce. These Guidelines define the characteristics of effective consumer protection in electronic commerce and were the result of several years of discussion and consultation between member countries. They provide a framework that informs consumers of the kind of information they can expect from online vendors.\(^{370}\) Since their adoption, numerous countries have used them as a primary source while at the same time developing their own specific regulations which complement the Guidelines.\(^{371}\)

\(^{368}\) Vide also United Nations Convention on the Use of Electronic Communications in International Contracts, which has been adopted by the General Assembly on 23 November 2005. The Convention aims to enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts. It addresses the determination of a party's location in an electronic environment; the time and place of dispatch and receipt of electronic communications; the use of automated message systems for contract formation; and the criteria to be used for establishing functional equivalence between electronic communications and paper documents - including "original" paper documents - as well as between electronic authentication methods and hand-written signatures.


\(^{370}\) The Guidelines reflect existing legal protection available to consumers in more traditional forms of commerce. The key policy principles in the 1999 Guidelines are:

(a) When concluding e-commerce transactions, consumers should benefit from:

(i) Transparent and effective protection;
(ii) Fair business, marketing and advertising practices;
(iii) Clear information about an online business’s identity, the goods or services at offer, and the terms and conditions of transactions;
(iv) A transparent confirmation process of the transaction;
(v) Secure payment mechanisms;
(vi) Fair, timely and affordable dispute resolution and redress; and
(vii) Privacy protection.

(b) Member countries should encourage and enhance:

(i) Consumer and business education;
(ii) Public-private sector co-operation as well as industry-led regulation;
(iii) The adoption and adaptation of laws and practices applicable to e-commerce; and
(iv) International law enforcement co-operation.
When the Guidelines were adopted in 1999, stakeholders anticipated that in the field of consumer policy, further guidelines would be needed in certain areas, notably for combating cross-border fraud, and fighting spam.

In 2003, the OECD thus issued a new set of Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders, which aim to establish a common framework to combat online and offline cross-border fraud through closer, faster, and efficient co-operation between consumer protection enforcement agencies.

In 2006, the OECD issued a Recommendation on Cross-border Co-operation in the Enforcement of Laws against Spam, which aimed to enhance cross-border enforcement co-operation in the fight against spam.

In 2007, the OECD issued a Recommendation on Electronic Authentication, which encourages member countries to establish compatible, technology-neutral approaches for effective domestic and cross-border electronic authentication of persons and entities. The Recommendation re-affirms the important role of electronic authentication in fostering online trust and the continued development of the digital economy.

Recognizing identity theft as a serious threat to consumer confidence in e-commerce, the 2008 Policy Guidance on Online Identity Theft contains principles aimed at preventing consumers from being victimized online through stakeholder education about the problem.

The 2008 Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce identifies new challenges faced by

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371 To complement the Guidelines, the CCP prepared an Inventory of Public Sector Consumer Protection Laws, Policies and Practices Applied to Electronic Commerce. This document has assisted stakeholders in reviewing public-sector laws and policies in connection with the Guidelines. In July 2002, a set of examples to illustrate best practices under the Guidelines was issued: “Best Practice Examples Under the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce” [DSTI/CP(2002)2/FINAL].
consumers in the marketplace and ways for governments to address them in cooperation with the private sector.

The 2008 Policy Guidance for Protecting and Empowering Consumers in Communication Services aims to ensure adequate protection of consumer interests in communication services while maintaining an environment that provides incentives to develop new communication services.

181. The EU has adopted the Directive on the Protection of Consumers in Respect of Distance Contracts in 1997.\textsuperscript{372} The intention of this directive was to impact on contracting principles over the internet, to prescribe that certain minimum information had to be provided by suppliers and a cooling-off right was established for the consumer.\textsuperscript{373}

In 2000 the Directive on E-Commerce\textsuperscript{374} was adopted, which establishes harmonized rules on issues such as the transparency and information requirements for online

\textsuperscript{372} Directive 97/7/EC

\textsuperscript{373} As part of its review of the EU Acquis, in late 2008, the EU presented a Proposal for a Directive on Consumer Rights which involves revising and consolidating the Directives on distance contracts, doorstep sales, consumer sales and unfair contract terms.

\textsuperscript{374} Directive 2000/31/EC has five key provisions:

- The internal market clause (Article 3) which, although subject to derogations, provides the legal certainty which is essential to the development of cross-border on-line services;
- Requirements aimed at facilitating the development of providers of information society services, boosting confidence and strengthening legal security (Article 4): namely the prohibition of prior authorizations, obligations to provide information and ensure transparency with a view to ensure consumer confidence as well as the provision of a framework for commercial communications (Articles 6 to 8). It abolishes the prohibition of commercial communication for the regulated professions, enabling them to open internet sites, and leaves it to the professional associations to regulate such new practices in their codes of conduct.
- The regulatory framework for electronic contracts (Articles 9 to 11), including the harmonization of the conditions necessary for the conclusion of such contracts (e.g. the obligation for the service provider to acknowledge the receipt of the customer/user without undue delay and by electronic means).
- The regulation of the exemptions of the liability of intermediaries (Section 4, Articles 12 to 15) with a view to ensuring, on the one hand, the provision of basic intermediary services guaranteeing the free movement of information on the network and, on the other, a legal framework enabling the development of the internet and electronic commerce.
- Administrative cooperation (Articles 19 and 3.4), both between Member States and between the Member States and the European Commission, with a view to ensuring the proper implementation of the Directive, through mutual assistance and the setting up of contact points. It also encourages Member States to inform
service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. The Directive places a greater obligation on suppliers regarding the provision of certain minimum required information which needed to be available to consumers. The main purpose of the E-Commerce Directive is to ensure that the full benefits of e-commerce are realized and that consumer confidence is established and maintained and further giving the supplier legal certainty, without excessive red tape.\textsuperscript{375}

182. In May 2000, the E-commerce Best Practice Model (the BPM), which sets standards for consumer protection in e-commerce was released by the Australian Government. The BPM was developed with the advice of the Expert Group on Electronic Commerce.\textsuperscript{376} The development of the BPM was a key initiative arising from the Australian Government’s Policy Framework for Consumer Protection in Electronic Commerce released in October 1999. The Policy Framework established the objective of building a world-class consumer protection environment for e-commerce in Australia and described the principles that guide its initiatives in achieving this goal.\textsuperscript{377} In developing the BPM, the Government sought to implement

\textsuperscript{375} On 10 August 2010, the EU Commission launched a consultation exercise aimed at analyzing the reasons why electronic commerce remains limited to less than 2\% of total retail service sales in the EU, and reaches 4\% in just 4 Member States, over 10 years after it started [as stated in the Retail Market Monitoring Report “Towards more efficient and fairer retail services in the internal market for 2020” (COM (2010) 355)] and evaluate the implementation of the Directive, in accordance with its Article 21, as announced in the Communication “A Digital Agenda for Europe” (COM (2010) 245). It seeks to identify obstacles to the development of e-commerce and to evaluate the impact of the E-commerce Directive (2000/31/CE). On the basis of the responses received, as well as the input from discussions with Member States, and relevant reports from the European Parliament, it is planned the Commission will come forward, in early 2011, with a Communication on E-commerce setting out lessons learnt and possible next steps. Issues covered in the consultation include: commercial communications of regulated professions such as pharmacists and lawyers; the development of the online press, the issue of the liability of internet intermediaries, administrative cooperation.


\textsuperscript{377} Five key principles are set out in the Policy Framework:-
(a) Functional Equivalence and Technology Neutrality: Consumers should have at least the same level of protection when engaged in e-commerce as in traditional shopping.
(b) Promoting the Interests of Consumers: Trust is the basis of successful online trading, just as it is offline. Adequate protection should be given to consumers to encourage participation in e-commerce.
the elements of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.

The BPM provided guidance to businesses and consumers on the elements of an effective self-regulatory framework for consumer protection in e-commerce. It was primarily designed to be adopted by industry associations and their members as part of their codes of conduct, and to guide the trading practices of individual businesses. The BPM consisted of a series of guidance principles in a range of areas including: the provision of information to consumers; identification of businesses; fair business practices; security of payments; privacy; dispute resolution; and advertising and marketing. While adoption of the BPM was voluntary, several of the standards in the model were legal requirements. These standards were intended to build consumer sovereignty in e-commerce – that is, the ability of consumers to make independent, well-informed choices when shopping online, supported by access to adequate means of redress, robust consumer protection legislation and a knowledge of their rights as consumers.

The BPM was revised in 2006 to take into account developments in the technologies and market relationships that are important in business to consumer e-commerce, most notably in the area of mobile commerce (m-commerce). The Guidelines seek to enhance consumer confidence in business to consumer electronic commerce by providing guidance to businesses on: (a) fair business practices; (b) accessibility and disability access; (c) advertising and marketing; (d) engaging with minors; (e) promoting the Interests of Australian Business: Australian businesses should not be disadvantaged in the global marketplace by the need to comply with an onerous regulatory burden. They will be at an advantage if they develop an international reputation for best practice in their dealings with consumers. (d) Dual Roles of Industry and Government: Industry will assume a leading role in providing effective consumer protection through innovative self-regulatory schemes. The Government, in consultation with consumers, will provide guidance and support to industry and will educate consumers about the benefits and risks of the online environment. (e) International Co-operation: Consumer protection in Australia will be developed in accordance with international principles. Based on these five principles, the Government has developed an approach to online consumer protection that emphasizes industry self-regulation, supported by well-designed consumer education initiatives and robust legislative safeguards. The BPM, together with its legislative underpinnings and associated promotional and educational campaign, exemplifies this approach.

(c) Promoting the Interests of Australian Business: Australian businesses should not be disadvantaged in the global marketplace by the need to comply with an onerous regulatory burden. They will be at an advantage if they develop an international reputation for best practice in their dealings with consumers. (d) Dual Roles of Industry and Government: Industry will assume a leading role in providing effective consumer protection through innovative self-regulatory schemes. The Government, in consultation with consumers, will provide guidance and support to industry and will educate consumers about the benefits and risks of the online environment. (e) International Co-operation: Consumer protection in Australia will be developed in accordance with international principles. Based on these five principles, the Government has developed an approach to online consumer protection that emphasizes industry self-regulation, supported by well-designed consumer education initiatives and robust legislative safeguards. The BPM, together with its legislative underpinnings and associated promotional and educational campaign, exemplifies this approach.

378 The Australian Guidelines for Electronic Commerce [Commonwealth of Australia, March 2006].
disclosure of a business’s identity and location; (f) disclosure of a contract’s terms and conditions; (g) the implementation of mechanisms for concluding contracts; (h) adopting privacy principles; (i) using and disclosing information about payment, security and authentication mechanisms; (j) the establishment of fair and effective procedures for handling complaints and resolving disputes; and (k) the law and forum for the resolution of contractual disputes.

183. In 2000, New Zealand launched a model code for consumer protection in e-commerce based on the Australian BPM and the OECD Guidelines. The New Zealand model code mirrors the provisions of the BPM with two exceptions, namely that it contains no provisions relating to unsolicited commercial e-mail or disability access. As with the BPM, the New Zealand model code is complemented by legislation that provides consumers with avenues for redress outside self-regulatory schemes. The New Zealand Ministry of Consumer Affairs has worked with industry associations to assist them incorporate the provisions of the model code in their industry codes of practice. For example, the Ministry worked with the New Zealand Direct Marketing Association as it redrafted its code of practice to attain consistency with the model code.379

184. In Canada, a new approach to harmonized consumer protection legislation in e-commerce was adopted in 2001 with a common ‘Internet Sales Contract Harmonization Template’,380 which was approved by federal, provincial and

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territorial Ministers to ensure that consumers benefit from equal protection across the country.\textsuperscript{381}

This was followed by a Canadian Code of Practice for Consumer Protection in Electronic Commerce,\textsuperscript{382} which was endorsed by federal, provincial and territorial ministers responsible for consumer affairs in 2004.\textsuperscript{383} The intention was that the Code would be reviewed regularly to ensure its relevance to current technology and business practices. The Code establishes benchmarks for traders conducting commercial activities with consumers on-line. It leaves unchanged rights, remedies and other obligations that already exist as a result of consumer protection, privacy or other laws and regulations, or other general or sector-specific voluntary codes to which traders may subscribe.

The Code bases its policies on eight principles:

(a) Internet vendors should provide accurate and sufficient information to consumers seeking to transact with them;

(b) All disclosures should be provided in any language in which goods and services are also proffered;

(c) A consumer’s consent to an Internet contract must be fully formed and intentional, with a meaningful opportunity to cancel or correct orders;

\textsuperscript{381} The new cyber market has coincided with the introduction of consumer protection Acts in Ontario (Consumer Protection Act 2002) and British Columbia (Business Practices and Consumer Protection Act 2004) and new regulations in Alberta (Internet Sales Contract Regulation 1981). Existing consumer protection legislation in Nova Scotia (Consumer Protection Act 1989), Manitoba (Consumer Protection Act 1987), and Saskatchewan (Consumer Protection Act 1996) has also been amended and supplemented with regulations to provide protection for consumers purchasing goods and services over the Internet. Vide A. Davies, The Development of Laws on Electronic Documents and E-Commerce Transactions [Canada, Library of Parliament Research Publications, 2008].


\textsuperscript{383} The Working Group on Electronic Commerce and Consumers, composed of representatives of different sectors of the economy, was set up in the Autumn of 1999 to develop the Code, based on the Principles of Consumer Protection for Electronic Commerce: A Canadian Framework, which were approved in August 1999. Draft versions of the Code were the subject of extensive consultations during 2001-2002. In January 2003, the Working Group approved the Code in principle as a model for effective consumer protection in electronic commerce. In Spring 2003, the Code underwent pilot testing by a number of private sector participants. The Code was then reviewed and finalized with input from the E-Commerce Leaders Code Review Committee.
(d) Internet vendors should adhere to generally accepted standards for protection of their customers’ privacy and personal information;

(e) Internet vendors should use security mechanisms adequate to protect storage of customers’ personal information;

(f) Consumers should be provided with access to a process for complaints and dispute resolution;

(g) Consent should be given by customers for any unsolicited marketing e-mails;

(h) Internet communications and transactions with children should be subject to strict and careful standards, including a requirement that no monetary transactions or collection of personal information be conducted without the consent of a parent or a guardian.

185. In UK a number of consumer protection initiatives that are consistent with the OECD Guidelines have been undertaken. Chief of these is the Trust UK initiative, which was jointly developed by government, business and consumer organisations and was launched in July 2000. This trust mark scheme accredits codes of conduct for ecommerce that reach an agreed minimum standard. Initially, three codes were accredited: Which?, Web Trader and the codes of the Direct Marketing Association and Association of British Travel Agents.\[384\]

The UK has also enacted e-commerce regulations based on the European Commission’s E-commerce Directive.\[385\] The Directive covers all services conducted over the Internet. Online businesses must make available basic information

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The Directive requires all Member States to ensure that their legal system allows contracts to be concluded online and to ensure that it does not deprive contracts of validity just because they are electronic. There are a few exceptions, such as property sales and guarantees. The UK did not make any specific regulation on this because the Government considered that it already complies. This followed the conclusions of the Report on “E-commerce: Formal Requirements in Commercial Transactions” by the Law Commission for England and Wales in December 2001. This report found that, in England and Wales, statutory requirements for “writing” and a “signature” are generally capable of being satisfied by email and by website trading.
concerning their activities including their name, address, e-mail address and Value Added Tax number.

The Consumer Protection (Distance Selling) Regulations 2000\(^{386}\) provide further protection for consumers. They were introduced in order to implement the European Commission’s Distance Selling Directive of 1997. The Regulations apply to any supplier (whether or not based in the UK) that sells goods or services to consumers in the UK. They are intended to be broad enough to cover the full range of mediums for commerce, including the Internet.

Consumers are entitled to: (a) receive clear information about the supplier, the goods or services and the sale before deciding to buy;\(^{387}\) (b) confirmation of this information in writing and certain additional information;\(^{388}\)

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\(^{386}\) SI 2000/2334, as amended by Consumer Protection (Distance Selling) (Amendment) Regulations 2005 [SI 2005/689].

\(^{387}\) A distance contract will not be enforceable against a consumer unless the supplier has provided to the consumer in good time prior to the conclusion of the contract the following information: (1) the identity of the supplier and, where the contract requires payment in advance, the supplier's address; (2) a description of the main characteristics of the goods or services; (3) the price of the goods or services including all taxes; (4) delivery costs, where appropriate; (5) the arrangements for payment, delivery or performance (e.g. when the customer can expect delivery of the goods or performance of the services); (6) the existence of a right to cancel; (7) if the consumer is to use a premium rate phone number, the cost of the call must be specified before charges are incurred for the telephone call; (8) the period for which the offer or the price remains valid; (9) where appropriate, the minimum duration of the contract, in the case of a contract to supply goods or services permanently (e.g. in a contract for a mobile phone or for cable TV services), or recurrently (e.g. in a contract with a monthly book club); (10) whether or not substitute goods or services may be provided in the event of those ordered by the customer being unavailable; and (11) notification that the supplier will meet the costs of the consumer of returning any such substitute goods he or she does not want. This prior information must be provided in a clear and comprehensible manner which is appropriate to the means of distance communication used. For example, if the customer has contacted the supplier by email, it may be reasonable for the supplier to provide the prior information by email. If a business 'cold calls' consumers by phone, there are special rules regarding any distance contract concluded during the course of the conversation. The contract will not be enforceable unless, at the beginning of the conversation, the supplier has made its identity and the commercial purpose of the telephone call explicitly clear. In the case of a dispute about cold calling contracts, the supplier must prove that the information was provided in accordance with the Regulations. However, this requirement should not cause too many difficulties as it can be built into a telescript quite easily and, in any case, most suppliers operating over the phone would have to provide such information in order to comply with data protection legislation.

\(^{388}\) Suppliers must provide the consumer with confirmation of the prior information otherwise they will not be able to enforce the distance contract. This confirmation must be in writing, e.g. by email. The supplier is required to confirm most of the prior information in writing and provide certain additional information. The following must be given: (1) most of the prior information, namely the identity of the supplier and, where the contract requires
(c) a ‘cooling off’ period during which an order can be cancelled,\textsuperscript{389} in both contracts for the sale of goods and contracts for the supply of services, the cancellation period begins on conclusion of the contract;\textsuperscript{390}

payment in advance, the supplier's address; a description of the main characteristics of the goods or services; the price of the goods or services including all taxes; delivery costs, where appropriate; the arrangements for payment, delivery or performance; the existence of a right to cancel; the conditions and procedures to enable the consumer to cancel the contract; whether the consumer must return the goods to the supplier if the consumer cancels; whether the consumer or the supplier is responsible for the cost of returning the goods to the supplier if the consumer cancels; in the case of contracts for the supply of services, information on the consequences of agreeing to performance of a service starting before the end of the usual 7 working day cancellation period; the geographical address of the place of business of the supplier to which the consumer may address any complaints; information on any after-sales services and guarantees; and the conditions for cancelling the contract, where it is of an unspecified duration or a duration exceeding one year.

This information must be given to the consumer either prior to the conclusion of the contract, or afterwards, provided it is done in good time; in contracts for services, during the performance of the contract; and in contracts for goods, at the latest at the time of delivery of the goods where goods not for delivery to third parties are concerned. This means that where consumer A orders goods to be despatched to consumer B (e.g. as a gift), the information must be given to consumer A prior to the conclusion of the contract.

An online supplier may choose to include this information in an acknowledgement email that it sends to the consumer when an order is placed. Others will include this information in their terms and conditions and send a copy of these terms to the consumer when an order is placed. The supplier in a contract for the supply of services shall not be subject to the obligations to provide written confirmation and additional information where those services are supplied on only one occasion and are invoiced by the operator of the means of distance communication. However, the supplier must take all necessary steps to ensure that the consumer in such a one-off contract is able to obtain the supplier's geographical address and the place of business to which the consumer may address any complaints.

\textsuperscript{389} Under the Regulations a consumer can cancel a distance contract at any time during the "cancellation period" by notifying this intention to the supplier in writing. A contract which is cancelled must be treated as if it had never been entered into by the consumer. For example, if the consumer has entered into a credit agreement in order to purchase the goods, that agreement must also be cancelled at the same time as the distance contract. Unless the parties have agreed otherwise, the consumer will not have the right to cancel in respect of certain distance contracts. This applies to the following contracts: for the provision of services, if the performance of the contract has begun with the consumer's consent before the end of the cancellation period and the supplier has provided the written confirmation and additional information (including information that the cancellation rights will end as soon as performance of the contract begins); for the supply of goods or services which are priced according to fluctuations in the financial market and cannot be controlled by the supplier; for the supply of goods which by means of their nature cannot be returned (e.g. personalised goods) or are likely to deteriorate or expire rapidly (e.g. dairy products); for the supply of audio or video recordings or computer software which were unsealed by the consumer; for the supply of newspapers, periodicals or magazines; or for gaming, betting or lottery services.

\textsuperscript{390} The duration of the cancellation period varies depending on the stage at which the written confirmation and additional information is provided. The earlier the information is provided, the shorter the cancellation period will be. The rules on the right to cancel and the information requirements were changed in 2005. Before the change a supplier was required to get written information about cancellation rights to a consumer before the conclusion of a contract for services. That proved difficult for suppliers who took orders by phone for services due to begin the same day, e.g. for the hire of equipment. It exposed them to a risk that a consumer would cancel and demand a refund. So the Regulations changed to provide that a supplier no longer needs to inform the consumer in writing before the contract is made that he will not be able to cancel the contract once the supply of services has begun. It is open for suppliers of goods and services to offer longer cancellation periods under their own contract terms, provided they do not mislead consumers about the rights they have under the Regulations or other legislation, such as the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.
(d) a full refund if the goods or services are not provided by the date agreed.  

186. In France, Articles L 121-16 to L 121-20-14 of the ‘Code de la Consommation’ deal specifically with “la vente de biens et fournitures de prestations de services à distance”.  

In 2008 the ‘Loi Chatel’ was adopted to complete the ‘Code de la Consommation’ through various measures aimed at better protecting consumers in e-commerce; these include enhanced pre-contractual information requirements, and indication of a date for the delivery of products.  

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391 On the cancellation of a contract, any sum paid by the consumer must be repaid as soon as possible and, in any case, within 30 days of cancellation. The full price paid for the goods must be refunded and this includes the cost of delivery of the goods to the consumer. 

In certain circumstances the supplier may charge the consumer for the cost of the supplier recovering the goods (e.g. where the consumer fails to return them). To do so, the contract must specify that the consumer is under an obligation to return the goods if he or she cancels the contract and the consumer gets notice of this in advance as part of the written confirmation relating to the right to cancel. The costs cannot be passed on to the consumer where the goods are returned because they are faulty or do not comply with the contract for some other reason. Where the supplier wishes to send substitute goods (e.g. where the original goods ordered are not in stock, but similar goods are available), the supplier must have provided for the possibility of sending substitute goods in its contract and in the case of the consumer cancelling the contract and returning the goods, the supplier must bear the cost of such return. 

392 Article L 121-18 provides that: 

« … L'offre de contrat doit comporter les informations suivantes: 1° Le nom du vendeur du produit ou du prestataire de service, des coordonnées téléphoniques permettant d'entrer effectivement en contact avec lui, son adresse ou, s'il s'agit d'une personne morale, son siège social et, si elle est différente, l'adresse de l'établissement responsable de l'offre; 2° Le cas échéant, les frais de livraison; 3° Les modalités de paiement, de livraison ou d'exécution; 4° L'existence d'un droit de rétractation et ses limites éventuelles ou, dans le cas où ce droit ne s'applique pas, l'absence d'un droit de rétractation ; 5° La durée de la validité de l'offre et du prix de celle-ci; 6° Le coût de l'utilisation de la technique de communication à distance utilisée lorsqu'il n'est pas calculé par référence au tarif de base; 7° Le cas échéant, la durée minimale du contrat proposé, lorsqu'il porte sur la fourniture continue ou périodique d'un bien ou d'un service. 

Ces informations, dont le caractère commercial doit apparaître sans équivoque, sont communiquées au consommateur de manière claire et compréhensible, par tout moyen adapté à la technique de communication à distance utilisée. En cas de démarchage par téléphone ou par toute autre technique assimilable, le professionnel doit indiquer explicitement au début de la conversation son identité et le caractère commercial de l'appel.» 

Article L 121-9 is to the effect that «le consommateur doit recevoir, par écrit ou sur un autre support durable à sa disposition, en temps utile et au plus tard au moment de la livraison : 1° Confirmation des informations mentionnées aux 1° à 4° de l'article L. 121-18 et de celles qui figurent en outre aux articles L. 111-1 et L. 113-3 ainsi que de celles prévues pour l'application de l'article L. 214-1, à moins que le professionnel n'ait satisfait à cette obligation avant la conclusion du contrat ; 2° Une information sur les conditions et les modalités d'exercice du droit de rétractation ; 3° L'adresse de l'établissement du fournisseur où le consommateur peut présenter ses réclamations ; 4° Les informations relatives au service après vente et aux garanties commerciales ; 5° Les conditions de résiliation du contrat lorsque celui-ci est d'une durée indéterminée ou supérieure à un an.»
187. In South Africa, Chapter VII of the Electronic Communications and Transactions Act 25 of 2002 deals specifically with “consumer protection” in the era of e-commerce. The protection provided to consumers in this Chapter applies irrespective of the legal system applicable to the agreement in question. Any provision in an agreement which excludes any rights provided for in this Chapter is null and void.

Section 43(1) of the Act provides that a supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered:
(a) Its full name and legal status;
(b) its physical address and telephone number;
(c) its web site address and e-mail address;
(d) membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
(e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
(f) in the case of a legal person, its registration number, the names of its officer bearers and its place of registration;
(g) the physical address where that supplier will receive legal service of documents;

It is also provided that (a) «le consommateur dispose d'un délai de sept jours francs pour exercer son droit de rétractation sans avoir à justifier de motifs ni à payer de pénalités, à l'exception, le cas échéant, des frais de retour» [Article L 121-20]; (b) «lorsque le droit de rétractation est exercé, le professionnel est tenu de rembourser le consommateur de la totalité des sommes versées, dans les meilleurs délais et au plus tard dans les trente jours suivant la date à laquelle ce droit a été exercé [Article L 121-20-1]; (c) «le fournisseur doit indiquer, avant la conclusion du contrat, la date limite à laquelle il s'engage à livrer le bien ou à exécuter la prestation de services. A défaut, le fournisseur est réputé devoir délivrer le bien ou exécuter la prestation de services dès la conclusion du contrat.»

393 Articles 28 to 32 of the «Loi no 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs» relate to «la vente à distance».

394 Section 47 of the Act.

395 Section 48 of the Act.
(h) a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
(i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
(j) the manner of payment;
(k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
(l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;
(m) the manner and period within which consumers can access and maintain a full record of the transaction;
(n) the return, exchange and refund policy of that supplier;
(o) any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
(p) the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;
(q) where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and
(r) the rights of consumers in terms of section 44, where applicable.

According to section 43(2) of the Act, the supplier must provide a consumer with an opportunity to review the entire electronic transaction, to correct any mistakes, and to withdraw from the transaction, before finally placing any order. A consumer may cancel the transaction within 14 days of receiving the goods or services if a supplier fails to comply with the provisions in section 43(1) and (2) of the Act.

By virtue of section 44 of the Act, a consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply
(a) of goods within seven days after the date of the receipt of the goods; or (b) of services within seven days after the date of the conclusion of the agreement. The only charge that may be levied on the consumer is the direct cost of returning the goods. If payment for the goods or services has been effected prior to a consumer exercising his right to cancel the agreement, the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.

Section 45(1) of the Act provides that any person who sends unsolicited commercial communications to consumers must provide the consumer with (a) the option to cancel his or her subscription to the mailing list of that person, and (b) with the identifying particulars of the source from which that person obtained the consumer’s personal information, on the request of the consumer.

Section 46 of the Act requires the supplier to execute the order within 30 days after the day on which an order has been received, unless the parties have agreed otherwise. Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days’ written notice. If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

188. Various changes have been effected to our law to develop a sound regulatory framework for the development of the ICT Sector in Mauritius. The Information Technology (Miscellaneous Provisions) Act 1998 amended various enactments to make provision for developments in information technology, such as electronically recorded documents. The Electronic Transactions Act 2000, as amended in 2009,

396 A Customer Charter was released by the Ministry of Information and Communication Technology in 2008.

397 The Interpretation and General Clauses Act was amended by the addition of a new section 35A entitled “Electronically recorded documents” which provides that (1) Where an electronically-recorded document bears, as
provides appropriate legal framework to facilitate electronic transactions and communications by regulating electronic records and electronic signatures and the security thereof. The Computer Misuse and Cybercrime Act 2003 provides for repression of criminal activities perpetrated through computer systems, and deals with the investigation and prosecution of computer-related offences. The Data Protection Act 2004 provides for the protection of the privacy rights of individuals in evidence that the document emanates from a particular individual, a personal identification mark, the mark shall have the same legal effect as if the individual had signed his name on the document, or affixed his thumbprint or other mark thereto, in accordance with section 35; (2) Except where it is otherwise provided in any other enactment, it shall be lawful to electronically record any matter; (3) Where any matter is electronically recorded, a reference, in any enactment (a) to an original shall be construed as a reference to that record; (b) to a true or certified copy, shall be construed as a reference to a reprint of that record.

A consequential amendment was effected to the "Livre Troisieme", "Titre Troisieme", “Chapitre Sixieme", "Section Premiere" of Code Civil Mauricien:

(a) by inserting, immediately after the title "De la preuve litterale", the following new paragraph, the existing paragraphs I, II, III, IV and V being accordingly renumbered II, III, IV, V and VI respectively:

I - Dispositions generales

1316-1 La preuve litterale, ou preuve par ecrit, resulte d'une suite de lettres, de caracteres, de chiffres ou de tous autres signes ou symboles dotes d'une signification intelligible, quels que soit leur support et leurs modalites de transmission.

1316-2 L'ecrit sous forme electronique est admis en preuve au meme titre que l'ecrit sur support papier, sous reserve que puisse etre dument identifiee la personne dont il emane et qu'il soit etabli et conserve dans des conditions de nature a en garantir l'integrite conformement aux dispositions de L'Electronic Transactions Act 2000.

1316-3 Lorsque la loi n'a pas fixe d'autres principes et a defaut de convention valable entre les parties, le juge regle les conflits de preuve litterale en determinant par tous moyens le titre le plus vraisemblable, quel qu'en soit le support.

1316-4 L'ecrit sur support electronique a la meme force probante.

1316-5 La signature necessaire a la perfection d'un acte juridique identifie celui qui l'appe. Elle manifeste le consentement des parties aux obligations qui decoulent de cet acte. Quand elle est apposee par un officier public, elle confere l'authenticite a l'acte. Lorsqu'elle est electronique, elle consiste en l'usage d'un procede fiable d'identification garantissant son lien avec l'acte auquel elle s'attache. La fiabilite de ce procede est presumee, jusqu'a preuve contraire, lorsque la signature electronique est cree, l'identite du signataire assuree et l'integrite de l'acte garantie, conformement aux dispositions de l'Electronic Transactions Act 2000.

(b) in article 1317, by adding, immediately after the existing alinea, the following new alinea -

Il peut etre dresse sur support electronique s'il est etabli et conserve conformement aux dispositions de l'Electronic Transactions Act 2000.

(c) in article 1326, by deleting the words "de sa main" and replacing them by the words "par lui-même".

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view of the developments in the techniques used to capture, transmit, manipulate, record or store data relating to individuals.

Our law, however, does not contain provisions relating to “distance selling”, as is the case in other jurisdictions, which would ensure consumers can transact online in confidence. Any proposed legislation would have to contain provisions on this aspect of consumer transactions.

399 At a CESPAM Executive Training Programme on “Cyber Law Development and Harmonization within SADC”, held in Mbabane, Swaziland, 5-8 April 2005, panelists discussed the importance of providing online consumers all relevant information relating to the products being bought, the seller, all the conditions of the sale, affecting the payment and any steps that may be needed in order to return the good or question the provision of the service. This information is vital for consumers and also for the merchant, as it increases the consumer confidence. On the other hand, panelists also presented examples of consumer abuse, for instance, credit card fraud, which can result in damages sustained by the merchant. The power of the Internet to inform and educate consumers, and to facilitate access to the courts or other remedies was also discussed and acknowledged.
189. In many jurisdictions, the need has been felt to protect the interests of consumers in connection with credit contracts and consumer leases as the terms of credit may be disadvantageous to the consumer and also with a view to avoid problems linked with over-indebtedness.\textsuperscript{400}


(a) Any credit-related advertising that indicates some aspect of the cost of the credit must also include a statement of the annual percentage rate of charge;
(b) The consumer should receive adequate information on the conditions and cost of credit and on his obligations. Credit agreements are to be made in writing. Besides the essential terms of the contract, an agreement must state the annual percentage rate of charge and the conditions under which it may be amended;
(c) In the case of credit granted for the acquisition of goods, Member States must lay down the conditions under which the goods may be repossessed and are to ensure that neither of the parties gains any unjustified enrichment;
(d) The existence of a credit agreement does not affect the rights of the consumer vis-à-vis the supplier of goods or services purchased by means of such an agreement.

\textsuperscript{400} In the local context, this problem was addressed in the Report of the Commission of Inquiry on Sale by Levy [26 Nov. 2004]. Vide also 2\textsuperscript{nd} issue of the Ministry’s ‘magazine des consommateurs’ Savoir Choisir [September 2010], which deals with “Surendettement: soyons vigilants”.


agreement in cases where the goods or services are not supplied or are not in conformity with the contract;

(e) The consumer may seek redress against the grantor of credit when the following conditions are fulfilled:

- the consumer has entered into a credit agreement with a person other than the supplier of the goods or services purchased;
- the grantor of the credit and the supplier of the goods or services have a pre-existing agreement under which credit is made available exclusively by the former;
- the consumer obtains his or her credit pursuant to that pre-existing agreement;
- the goods or services covered by the credit agreement are not supplied or are not in conformity with the contract;
- the consumer has sought redress against the supplier but has failed to obtain satisfaction.

191. The New Zealand Credit Contracts and Consumer Finance Act 2003 provides for (a) the disclosure of adequate information to consumers under consumer credit contracts and consumer leases to enable consumers to distinguish between competing credit arrangements or competing lease arrangements, to become informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them, and to monitor the performance of consumer credit contracts or consumer leases; (b) rules about interest charges, fees, and payments in relation to consumer credit contracts.

The Act also enables consumers to seek reasonable changes to consumer credit contracts on the grounds of unforeseen hardship and prevents oppressive credit contracts, consumer leases, or oppressive conduct by creditors under credit contracts, lessors under consumer leases.
192. Australia recently adopted the National Consumer Credit Act 2009. One of the distinctive features of the Act is the requirement for responsible lending conduct.

The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This obligation requires licensees to assess that the credit contract or lease is not unsuitable for the consumer’s requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.\(^{403}\)

193. Our law is more or less in line with best practices in respect of consumer credit.

The Hire Purchase and Credit Sale Act lays down disclosure requirements on the part of the dealer,\(^{404}\) affords to the hirer or buyer the ability to determine the agreement at any time before final payment,\(^{405}\) prohibits certain forms of oppressive behaviour on the part of the dealer or any person acting on his behalf,\(^{406}\) and safeguards the rights of the consumer vis-à-vis the supplier of goods purchased in cases where the goods are not supplied or are not in conformity with the contract.\(^{407}\)

The Borrower Protection Act 2007 provides inter alia that every lender\(^{408}\) shall before granting a credit facility to any person take all reasonable steps to verify that the person has, or is likely to have, the means to repay the amount.

\(^{403}\) Sections 115 to 120 of the Act.

\(^{404}\) Sections 3, 4 and 7 of the Act.

\(^{405}\) Sections 5 and 5A of the Act.

\(^{406}\) Section 6 of the Act.

\(^{407}\) Section 9 of the Act.

\(^{408}\) The “lender” is defined in section 2 of the Act as a lending institution which grants a credit facility. A "lending institution" is defined as (a) a body specified in the Second Schedule [a bank under the Banking Act 2004, the Development Bank of Mauritius Ltd, the Employees' Welfare Fund, an insurance company under the Insurance Act, the Mauritius Housing Company Ltd, the National Housing Development Company Ltd]; and (b) includes a moneylender under the Moneylenders Act.
We consider the Hire Purchase and Credit Sale Act should be amended to provide for responsible lending conduct: a dealer should be under an obligation to assess that the agreement is not unsuitable for the consumer’s requirements and that the consumer has the capacity to meet the financial obligations under the agreement.
(9) Consumer Awareness and Advocacy

194. In most jurisdictions, it is generally recognized that an empowered consumer must be equipped with the knowledge and the skills to make informed choices, assert his/her rights, or seek advice, when things go wrong.\(^{409}\)

195. This requires that appropriate information should be made available to consumers in a clear and accessible manner.\(^{410}\) Most jurisdictions focus resources on the provision of consumer information and advice channels. While telephone and the internet appear to be the dominant channels of delivery, some jurisdictions also provide for face-to-face advice which may benefit certain disadvantaged groups in particular.\(^{411}\)

196. Consumer information is necessary but not sufficient.\(^{412}\) Formal education provision is seen as having an increasing role to play in the empowerment of consumers.\(^{413}\)

\(^{409}\) Consumer education plays a vital role in enabling consumers to function effectively and responsibly within an ever-increasing and changing global market. It is not only necessary that consumers understand the difficulties and complexities in the market but that they also understand the protection measures created for their benefit as well as their role within the market.

\(^{410}\) As far back as 1979, the Committee of Ministers of the Council of Europe, in its recommendation to Member States concerning consumer education of adults and consumer information [Rec. No. R (79) 1], recommended that Member States should seek to ensure in accordance with their national traditions and circumstances the provision of a network of regional and/or local centres from which citizens can obtain impartial advice and information material on consumer matters in person, by telephone or by correspondence.

\(^{411}\) In UK, the leading consumer advice and information channel is Consumer Direct. BERR (and its predecessor the DTI) has adopted a policy of simple branding and the one-stop shop principle in respect of consumer advice and information. As to the practice in other jurisdictions, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy, University of East Anglia, Norwich, *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* [Dec 2008] at pp. 231-239.

\(^{412}\) A distinction needs to be drawn between consumer education and consumer information. Consumer information relates to data about a certain product or service that enables the consumer to make an informed choice. Consumer education is not bound to a specific product or service but is essential in the use of consumer information in that educated consumers can use consumer information effectively in the choice of products or services. In order to be effective, consumer education needs to be directed at all consumers, whether through the formal system or by using unique methods to reach the vulnerable segments of the population.

\(^{413}\) In Argentina, Article 60 of the Consumer Protection Code creates a general obligation on the State to provide consumer education for consumers, which includes a duty to ensure that consumers are informed about the code. Article 61 states the following as consumer education objectives: (a) acquiring skills to assist consumers to evaluate
Consumer agencies cannot deliver alone. Agencies (including consumer organisations) can, however, seek to coordinate and contribute to consumer education initiatives with other partners (for example, the media and schools). 414

197. Consumer advocacy – alongside information and advice – plays an important role in empowering consumers. 415 It enables governments and regulators to respond to the disparate and diverse nature of consumers at the policy level and in setting enforcement priorities. Consumer complaints to advocacy/representative groups may provide agencies with important intelligence on markets. Consumer groups/organizations are generally the ‘first port of call’ for aggrieved consumers. Consumer advocacy groups can highlight the special problems of disadvantaged consumers. 416

alternatives and to ensure that their resources are used in an efficient manner, (b) directing consumers against risks that arise from the consumption of goods and services and (c) assist the consumer to make choices that transform behaviour of the market. The government is required by law to provide some funding for consumer education. Consumer education is mostly done by approved independent consumer associations.

Section 77 of the South African Consumer Protection Act 2008, which deals with “support for consumer protection groups”, provides that the National Consumer Commission may co-operate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group: (a) Consumer advice and education activities and consumer-related publications; (b) research, market monitoring, surveillance and reporting; (c) promotion of consumer rights and advocacy of consumer interests; (d) representation of consumers, either specifically or generally, in court; (e) alternative dispute resolution through mediation or conciliation; and (f) participation in national and international associations, conferences or forums concerned with consumer protection matters.

414 In UK, the Office of Fair Trading (OFT) is the strategic leader of an alliance to promote consumer education and awareness. The OFT also undertakes an educative function for business and consumers, coordinating the national consumer education strategy and lead the consumer education Alliance of public, private and voluntary-sector organisations. In terms of more formal provision, the National Consumer Education Partnership has a generic ‘Framework for Developing Consumer Skills and Attitudes’, supported by one for the National Curriculum, and one for adult education lifelong learning. The UK Trading Standards Agency is active in provision of materials for teaching in schools and provides detailed lesson plans. As to the practice in other jurisdictions, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy, University of East Anglia, Norwich, Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008] at pp. 240-242. Vide also South Africa Department of Trade and Industry, Consumer Law Benchmark Study (2004) at pp. 68-74.

415 It is noteworthy that Article 51 of the Constitution of Spain requires the public administration to protect consumers and promote their education, information and representation. The right of consumers to representation has two dimensions: the right to associate or organize themselves into consumer organisations, and the right that their associations are heard by the government agencies.

416 Consumer advocacy takes a wide range of forms. Often, it is concerned with the interests of individual consumers, focusing on the resolution of specific issues and complaints relating to the provision of goods and services. However, it is also concerned with the representation of the views of wider consumer interests in dealing with specific business practices and policy making processes, and in debates on wider economic, political and social
198. In many jurisdictions, there are mechanisms in place for the representation of consumer interests in policy making and priority setting.\footnote{Vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], \textit{Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries} [Dec 2008] at pp. 242-247.}

In UK, the leading institution is the National Consumer Council (NCC), which is a new, enhanced consumer representation and advocacy body. The new NCC results from the Government’s decision to streamline and strengthen the UK’s consumer representation regime, which has been criticized as being fragmented and lacking coherence and public presence.\footnote{Vide DTI, \textit{Strengthen and streamline consumer advocacy: Consultation on consumer representation and redress} (DTI London 2006).} The new NCC has considerably enhanced powers and duties; for example, it now has general powers to investigate and gather information from firms and regulatory bodies. Its core functions will be to act as consumer advocate, to research into consumer matters, and to provide information to consumers. The NCC has the status of super-complainant, which requires the OFT, upon receipt from it, to respond with reasons stating whether or not it has identified a problem, and how this problem can be remedied. A number of other non-statutory bodies exist for the representation of consumers, including Which? and Citizens Advice (supporting a charitable network of Citizens’ Advice Bureaux).\footnote{Citizens Advice is partly funded by BERR, as well as by local authorities. For further information see \url{http://www.berr.gov.uk/consumers/fact-sheets/page38097.html}.}

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In Australia, the ACCC [Australian Competition and Consumer Commission] has instituted a Consumer Consultative Committee to facilitate discussions with consumer representatives on consumer issues. Appropriate individuals are invited to apply and attend the thrice-yearly meetings. The Commonwealth Consumer Affairs Advisory Council (CCAAC) is an important source of independent advice to the Government on both current issues and on new and emerging consumer issues.420

In Denmark, the Forum for Consumers, established in 2003, provides a forum where current consumer issues are discussed. It fosters dialogue between public agencies, consumers and businesses on consumer policy and provides advice to the responsible Minister and other consumer agencies. The Consumer Council (‘the CC’) (a private organization established in 1947) represents the interests of consumers and commercial interests. The CC is the principal voice for consumers' interests, lobbying the Government, Parliament, public authorities and the business community. It is represented on more than 200 committees, boards and councils dealing with matters important to consumers. The CC has an extensive dialogue with the business community. This contact has among other things led to the establishment of several private complaint boards covering sectors such as insurance, banking and investments, travel and construction. The CC takes the initiative to bring up issues, for example, through taking issues to court.

199. The Consumers International Model Law for Consumer Protection in Africa421 provides for:
(a) The establishment of consumer organizations and their participation in decision making;422

420 In June 2005, CCAAC issued its Final Report on “Principles for the Appointment of Consumer Representatives: A Process for Governments and Industry”, which ensures that consumers and their interests are appropriately represented on government and industry decision-making and advisory bodies.

421 Harare, Zimbabwe, May 1996.

422 Section 27 thereof reads as follows:
(b) The establishment of a National Consumer Council as an autonomous body, which shall:

i) coordinate consumer activities and nominate consumer representatives to represent consumers in the decision making processes affecting consumers;

ii) carry out, promote or participate in consumers education programs and activities;

iii) disseminate consumer information;

iv) conduct or commission research on consumer issues with a view to proposing measures to address the issues;

v) provide advice to consumers on their rights and responsibilities under the appropriate laws;

vi) create or facilitate the establishment of conflict resolution mechanisms on consumer issues;

vii) formulate and submit to the Minister policy and legislative proposals in the interest of consumers;

27. (i) Consumers shall have the right and freedom to form voluntary, autonomous and independent consumer associations or organizations. They shall participate in formal and informal State and other decision making structures individually or collectively through representation in governmental and quasi-governmental administrative and policy making bodies, amongst others.

(ii) In order to realise or participate in the promotion and defense of the rights provided for under this Law, the consumer associations shall:

(a) be entirely uninterested in the promotion of partisan trade or partisan political concerns;

(b) be a not-for-profit association;

(c) not accept commercial advertisements in their publications; and

(d) not permit commercial exploitation of the information and advise given to Consumers;

(iii) It shall be the purpose of consumer associations, among others:

(a) to promote and protect consumer rights and interests;

(b) to represent the individual or collective interests of consumers before judicial or administrative authorities by pursuing appropriate actions, remedies, formalities or things;

(c) to represent the interests of consumers before the State or public and private sector providers or suppliers;

(d) to collect, process and disseminate objective information on the goods and services which exist in the market;

(e) to conduct consumer training and education programmes;

(f) to do anything crucial for or incidental to the promotion and protection of consumer rights and interests.

(iv) “Consumer Association”, in the context of this Article, means any organization constituted by consumers whether acting as individuals or groups and whether such groups are incorporated or not regardless of any economic, trade or political interest, whose purpose is to guarantee or facilitate the protection and defense of consumers and promote consumer information, education, representation and the respect for consumer rights.
viii) consider and examine and, where necessary, advise the Minister on the modification, consolidation or updating of legislation providing protection to consumers in the areas covered under, or related to, this Law; 
ix) investigate any complaint received regarding consumer protection and, where appropriate, refer the complaint to the appropriate competent authority and ensure that action is taken or petition so that action may be taken by the competent authority to whom the complaint has been referred;  
x) make available to consumers general information affecting the interests of consumers; 
xi) encourage the development of organizations and associations established for the purpose of furthering the interests of consumers and to liaise and consult with them on the development of appropriate consumer policies; 
xi) liaise with consumer organizations, competent authorities on consumer affairs and consumer protection groups locally and abroad to exchange information on consumer issues with such bodies; and 
xxiii) do anything or all things that are necessary, expedient or convenient for or in connection with the performance of its functions; 

(c) Consumer education as an integral part of the basic curriculum of the formal and informal educational system.  

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423 Section 29 of the Model Law provides that consumer education and information shall include:- (a) supporting activities for training and informing consumers both at formal and informal levels; (b) allowing or enabling consumer groups to disseminate or broadcast information on consumer issues; (c) supporting the mass media in publishing, broadcasting and disseminating consumer information and providing the same with the necessary skills, funds, equipment and facilities; (d) facilitating the development and dissemination of special programmes for the benefit of illiterate, physically and mentally disabled and disadvantaged groups. Consumer education and information programs shall deal with matters such as (a) health; (b) nutrition and the prevention of water-borne and food-borne diseases and food adulteration; (c) product safety and hazards; (d) product labelling; (e) information on weights and measures, prices and quality; availability of basic necessities; and environmental pollution; and (f) relevant consumer legislation and law on how to obtain redress, and agencies and associations dealing with consumer protection.
200. Section 77 of the South African Consumer Protection Act 2008 makes provision for the National Consumer Commission to co-operate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group:

(a) Consumer advice and education activities and consumer-related publications;
(b) Research, market monitoring, surveillance and reporting;
(c) Promotion of consumer rights and advocacy of consumer interests;
(d) Representation of consumers, either specifically or generally, in court;
(e) Alternative dispute resolution through mediation or conciliation; and
(f) Participation in national and international associations, conferences or forums concerned with consumer protection matters.

201. We consider our law should facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests, promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers. We are also of the opinion that a National Consumer Council should be established and the Prices and Consumer Protection Advisory Committee Act repealed.
Consumer Redress Mechanisms

202. Consumer empowerment relies upon consumers having the confidence that they will have access to redress should things go wrong. In most jurisdictions, it has been recognized there are a number of formidable barriers to a consumer obtaining relief in the face of a supplier who is unwilling to fulfil its commitments, in particular when the claim is relatively of small value compared with potential litigation costs.

A number of different ways have been devised in Consumer protection regimes to assist consumers in asserting their rights: (a) Provision of simple, low-cost Alternative Dispute Resolution (ADR) mechanisms; (b) Simplification of court processes - flexible and expedited small claims procedures - to reduce the costs, risk and time involved in making a claim; and (c) Provision of collective action claims involving a large number of consumers.

203. There is broad consensus internationally as to the need for ADR procedures, although the models of ADR differ greatly as between different markets and between countries.

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424 As regards ADR in the EU and other jurisdictions, vide J. Stuyck et al., An Analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report (Katholieke Universiteit Leuven 2007).

425 In UK, there is plethora of ombudsman/ADR schemes [vide S. Brooker, Lessons from Ombudsmania (NCC London 2008)].

In Australia, the Banking and Financial Services Ombudsman (BFSO) provides for a free and independent dispute resolution service. It can consider a dispute which relates to any act or omission by a financial services provider, in relation to financial services in Australia, or any act or omission by a financial services provider relating to confidentiality, and, in the case of an individual disputant, privacy. The Consumer Complaint Board in Denmark deals with business to consumer disputes is a public ADR scheme which acts as a stop-gap where there is no (approved) private ADR provision. Denmark also has a Consumer Ombudsman, who monitors primarily business compliance with the Marketing Practices Act, and only intervenes in cases of harm to the collective interest of consumers, and does not have power to settle individual disputes.

In South Africa, section 70(1) of the Consumer Protection Act provides that 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. An “alternative dispute resolution agent” is defined as (a) an ombud with jurisdiction; (b) an industry ombud accredited in terms of section 82(6) (where there exists an industry code providing for alternative dispute resolution between a person conducting business within an industry and consumers); or (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.
Alternative dispute resolution (ADR) covers a wide range of different redress mechanisms which are used in the alternative to private enforcement by individual (or group) litigation through the ordinary courts. It can be expressed as a spectrum or continuum ranging from bilateral consumer-business negotiation, mediation through third-party intermediaries, to full-scale adjudication. It may be further sub-divided according, for example, to whether it is voluntary or compulsory, or binding or non-binding. In many ways, from the point of view of the end user, the labels attached to ADR processes are unimportant, in contrast to the accessibility of the process. In markets which are broadly competitive, there is an alignment of the interests of firms and consumers in seeking to avoid and resolve disputes without recourse to law, with all of its attendant costs and delays. Furthermore, firms in such markets have an interest in protecting their reputation, seeing the resolution of complaints as an important parameter of competition. Direct bilateral negotiations, while being the most efficient means of redress for consumers, cannot be relied upon in respect of certain practices which involve bad faith or fraud. Nevertheless, there is clear evidence that consumers are far more likely to approach a trader directly to resolve than be willing to approach a third party. In recognition of this fact, many larger firms have internal complaints handling systems, and the use of such systems is often a pre-condition of the use of external schemes.

The aim of the ADR mechanisms is always the same: to provide an easily accessible, cost-efficient, prompt dispute resolution procedure for consumers in their disputes with businesses. Most ADR mechanisms are more accessible to consumers than actions through the ordinary courts. Compared with ordinary court procedures, ADR mechanisms - such as a mediator, a complaints procedure through an administrative agency or an ombudsman scheme - are characterized by greater flexibility, shorter

duration, and lower costs. These mechanisms are particularly important in markets which demonstrate low levels of consumer satisfaction.\footnote{Vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], \textit{Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries} [Dec 2008] at p. 70.}

204. In many jurisdictions - given the relatively small monetary value associated with consumer claims and the need for flexible and expedited small claims procedures for consumers - a small claims procedure has been devised.\footnote{As to consumers’ possibilities for civil redress in form of small claims across a number of countries, vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], \textit{Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries} [Dec 2008] at pp. 256-261: (a) In the UK, consumers can take action in the civil courts when the law gives individual rights of redress or when there is a breach of contract. Consumers can seek civil redress in a County Court or the High Court. Where the amount in dispute (the value of the claim) is £5000 or below, it can be dealt with through the County Court’s small claims procedure. Ultimately, it is up to the judge to decide whether the claim will be dealt in the ‘small claims track’. The average duration of the procedure is around six months. (b) In Australia, consumers are able to use a small claims procedure where the value of the claim is AUD25000 to 50000 (approximately £11500 – £23000) depending on the state. In the Australian provinces of New South Wales, Victoria, Queensland and Western Australia this procedure is applied in separate small claims courts. The majority of cases finish within 35 days from filing the case. It costs consumers approximately £20 to file a complaint. (c) Canada also provides small claims procedures. Some provinces of Canada have such procedures available in separate courts. It costs consumers CAD50 or more for filing a case which may act as a barrier for some consumers. Depending on the province, claims of up to CAD7000 (approximately £3500) can be resolved through the small claims procedure. The duration of the procedure is approximately six months.} The aim of the small claims procedure has been to provide a flexible, cheaper, faster and less formal procedure than ordinary civil court procedures.\footnote{For a comparative study, vide J. Stuyck et al., \textit{An Analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings}, Final Report (Katholieke Universiteit Leuven 2007), Chapter 4. Vide also C.J. Whelan (ed.), \textit{Small claims courts: A comparative study} (Clarendon Press Oxford 1990).} In consequence, consumers have better access to justice to resolve small disputes and obtain redress at a cost and burden which is not disproportionate to the value of their claim.

These procedures represent a trade-off between efficiency concerns, on the one hand, and the need for due process, on the other hand. The flexibility of such procedures varies between jurisdictions, and the provision of such mechanisms is sometimes obviated by the provision of consumer specific arbitration and mediation schemes,
which can therefore be viewed as close substitutes. Indeed, in many jurisdictions such procedures often involve the judge engaging in conciliation of the parties.

205. Small claims procedures may not be appropriate for very small claims affecting a large number of consumers, and so mechanisms for group litigation have been regarded as more appropriate in such instances.

There are two main justifications for facilitating group litigation: (a) providing compensation for those harmed by infringements of the consumer protection laws (but who would not have an incentive to litigate individually); (b) deterring infringement (which is particularly important if there are insufficient resources available for public enforcement). In respect of compensation, class actions increase the leverage of consumers to obtain settlements from defendants, while also providing an efficient means of redress for consumers. Group litigation mechanisms have the disadvantage, however, of taking the litigation out of the hands of the plaintiffs, and it is generally accepted that mechanisms need to be in place to ensure that plaintiffs’ interests are protected. Furthermore, where there is a strong public enforcement regime, the role and significance of group litigation is less important.

206. There is a great diversity internationally when it comes to the provision of collective action. Collective action exists in different forms.

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431 Vide Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008] at pp. 44-45, 159-161.

432 Vide J. Stuyck et al., An Analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, Final Report (Katholieke Universiteit Leuven 2007), Chapter 5. See also Report prepared for BERR [Department for Business Enterprise & Regulatory Reform] by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries [Dec 2008] at pp. 263 seq.
The UK currently does not recognize the existence of class actions, but the Civil Procedure Rules do allow for group litigation and for representative claims where more than one person has the same interest in a claim.\(^{433}\) Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim. It may only be enforced by or against a person who is not a party to the claim with the permission of the court. In private law cases there are no procedures for representative organisations, such as a consumer group, to bring proceedings on behalf of people whose collective interests they support or on behalf of an unnamed individual.\(^{434}\)

In Canada class actions are available in some of the provinces and territories, for example British Columbia, Ontario and Quebec. Litigation by this route can be pursued by consumer groups.

In the US, class actions are available for consumers. The US class action is an action brought by a person, on behalf of a class of persons, who are not individually represented by the acting party but are deemed to be represented by it, unless they opt-out.\(^{435}\)

\(^{433}\) The mechanism of the ‘group litigation order’ (GLO) has been provided for by the Civil Procedure Rules Part 19.III. A ‘Group Litigation Order’ (GLO) means an order providing for the case management of claims which give rise to common or related issues of fact or law (GLO issues). Once the order is made, a register of claims is established and the judgments/orders of the court in relation to ‘group issues’ are binding on all parties to the claim on the register.

\(^{434}\) Such claims are possible by certain designated bodies before the Competition Appeal Tribunal for harm or loss suffered as a result of an infringement of UK or EC competition law (\textit{Competition Act 1998}, s 47B). Regarding Government proposals to reform the law in UK, vide “Representative Actions in Consumer Protection legislation: Consultation” [DTI, July 2006].

\(^{435}\) Given this there are high standards of standing in class actions. According to the Federal Rules of Civil Procedure, which prescribe the preconditions of class actions, questions of law or fact common to all members of the class should predominate over individual questions. Class action must be ‘manageable’ and superior to other methods of litigation, and since the judgment has \textit{res judicata} effect for all class members unless they opt-out, all potential members should be identified and given notice about the litigation. Even if these procedural hurdles are cleared and the class is successfully certified, substantive analysis and distribution of damages in a class action can be problematic. In the context of class actions, proof of damages on an aggregate basis is not sufficient, and verification of the individual damages is required.
Class actions were introduced in Denmark in January 2008, which have some but not all of the characteristics of US type class actions. In order for a claim to be brought, the court must be satisfied that collective redress is the best procedural way to examine the claim. The claims in the class need not be completely identical, but they must arise from the same factual circumstances and have the same legal basis. Class actions are conducted by a class representative (appointed by the court) on behalf of the class. The representative may be a member of the class, an association, private institution or other organization when the action falls within the framework of the organization’s object (for example, a consumer organization), or certain public authorities. In class actions under the opt-out arrangement, meaning that the class members automatically join the class unless they opt-out, the only eligible class representative is the Consumer Ombudsman.

German civil procedural law does not provide for US-type class actions. However, it diverges from the principle of individual rights enforcement and allows consumer associations to pursue collective claims (Verbandsklagen) in the general interest of consumers in selected areas of law. The German Civil Law also provides for the possibility of facilitating claims and bundling resources so that potential plaintiffs can join an existing action if there is a common factual and legal basis. Consumers are allowed to cede their claims to consumer associations who may bring actions on their behalf.

Under section 78(1) of the South African Consumer Protection Act 2008, an accredited consumer protection group may (a) commence or undertake any act to

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437 Vide Report prepared for BERR by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* [Dec 2008] at p. 264.
protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in the Act; and (b) intervene in any matter before any forum contemplated in the Act, if the interests of consumers represented by that group are not otherwise adequately represented in that forum.

207. In our legal system, a “small claims procedure” before a district court was introduced by Act No. 4 of 1999 following the recommendation of the Mackay Report, but unfortunately this procedure is mainly resorted to by businesses rather than by consumers. Our law is silent regarding “alternative dispute resolution mechanisms” or any form of “collective actions”, by or on behalf of consumers, as redress mechanisms for consumer grievances. We consider therefore that the Consumer Redress mechanisms in our law should be strengthened.

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438 Following the recommendation of the Mackay Report [Paragraphs 1.4 to 1.6 of the Report] that a summary procedure be devised to deal with small claims so that these cases be disposed of in fairly short period of time without the parties having to incur much expenditure, changes were effected to our law by Act No. 4 of 1999. Section 104A of the Courts Act now provides that, notwithstanding any other enactment, a District Court shall have jurisdiction in any civil action, where the sum claimed or matter in dispute does not exceed Rs 25,000 and the case has been lodged under Part IIA of the District and Intermediate Courts (Civil Jurisdiction) Act, to hear and determine the action in accordance with the procedure set out under that part. Where a claim is for an amount of more than Rs 25,000, a claimant may abandon the excess, and the Court shall have jurisdiction to hear and determine the claim.
(11) **Public Enforcement of Consumer Laws**

208. Where there is a consumer interest that should be protected by law, policy-makers need to consider whether that interest should be protected through public enforcement and sanctions or through private claims and redress.\(^{439}\)

209. There is a diversity of approaches to the enforcement of consumer protection legislation.\(^{440}\) In some jurisdictions there is almost no administrative intervention and reliance is placed predominantly on consumer initiative and alternative dispute resolution (the Netherlands); some confer penalty-imposing powers on administrative agencies (Belgium); and others largely depend upon either civil justice (Australia) or criminal justice proceedings for the infliction of significant sanctions (United Kingdom).\(^{441}\) These differences reflect, to some extent at least, varying circumstances and, in particular, different legal traditions and cultures. Civil

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\(^{439}\) On this aspect of policy-making vide New Zealand, Ministry for Consumer Affairs, *Consumer Policy Tools – Background Paper to Creating Confident Consumers* [May 2003].


(a) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and, for the purposes of punishment and deterrence, there is reliance on the possibility of penalties being imposed as a result of criminal justice proceedings;

(b) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies but efforts to secure compliance are focused on agencies taking proceedings against traders in the civil courts, although this does not preclude the possibility of criminal prosecutions;

(c) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and they themselves have the power to impose (generally modest) financial penalties (this does not preclude the possibility of criminal prosecutions or civil proceedings);

(d) Jurisdictions in which a public institution (such as an Ombudsman) exists to receive complaints from consumers and third parties and that agency may be instrumental in initiating proceedings in a civil court or referring the case for prosecution in the criminal courts;

(e) Jurisdictions in which there is little or no monitoring of traders by an administrative agency and it is mainly left to the consumers, aided by voluntary or publicly-funded consumer associations, to enforce private rights against defaulting traders, or else to resort to self-regulatory dispute settlement processes. Administrative and/or criminal proceedings by a residual, public enforcement agency are taken only in exceptional cases.

remedies and ADR may for example work well in a country like the Netherlands with a long tradition of consumer activism, but may be less effective in other legal systems.

210. In the UK, the OFT is responsible for enforcement at the administrative level together with Local Authority Trading Standards Services (TSSs) and, in certain respects, other designated bodies, for example, the National Consumer Council (NCC). In respect of civil orders, under the Enterprise Act 2002, Enforcement Orders can be obtained from the court to stop infringements which harm the collective interests of consumers. The Regulatory Enforcement and Sanctions Act 2008 has increased significantly the enforcement powers of the OFT and the TSSs in respect of criminal infringements of consumer law by allowing them to seek to impose administrative penalties. If and when they do so successfully, the OFT and TSSs (among others) have the power to issue fixed and variable penalties to firms who break the law as an alternative to prosecution. There is no involvement of the court, save for the right of an appeal against a penalty. In terms of criminal powers, Local Authority TSSs (and the Department of Trade and Investment in Northern Ireland) can investigate and prosecute criminal offences, and the OFT has the power to prosecute in relation to unfair commercial practices.

211. Under the Trade Practices Act 1974 (TPA), the Australian Competition and Consumer commission (ACCC) (a) can compel provision of information, (b) require evidence to be given on oath, and (c) may apply to the Federal Court to seek orders to grant damages, make declarations, secure enforceable undertakings and impose injunctions.

A probation order is one of the civil remedies available to the ACCC. A probation order may require an infringing firm to establish a compliance program, an education and training program, or direct a firm to revise the internal operations of its business. Compliance programs provide a preventative mechanism enabling companies to
identify, remedy and reduce the risk of subsequent trade practices breaches. The ACCC has a dedicated team that monitors compliance with court orders and compliance programs, and breach of an order can give rise to proceedings for contempt of court, leading to imprisonment or a very hefty fine. Criminal sanctions are available under the TPA. Emphasis is put, nevertheless, on reputational damage, and there is the possibility of significant financial penalties (a maximum AUD200000 for corporations and AUD40000 for individuals).

Criminal sanctions are reserved for the most serious contraventions of the law and, because of the additional time and complexity involved they are not generally considered an effective mechanism for achieving timely consumer redress.

212. Under the Australian Consumer Law, which shall come into force on 1 January 2011, provision is made for enhanced enforcement powers and redress mechanisms. The law provides accessible and timely redress where consumer detriment has occurred; and promotes proportionate, risk-based enforcement. Regulators are empowered to take representative actions on behalf of consumers, whether or not they are parties to the proceedings. Provision is made inter alia for civil pecuniary penalties (including recovery of profits from an unlawful activity), banning orders, substantiation notices for questionable claims made to consumers, public warning notices, adverse publicity orders, and an order disqualifying a person from managing corporations.

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442 Sections 239 to 241.

443 Sections 224 to 231.

444 Sections 109 to 121.

445 Sections 219 to 222.

446 Section 223.

447 Section 247.

448 Section 248.
213. Under the Barbados Consumer Protection Act 2003, the Fair Trading Commission may (a) serve on any person a "prohibition notice", prohibiting that person from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, any relevant goods which the Commission considers are unsafe;\(^{449}\) (b) serve a notice on any person requiring that person to furnish such information as is so specified or to produce such records as are specified;\(^{450}\) (c) accept a written undertaking given by a person in connection with a matter in relation to which the Commission has a function under the Act and enforce such undertaking by the High Court;\(^{451}\) (d) apply to the High Court for an injunction restraining a person from engaging in conduct that constitutes or would constitute a breach of the provisions of the Act.\(^{452}\)

214. The 2008 Report of the Centre for Competition Policy [University of East Anglia, Norwich] on the comparison of consumer empowerment regimes identified the following benchmarking principles:\(^{453}\)

(a) Administrative enforcement has an important role to play by correcting for the under-use of redress mechanisms. Penalties should be used to change the behaviour of the offender, and should be transparent, proportionate and fair.

\(^{449}\) Section 55(1)(a) of the Act.

\(^{450}\) Section 56(1) of the Act.

\(^{451}\) Under section 57(1) of the Act.

\(^{452}\) Section 58(1) of the Act.

\(^{453}\) Report prepared for BERR by the ESRC Centre for Competition Policy [University of East Anglia, Norwich], *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* [Dec 2008] at pp. 45-49.
Enforcement agencies should have a hierarchy of sanctions, with the ability to escalate sanctions in the face of non-compliance by firms;\textsuperscript{454}

(b) Enforcement resources should be targeted appropriately. Transparency both in terms of enforcement policy and in terms of monitoring outcomes can increase both compliance and the efficient use of enforcement resources;\textsuperscript{455}

(c) The powers of an agency (or agencies) should include an ability to deal with systemic consumer detriment occurring in individual markets;\textsuperscript{456}

\textsuperscript{454}Redress mechanisms are unlikely to be sufficient to secure firm compliance with the law where consumer transactions tend to be small relative to the costs of redress and consumers may suffer harms which are incapable of being compensated by a monetary award, and the harmful behaviour of the firm may produce externalities for society. Penalties should be aimed at securing compliance which depends upon having the right enforcement tools and using them responsively. In line with the principles of better regulation, firm compliance is likely to be optimized if penalties are seen as proportionate and fair. The use of tough but blunt and inflexible punishment devices can be counter-productive: such a strategy will undermine the goodwill of firms when they are motivated by a sense of responsibility, and lacks credibility in all but the most serious cases of infringement. Conversely, a strategy based purely on persuasion and self-regulation may be exploited by firms. As has been argued convincingly by I. Aires and J Braithwaite \cite{I. Aires and J Braithwaite \textit{Responsive Regulation: Transcending the Deregulation Debate} (OUP Oxford 1992), chapter 2}, a successful strategy of enforcement depends upon both “speaking softly” and “carrying big sticks”, and crucially a hierarchy of sanctions which regulators can escalate in the face of non-compliance by firms. Court-based enforcement powers can be expensive to impose, and criminal penalties have been seen to be ineffective because the penalties have been insufficient to deter infringement. A system of administrative penalties (which can be imposed without the sanction of the court) can play an important role in securing compliance.

\textsuperscript{455}In any policy context in which resources are finite, one might expect a policymaker or regulator to allocate resources to where the risk of harm is greatest, and that the cost and the benefits of a regulatory (non-)intervention be taken into account, including any attendant costs to business and the wider economy. The Hampton Review \cite{P. Hampton, \textit{Reducing administrative burdens: Effective inspection and enforcement} (London: HM Treasury, 2005)} made a number of recommendations on how to focus resources best, including: ensuring that the regulatory burden falls most on the highest-risk business and conversely least on those with the best records of compliance, and making better provision of advice to business in order to promote compliance. An effective consumer regime is dependent crucially upon traders being aware of their obligations. In many instances, reputation will assert a powerful (perhaps the most powerful) incentive upon firms to comply with consumer legislation. Both Hampton and the Macrory Review \cite{R.B. Macrory, \textit{Regulatory Justice: Making Sanctions Effective, Final Report} (London: Cabinet Office, 2006)} placed emphasis on the need for transparency in the form of monitoring outcomes. As a general proposition, one would expect data on consumer complaints to provide important intelligence on the possibility of systemic market problems. It should be noted, however, that the use of raw data on complaints may be an important indicator of consumer dissatisfaction in a particular market, while at the same time being an indicator of high levels of consumer empowerment (consumers being aware of their rights and of redress mechanisms). Enforcement agencies should have targets and mechanisms in place for the measuring of outcomes of interventions. Measuring outcomes is “essentially concerned with the expected consequences and goals of the regulator’s enforcement activity rather than an account of the amount and type of enforcement activity it undertakes”. Transparency in enforcement – in particular monitoring of outcomes – increases the accountability of public agencies, and ensures that enforcement resources are being targeted to where harm to consumers is greatest.

\textsuperscript{456}An effective consumer empowerment regime requires that there are mechanisms in place to deal with systemic market issues. There are several strong justifications for this. First, the cause of consumer detriment may be at a market level rather than a firm level (and there may be no specific breach of the consumer laws). Second, the use of tightly defined and focused ex ante remedies (consequent upon a market inquiry) may avoid the problem of business transactions tending to be small relative to the costs of redress and consumers may suffer harms which are incapable of being compensated by a monetary award, and the harmful behaviour of the firm may produce externalities for society.

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(d) In a multiple-agency setting, mechanisms should be in place to ensure that there is co-ordination and consistency of approach,\textsuperscript{457} and

(e) Self-regulatory mechanisms can be a cost-effective means of securing compliance, but self-regulation must be underpinned by effective and credible threats of intervention should it fail to perform in the interests of consumers.\textsuperscript{458}


(1) The monitoring of traders’ behaviour by public authorities, enhanced by a system of risk-assessment, is likely to be cost-effective where there is not within the jurisdiction a significant culture of pro-active complaints by consumers and consumer associations or where the contravention is unlikely to be easily detected by consumers themselves;

\textsuperscript{457} As a general proposition, regulatory tasks should be allocated to those best placed to make decisions. Some diversity of enforcement may be desirable, but these benefits should be balanced carefully against the needs to conserve scarce enforcement resources (for example, by avoiding duplication), target such resources appropriately, and avoid the imposition of unnecessary costs on business (through, for example, being subject to more than one agency in respect of the same activity).

\textsuperscript{458} There are a number of potential benefits to self-regulation, including the reduction of agency costs, a more responsive regime (assuming that self-regulatory bodies have greater informational advantages than do public agencies), and the possibility of providing more accessible redress mechanisms for consumers. There are, however, a number of potential disadvantages, for example, self-regulation can lead to excessively high standards which act as barriers to entry. Self-regulation requires the credible threat of state intervention should the self-regulatory mechanisms fail or under-perform. Insofar as soft-law mechanisms [for example industry codes] provide clarity and guidance to firms and consumers regarding the interpretation of the law, they may be effective tools of consumer empowerment. As such, they would increase transparency. However, it must also be borne in mind that adopting and monitoring compliance with these will entail costs. For these mechanisms to be efficient such costs should be outweighed by the benefits which can only arise when these are complied with by the undertakings and/or they provide clarity and awareness of the law when this cannot be achieved in any more efficient way. If the soft-law mechanisms do not provide any of these benefits, then they may actually be counter-productive by adding more rules to an already complicated body of law and by increasing the cost of the regime.
(2) Enforcement agencies dealing with alleged contraventions should have the power to choose between dismissing a case (with or without a warning) and initiating procedures for penalties;

(3) There are powerful cost-effectiveness arguments for allowing administrative agencies themselves to impose some form of financial penalty. However there are also significant risks associated with such a regime, particularly the risk of regulatory error. Detailed analysis of any administrative penalties regime would need to be undertaken with respect to each jurisdiction bearing in mind its judicial and administrative framework. If administrative penalties are introduced, it seems preferable that the language typically associated with the criminal process (for example “fine” or “penalty”) should be avoided. It is also considered that fixed penalties should be used only for very minor offences. For others, the agency should have a discretion, up to a limit;

(4) A civil injunction or enforcement order is justified where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential;

(5) In general criminal prosecutions should be reserved for repeat offenders who cannot be deterred by other instruments, as well as for those whose conduct is regarded as so repugnant morally as to justify such proceedings being taken, irrespective of deterrence considerations;

(6) As regards sanctions available as a consequence of criminal or civil proceedings, it is considered that the imposition of a financial penalty, determined by reference to the nature of the contravention and the trader’s circumstances, is likely to be cost-effective in inducing compliance in many cases. However, in appropriate cases, particularly where that penalty is insufficiently large for deterrence purposes, the likelihood of compliance can be enhanced by compensation orders, orders for the recovery of administrative costs, the disgorgement of profits and a policy of “naming and shaming”; also a “probation order” as developed in Australia, if used selectively. In some extreme cases, imprisonment may be justified as an ultimate sanction, but the suspension or revocation of a trading licence, if applicable, is likely to be much more cost-
The same may apply to a “cease trading” order where the scope of the order can be defined with sufficient precision;

(7) Consideration ought to be given to cost-effective possibilities for using public law determinations that a trader has contravened consumer protection regulation to facilitate the enforcement of private rights; and

(8) It is preferable for the right (if any) of third parties to initiate public enforcement proceedings for the imposition of sanctions to be subject to approval by a relevant public agency.

216. In Mauritius, consumer protection legislation places much reliance on recourse to the criminal justice system for securing compliance with consumer rights. In our view, an alternative system of civil sanctions needs to be introduced in our law in order to set up a modern and targeted sanctioning regime that would enable the Consumer Protection Unit of the Ministry, as enforcement authority, to match the sanctions to the circumstances of different cases.\(^{459}\) The Consumer Protection Unit should have the discretion to choose the approach that is best suited to the offence or breach of consumer legislation and the circumstances in which it was committed.\(^{460}\)

\(^{459}\) Section 5(1) of the Consumer Protection Act already confers on the enforcement authority the power to serve on any person a prohibition notice prohibiting that person from supplying any goods which in its opinion are not safe for use or consumption.

\(^{460}\) Regulatory compliance is best secured when an enforcement agency uses persuasion and negotiation techniques rather than enforcement measures. For these techniques to be effective, however, enforcement agencies must have at their disposal a range of escalating sanctions which can be used if an individual or business chooses not to cooperate or when the contravention represents a serious breach of the legislation. Non-compliance is less attractive for individuals and businesses if the enforcement agency is able to escalate the sanction should persuasion be ineffective or inappropriate given the nature of the alleged breach. The process whereby enforcement agencies can escalate the level of sanctions that they use is often depicted by way of the pyramid of responsive regulation. At the base of the pyramid are the most frequently used and least severe sanctions while the most severe sanctions are found at the peak. According to this model, enforcement agencies that have a number of sanctions at their disposal, as depicted by a tall pyramid, are the most effective. This is because the sanctions at the peak can exert pressure which can motivate individuals and businesses to voluntarily comply – the threat of a more severe form of punishment encourages individuals and businesses to comply.

(V) **Concluding Observations: Proposals for Reform of the Mauritius Consumer Protection Framework**

217. A new Consumer Protection Regime should be put in place. We have reproduced as an Annex to this Report draft legislation, which would help strengthen the existing regime.

The overall objectives of the new legislation should be to promote and advance the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides adequate safeguards to vulnerable consumers.

To that end, legislation needs to be introduced which should make provision for

(a) Consumer rights, including the freedom of consumers to associate and form groups to advocate and promote their common interests;
(b) Standards of consumer information so as to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;
(c) Consumer guarantees in respect of the supply of goods and services;
(d) The protection of consumers from hazards to their well-being and safety, and product liability;
(e) The prohibition of unfair terms in consumer contracts;
(f) The prohibition of unfair business practices;
(g) The regulation of distance selling, doorstep selling and unsolicited consumer transactions;
(h) The regulation of consumer credit;
(i) The establishment and operation of a National Consumer Council, which would encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers;
(j) An effective enforcement framework relating to consumer transactions and agreements; and

(k) An accessible, effective and efficient system of redress for consumers, including a mechanism for consensual resolution of disputes arising from consumer transactions.

218. The consumer law should protect both natural persons and legal entities when goods and services are supplied to them, as well as (a) any user of such goods, or (b) any beneficiary of such services. However, goods acquired or the services availed of must not have been for a commercial purpose. Special protection should be afforded to children and other vulnerable consumers.

219. The following rights should be guaranteed to consumers:

(a) Right to be protected against products, production processes and services, which are hazardous to health or life;

(b) Right of access to basic goods and services;

(c) Right to true, sufficient, clear and timely information concerning goods and services;

(d) Right to choose and to return unsafe or defective goods;

(e) Right to fair, nondiscriminatory treatment by suppliers of goods and services;

(f) Right to prompt, timely and adequate compensation for any damages caused by the supply of goods and services;

(g) Right to be heard and to make complaints to the appropriate authority for redress against unfair practices;

(h) Right to associate and join or form consumer unions and associations;

(i) Right to consumer education.

Retaliatory measures against a consumer who exercises his rights should be prohibited.
220. The effectiveness of consumer rights requires when a consumer’s rights have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring, that not only the consumer may seek redress but also any of the following persons:
(a) an authorized person acting on behalf of another person who cannot act in his own name;
(b) a person acting as a member of, or in the interest of, a group or class of affected persons;
(c) an association acting in the interest of its members; or
(d) a person acting in the public interest, with leave of the Court.

221. The State has responsibilities towards consumers.

It should ensure the protection, management, conservation and sustainable utilization of the environment and environmental resources to facilitate the enjoyment by consumers of rights and facilities associated with a clean and healthy environment.

The State should also promote and support the dissemination of consumer education and information in conjunction with local consumer associations and appropriate NGOs. It should also be the responsibility of the State to provide or facilitate the provision of requisite financial and logistical support for the operation of consumer groups and associations.

Consumer education programs and activities could include: supporting activities for training and informing consumers both at formal and informal levels; allowing or enabling consumer groups to disseminate or broadcast information on consumer issues; supporting the mass media in publishing, broadcasting and disseminating consumer information and providing the same with the necessary skills, funds, equipment and facilities; facilitating the development and dissemination of special programs for the benefit of illiterate, physically and mentally disabled and disadvantaged groups.
Consumer education and information programs should deal inter alia with the following matters: product safety and hazards; product labelling; information on weights and measures, prices and quality, availability of basic necessities, and environmental pollution; relevant consumer legislation and law on how to obtain redress, and agencies and associations dealing with consumer protection.

222. The consumer regime should provide for “information standards” to be complied with by any supplier. Every supplier shall provide consumers with true, sufficient, clear and timely information on goods and services offered to enable consumers to make proper and reasonable choices.

A person offering goods or services to a consumer away from his usual place of business (for instance at the customer’s place), or as a hawker, should visibly wear or display a badge or similar identification device that satisfies any prescribed standards, and which enables suitable identification by the consumer.

223. The consumer regime should provide for guarantees to consumers in respect of the supply of goods and services.

224. In respect of the supply of goods, the following guarantees should be provided:

(a) An implied guarantee as to title: that the supplier has a right to sell the goods; that the goods are free from any undisclosed security; and that the consumer, save as otherwise provided, has a right to quiet possession of the goods.

(b) An implied guarantee as to acceptable quality: that the goods are fit for all the purposes for which goods of the type in question are commonly supplied, acceptable in appearance and finish, free from minor defects, safe, and durable.

The goods must be such that a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to the nature of the goods, the price,
any statements made about the goods on any packaging or label on the goods, and any representation made about the goods by the supplier or the manufacturer, and all other relevant circumstances of the supply of the goods. Where any defects in the goods have been specifically drawn to the consumer's attention before he agrees to the supply, then, the goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality by reason only of those defects. This shall also be the case when the goods have been used in a manner or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer can expect to obtain from the goods. In order to protect consumers from dishonest suppliers, there should be a legal presumption that goods have been used in a manner or to an extent which is consistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods.

(c) An implied guarantee as to fitness for a particular purpose, where the consumer makes known, expressly or by implication, to the supplier the purpose for which the goods are being acquired.

(d) An implied guarantee that goods comply with description when they are supplied by description to a consumer.

(e) An implied guarantee that goods comply with sample when they are supplied to a consumer by reference to a sample or demonstration model.

(f) An implied guarantee as to price: that the consumer shall not be liable to pay to the supplier more than the reasonable price of the goods.

(g) An implied guarantee as to Repairs and Spare Parts: that the manufacturer and the supplier will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied, unless the consumer has otherwise been notified.

Provision should be made that any express guarantee given by a manufacturer (for instance as to quality, performance or characteristics of the goods) binds the latter.
There should also be provisions as to availability of redress against suppliers and manufacturers where goods fail to comply with the guarantees (including the right to reject the goods).

225. In respect of the supply of services, the following guarantees should be provided:
(a) An implied guarantee that the services will be carried out with reasonable care and skill;
(b) An implied guarantee as to fitness for any particular purpose where the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the services, the particular purpose for which the services are required or the result that the consumer desires to achieve;
(c) An implied guarantee as to completion within a reasonable time;
(d) An implied guarantee as to price: that the consumer shall not be liable to pay to the supplier more than the reasonable price for the services.

Provision should also be made as to availability of redress against suppliers where services or product resulting from the services fail to comply with any of the implied guarantees.

226. Safety standards that have to be complied with when goods and services are supplied should be provided.

The Minister should have the power to prescribe safety standards in respect of any goods or class of goods, any services or class of services; and he should also be able to prescribe different safety standards for different goods or services, or classes of goods or services. The safety standard in relation to goods could relate to any or all of the following matters: the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods; the testing of the goods during or after manufacture or processing; the form and content of markings, warnings or instructions to accompany the goods.
The Minister should also have the power, by order published in the Gazette, to declare any goods or any class of goods to be prohibited goods where the goods or goods of that class have caused or are likely to cause injury to any person or property or is otherwise unsafe.

Provision should be made that, where no safety standard has been prescribed, the person supplying or offering to supply the goods or services shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods or services concerned.

The courts should be empowered to grant ancillary relief to any person who has suffered loss or damage as a result of a breach of safety standards.

227. Provision must be made for liability in respect of defective products supplied to consumers. There would be a defect in a product where its safety is not such as a person is generally entitled to expect from the circumstances.

228. The consumer regime must make provision for unfair contract terms in consumer agreements.

Contractual clauses or stipulations should be null and void and have no effect whatsoever where they purport to or in fact:-

(a) exempt, exclude, reduce or limit the responsibility or liability of providers or suppliers for defects, deficiency, or inadequacy of any nature of the good supplied or the service rendered;

(b) imply a waiver of the rights vested in the consumer pursuant to Law or where they purport to or in fact limit the exercise thereof;

(c) place, shift or reverse the burden of proof against the consumer for defects, deficiencies or inadequacies which are not immediately apparent to the consumer;
(d) impose the compulsory referral to arbitration pursuant to a unilateral arbitration clause; or

(e) authorize the provider or supplier to unilaterally cancel, repudiate or rescind the contract.

Contractual terms or conditions which are unfair, unreasonable or unjust, to the consumers should also be null and void.

A transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, should be treated as unfair, unreasonable or unjust if (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; (c) the consumer relied upon a false, misleading or deceptive representation, or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.

Courts should be vested with sufficient powers for them to ensure fair and just conduct, terms and conditions, in respect of consumer transactions.

229. The consumer regime should prohibit in a comprehensive manner unfair commercial practices.

It should be laid down that a commercial practice is unfair if (1) it is contrary to the general principle of good faith in the trader’s field of activity and/or the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers; and (2) it would be likely to cause appreciable impairment of the average consumer’s ability to make an informed choice in relation to the product concerned, and cause the average consumer to make a transactional decision that the average consumer would not otherwise make.
Misleading commercial practices, as well as misleading marketing or advertisement, should be prohibited. These include practices such as omission or concealment of material information, provision of false information or information likely to deceive the average consumer.

Aggressive commercial practices, such as harassment, coercion or undue influence which would likely cause significant impairment of the average consumer’s freedom of choice or conduct and cause the average consumer to make a transactional decision that the average consumer would not otherwise make, should also be prohibited.

Other unfair practices, such as referral selling, pyramid promotional schemes, bait advertising, would also have to be prohibited.

Protection should be afforded to recipients of unsolicited goods or of invoices in respect of unordered goods or services. It must also be expressly provided that agreements with persons lacking legal capacity would be treated as void or voidable.

230. The Minister should have the power to prescribe regulations in respect of distance selling for the purpose of protecting consumers in relation to distance contracts. These are contracts concerning goods or services concluded between a supplier and a consumer under a scheme operated by the supplier, who, for the purposes of the contract, makes exclusive use of one or more means of distance communication up to and including the point at which the contract is concluded.

Distance selling regulations would inter alia contain provisions
(a) regulating the advertising and marketing (including advertising and marketing by mail-order or doorstep selling) of business that is to be conducted by way of distance contracts;
(b) with respect to the information that must be supplied to persons to whom distance contracts are offered;
(c) with respect to the transparency, clarity and fairness of distance contracts;
(d) requiring information to be given to any such person as may be determined by
or under the regulations for the purpose of enabling that person to exercise
any function conferred on him by the regulations;
(e) for the resolution of disputes and differences between parties to distance
contracts, including resolution of such disputes and differences otherwise than
by a court.

231. Provision should be made in respect of consumer credit for responsible lending
conduct. No dealer, under the Hire Purchase and Credit Sale Act, should enter into a
credit contract with a consumer unless he has ascertained the credit contract will
meet the consumer’s requirements and that the consumer has the capacity to fulfill
his obligations under the contract.

232. Provision should be made for the establishment of a National Consumer Council,
composed of representatives of Government, consumer organizations or groups and
NGOs, and business. Its functions shall be to encourage consumer participation in
decision-making processes concerning the marketplace and the interests of
consumers, advise the Minister on research to be conducted on consumer issues,
formulate and submit to the Minister Policy and legislative proposals in the interest
of consumers, and advise the Minister on consumer education programs and
activities.

233. The Consumer Protection Unit should be given the necessary powers to enable it to
perform its functions effectively and efficiently. It should, inter alia, have the power
to obtain information, search premises, and seize incriminating materials. The Unit
should have the power to accept and enforce undertakings. An officer from the Unit
should also be entitled to seek an injunction to restrain a person from engaging in
conduct that constitutes or would constitute a breach of consumer law.
234. Courts should have the power to award compensation, where appropriate, and to issue any appropriate order.

Alternative dispute resolution mechanisms, as well as forms of “collective actions”, by or on behalf of consumers, should be available as redress mechanisms for consumer grievances.

235. We trust our proposals for a new consumer regime will better empower consumers and help them transact in confidence.

With the establishment of a new consumer regime, the operational capability of the Ministry will have to be strengthened: additional resources will have to be put at its disposal. No effort should be spared for the training of staff (both locally and overseas).

The Ministry should also reassess its role. There is a need for research on consumer issues so as to effectively combat consumer detriment.
ANNEX
DRAFT LEGISLATION FOR THE STRENGTHENING OF THE
CONSUMER PROTECTION REGIME

(A) Interpretation Provisions as to meaning of Certain Words

“Consumer” means a person to whom goods or services are supplied, as well as (a) any user of such goods, or (b) any beneficiary of such services. A “consumer” does not include (a) a person who obtains such goods for resale or for any other commercial purpose, or (b) a person who avails of such services for any commercial purposes.

“Consumer agreement” means an agreement between a supplier and a consumer.

“Enforcement Authority” means the Consumer Protection Unit of the Ministry.

“Goods” include all tangible items or articles which are the subject of trade or business.

“Minister” means the Minister to whom responsibility for the subject of consumer protection is assigned.

“Manufacture” includes any artificial process which transforms goods in order to add value to them for the purpose of resale; and includes any operation of packing or repacking not linked to another form of transformation within a single enterprise.

“Manufacturer” means a person who:-
(a) makes or manufactures any goods or parts thereof; or
(b) does not make or manufacture any goods but assembles or fabricates parts thereof made or manufactured by others and claims the end product to be goods manufactured by him or puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer.

“Services” includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service.

“Supplier” means a person who in trade supplies goods or services to another person.

“Supply” includes, in relation to -
(a) goods, supply or resupply by way of sale, exchange, lease, a credit sale agreement, hire or a hire purchase agreement, and giving the goods as a prize or otherwise as a gift;
(b) in relation to services, means to provide, grant or confer.

“Trade” means the production, distribution, sale, transfer, import, export, use or other dealing in goods and includes the provision of services;

“Trader” -
(a) means a person engaged in any trade;
(b) includes the agent of any such person.
(B) Provisions about the State and Consumer Rights

Protection of Consumer Rights

(1) In accordance with the provisions of this Act and any other law, every consumer shall enjoy the following rights:

(a) Right to be protected against products, production processes and services, which are hazardous to health or life;
(b) Right of access to basic goods and services;
(c) Right to true, sufficient, clear and timely information concerning goods and services;
(d) Right to choose and to return unsafe or defective goods;
(e) Right to fair, nondiscriminatory treatment by suppliers of goods and services;
(f) Right to prompt, timely and adequate compensation for any damages caused by the supply of goods and services;
(g) Right to be heard and to make complaints to the appropriate authority for redress against unfair practices;
(h) Right to associate and join or form consumer unions and associations;
(i) Right to consumer education.

(2) 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.

(3) 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, 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.
Protection of Consumer against discriminatory practices

(1) Subject to subsection (3), a supplier of goods or services shall not unfairly—

(a) exclude any person or category of persons from accessing any goods or services offered by the supplier;
(b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;
(c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
(d) supply a different quality of goods or services to any person or category of persons;
(e) charge different prices for any goods or services to any persons or category of persons;
(f) target particular communities or market segments for exclusive, priority or preferential supply of any goods or services; or
(g) exclude a particular community, population or market segment from the supply of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination contemplated in section 16 of the Constitution or section 2 of the Equal Opportunities Act 2008.

(2) Subject to subsection (3), a supplier shall not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds set out in section 16 of the Constitution, or one or more grounds set out in section 2 of the Equal opportunities Act 2008, when—

(a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
(b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
(c) determining any aspect of the cost of a transaction or agreement to the consumer;
(d) interacting with the consumer—
   (i) in the supplier’s place of business, or
   (ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or
(e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
(f) proposing or agreeing the terms and conditions of a transaction or agreement;
(g) assessing or requiring compliance by the person with the terms of a transaction or agreement;
(h) exercising any right of the supplier under a transaction or agreement in terms of this Act or any other consumer legislation;
(i) determining whether to continue, enforce, seek judgment in respect of, or terminate a transaction or agreement; or
(j) determining whether to report, or reporting, any personal information of such person.

(3) A supplier may—
(a) refuse to supply or provide access to any particular goods or services to a minor, or require the consent of a parent, guardian or other responsible adult before supplying or providing access to any particular goods or services to an un-emancipated minor—
   (i) in accordance with any public regulation; or
   (ii) as a reasonable precaution to protect the health, welfare or safety of a minor;
(b) refuse on reasonable grounds to—
   (i) enter into an agreement with a minor for the supply of any goods or services; or
   (ii) continue, or renew, an agreement contemplated in subparagraph (i), unless the supplier has reason to believe that the minor is emancipated;
(c) reasonably designate any facility or service, permanently, or from time to time, for the exclusive use of—
   (i) minors generally;
   (ii) minors who are above or below a specified age, or between specified ages; or
   (iii) adults who have attained a specified age of at least 60 years; or
(d) advertise, offer or agree to supply, or supply, any goods or services at a discounted price solely on the basis that the consumer—
   (i) is a minor who has not yet attained a specified age; or
   (ii) is an adult who has attained a specified age of at least 60 years.
(e) reasonably provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or
(f) offer to supply or provide access to a facility exclusively to persons of one gender;
(g) market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the rest of the population on the basis of a ground of discrimination set out in section 16 of the Constitution or section 2 of the Equal Opportunities Act 2008, if the particular goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers.
Realisation of consumer rights

Any of the following persons may, in the manner provided for in this Act, approach a Court or the Enforcement Authority alleging that a consumer’s rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

(a) a person acting on his own behalf;
(b) a person acting on behalf of another person who cannot act in his own name;
(c) a person acting as a member of, or in the interest of, a group or class of affected persons;
(d) an association acting in the interest of its members; and
(e) a person acting in the public interest, with leave of the Court.

The State and Consumer Needs

(1) The State shall ensure the protection, management, conservation and sustainable utilization of the environment and environmental resources to facilitate the enjoyment by consumers of rights and facilities associated with a clean and healthy environment.

(2) The State shall provide or facilitate the provision of the requisite financial and logistical support for the operation of consumer groups and associations.
Consumer Education

(1) The State shall promote and support the dissemination of consumer education and information in conjunction with local consumer associations and appropriate NGOs.

(2) Consumer education programs and activities shall include:
   (a) supporting activities for training and informing consumers both at formal and informal levels;
   (b) allowing or enabling consumer groups to disseminate or broadcast information on consumer issues;
   (c) supporting the mass media in publishing, broadcasting and disseminating consumer information and providing the same with the necessary skills, funds, equipment and facilities;
   (d) facilitating the development and dissemination of special programmes for the benefit of illiterate, physically and mentally disabled and disadvantaged groups.

(3) Consumer education and information programmes shall deal with the matters covered by this Act, including but not limited to:
   (a) health;
   (b) product safety and hazards;
   (c) product labelling;
   (d) information on weights and measures, prices and quality, availability of basic necessities, and environmental pollution;
   (e) relevant consumer legislation and law on how to obtain redress, and agencies and associations dealing with consumer protection.
(C) **Provisions on Information Standards**

**Consumer Information Standards**

(1) Every supplier of goods or services shall provide consumers with true, sufficient, clear and timely information on goods and services offered to enable consumers to make proper and reasonable choices.

(2) The labelling of all products shall be legible and where applicable in bold letters.

(3) Suppliers of goods or services shall provide consumers with a contract, receipt, ticket, invoice, business record or any other document that embodies or evidences the transaction unless this requirement is expressly excluded by law.

(4) In the event that the goods or services are not delivered, supplied or performed upon the execution of the transaction or upon the sale, the contract, receipt, ticket, invoice, business record or document shall indicate the date and place where delivery, supply or performance is to take place and the consequences of any failure or delay.

(5) The contract, receipt, ticket or invoice shall indicate the terms under which the supplier undertakes to provide such goods or services.

(6) The price of any goods or services shall include the cash price as well as any duty, tax, charge, fees or levy the consumer is liable to pay.

**Identification of Suppliers and Others**

(1) Whenever a person is engaged in direct marketing in person at the premises of a consumer, or performing any services for a consumer at any such premises, or delivering any goods to, or installing any goods for, a consumer, at any such premises, that person shall—
   (a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or
   (b) provide suitable identification on request by the consumer.

(2) A hawker shall —
   (a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or
   (b) provide suitable identification on request by the consumer.
(D) **Provisions as to Guarantees in respect of Supply of Goods**

**Implied Guarantee as to Title**

(1) Subject to subsection (5), the following guarantees shall be implied where goods are supplied to a consumer:
   (a) that the supplier has a right to sell the goods;
   (b) that the goods are free from any undisclosed security; and
   (c) that the consumer has a right to quiet possession of the goods, except in so far as that right is varied by -
      (i) a term of the agreement for supply where that agreement is a hire-purchase agreement within the meaning of the Hire-Purchase Act;
      (ii) a disclosed security; or
      (ii) a term of the agreement for supply.

(2) Where subparagraphs (1)(c)(ii) and (iii) apply, the supplier shall first orally advise the consumer as to the way in which his right to quiet possession of the goods may be varied.

(3) The advice given by the supplier under subsection (2) shall be as may be sufficient to enable a reasonable consumer to understand the general nature and effect of the variation.

(4) Where a consumer has received oral advice under subsection (2)-
   (a) the supplier shall give to the consumer a written copy of the security or agreement for supply or a written copy of the part thereof which provides for the variation as explained to the consumer under subsection (2); and
   (b) the consumer shall acknowledge receipt thereof in writing.

(5) Where the goods are only hired or leased -
   (a) paragraphs (1)(a) and (b) shall not apply; and
   (b) paragraph (1)(c) shall confer a right to quiet possession of the goods only for the period of the hire or lease.

(6) For the purposes of this section –

"right to sell" means a right to dispose of the ownership of the goods to the consumer at the time when that ownership is to pass;

"undisclosed security" means any security that is –
(a) not disclosed to the consumer in writing before he agrees to the supply; and
(b) not created by or with his express consent.

Implied Guarantee as to Acceptable Quality

(1) Where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality.

(2) For the purposes of subsection (1), goods shall be deemed to be of acceptable quality -
   (a) if they are -
      (i) fit for all the purposes for which goods of the type in question are commonly supplied;
      (ii) acceptable in appearance and finish;
      (iii) free from minor defects;
      (iv) safe; and
      (v) durable; and
   (b) a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard the goods as acceptable having regard to -
      (i) the nature of the goods;
      (ii) the price;
      (iii) any statements made about the goods on any packaging or label on the goods;
      (iv) any representation made about the goods by the supplier or the manufacturer; and
      (v) all other relevant circumstances of the supply of the goods.

(3) Where any defects in the goods have been specifically drawn to the consumer's attention before he agrees to the supply, then, the goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality by reason only of those defects.

(4) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (3) shall be defects disclosed on a written notice displayed with the goods.

(5) Goods shall not be deemed to have failed to comply with the implied guarantee as to acceptable quality if -
(a) the goods have been used in a manner or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and
(b) the goods would have complied with the implied guarantee as to acceptable quality if they had not been used in that manner or to that extent.

(6) For the purpose of subsection (5) goods shall be presumed to have been used by consumer in a manner or to an extent which is consistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods.

**Implied Guarantee as to Fitness for a Particular Purpose**

(1) Subject to subsection (2), the following guarantees shall be implied where goods are supplied to a consumer:
(a) that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and
(b) that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

(2) The implied guarantees referred to in subsection (1) shall not apply where the circumstances show that -
(a) the consumer does not rely on the supplier's skill or judgment; or
(b) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

(3) This section shall apply whether or not the purpose is a purpose as to which the goods are commonly supplied.

**Implied Guarantee that Goods comply with Description**

(1) Where goods are supplied by description to a consumer, there shall be implied a guarantee that the goods correspond with description.

(2) A supply of goods is not prevented from being a supply by description by reason only that, being exposed for sale or hire, they are selected by a consumer.
Implied Guarantee that Goods comply with Sample

The following guarantees shall be implied where goods are supplied to a consumer by reference to a sample or demonstration model:

(a) that the goods correspond with the sample or demonstration model in quality; and
(b) that the consumer will have a reasonable opportunity to compare the goods with the sample or demonstration model.

Implied Guarantee as to Price

(1) Where goods are supplied to a consumer, there shall be implied a guarantee that the consumer shall not be liable to pay to the supplier more than the reasonable price of the goods where the price for the goods is not -
(a) determined by the contract;
(b) left to be determined in a manner agreed by the contract; or
(c) left to be determined by the course of dealing between the parties.

(2) Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's only right of redress shall be to refuse to pay more than the reasonable price.

(3) For the purposes of this section, what is a "reasonable price" shall be a question of fact depending on the circumstances of each particular case, and where the price has been fixed under any law, the reasonable price shall be as may be specified under that law.

Implied Guarantee as to Repairs and Spare Parts

(1) Where goods are supplied to a consumer, there shall be implied a guarantee that the manufacturer and the supplier will take reasonable action to ensure that facilities for the repair of the goods and the supply of spare parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

(2) Subsection (1) shall not apply where reasonable action has been taken to notify the consumer, at or before the time the goods are supplied, that the manufacturer or the supplier or both does not undertake that repair facilities and spare parts will be available for those goods.
(3) Where reasonable action has been taken to notify the consumer, at or before the time the goods are supplied, that the manufacturer or supplier or both does not undertake that repair facilities and spare parts will be available for those goods after the expiration of a specified period, subsection (1) shall not apply in relation to the goods after the expiration of that period.

Manufacturer's Express Guarantee

(1) An express guarantee given by a manufacturer of goods which are supplied to a consumer shall bind the manufacturer to the extent specified in subsections (2), (3) and (4).

(2) An express guarantee in respect of goods given by a manufacturer in a document binds the manufacturer where the document is given to a consumer with the actual or apparent authority of the manufacturer in connection with the supply by a supplier of those goods to the consumer.

(3) An express guarantee which is included in a document relating to the goods and which appears to have been made by the manufacturer of the goods shall, in the absence of proof to the contrary, be presumed to have been made by the manufacturer.

(4) Proof that a consumer was given a document containing express guarantees by a manufacturer in respect of goods in connection with the supply of those goods to the consumer shall, in the absence of proof to the contrary, constitute proof that the document was given to the consumer with the authority of the manufacturer.

(5) For the purposes of this section, "express guarantee", in relation to any goods, means an undertaking, assertion or representation in relation to -

(a) the quality, performance or characteristics of the goods;
(b) the provision of services that are or may at any time be required in respect of the goods;
(c) the supply of parts that are or may at any time be required for the goods;
(d) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion or representation is given or made form part of; or
(e) the return of money or other consideration should the goods not meet any undertaking by the guarantor, given or made in connection with the supply of the goods or in connection with the promotion by any means of the supply or use of the goods.
(E) **Provisions for Right of Redress against Suppliers in respect of Guarantees in the Supply of Goods**

**Consumer's Right of Redress against Suppliers**

A consumer shall have a right of redress against a supplier of goods where the goods fail to comply with any of the implied guarantees.

**Exception in respect of Implied Guarantee as to Acceptable Quality**

There shall be no right of redress against the supplier of goods in respect of the failure of the goods to comply with the implied guarantee as to acceptable quality where –

(a) the manufacturer makes a representation in respect of the goods otherwise than by a statement on any packaging or label; and

(b) the goods would have complied with the implied guarantee as to acceptable quality if that representation had not been made.

**Options against Suppliers where Goods do not comply with Guarantees**

(1) Where a consumer has a right of redress against the supplier in respect of the failure of any goods to comply with a guarantee, the consumer may exercise the following remedies:

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time; and

(b) where the failure is one that cannot be remedied or is of a substantial character, the consumer may -

(i) reject the goods; or

(ii) obtain from the supplier damages in compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.
(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time, the consumer may -
(a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
(b) reject the goods.

Satisfaction of Requirement to Remedy a Failure

(1) A supplier may satisfy a requirement to remedy a failure of any goods to comply with a guarantee by -
(a) where the failure does not relate to title, repairing the goods;
(b) where the failure relates to title, curing any defect in title;
(c) replacing the goods with goods of identical type; or
(d) providing a refund of any money paid or other consideration provided by the consumer in respect of the goods where the supplier cannot reasonably be expected to repair or replace the goods or cure any defect in title.

(2) Where a consumer obtains goods to replace defective goods under paragraph (1)(c), the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier and the guarantees and obligations under this Act relating to the supply of goods to a consumer shall apply to the replacement goods.

(3) A refund under paragraph (1)(d) means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.

Loss of Right to Reject Goods

(1) The right conferred under this Act to reject goods shall not apply where -
(a) the right is not exercised within a reasonable time;
(b) the goods have been disposed of by the consumer;
(c) the goods have been lost or destroyed while in the possession of a person other than the supplier;
(d) the goods were damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or
(e) the goods have been attached to or incorporated in any other property and the goods cannot be detached or isolated without damaging them.
 failure of substantial character

A failure to comply with a guarantee shall be of a substantial character where -
(a) the goods would not have been acquired by a reasonable consumer fully
acquainted with the nature and extent of the failure;
(b) the goods depart in one or more significant respects from the description by
which they were supplied or, where they were supplied by reference to a sample
or demonstration model, from the sample or demonstration model;
(c) the goods are -
   (i) substantially unfit for a purpose for which goods of the type in question
      are commonly supplied; or
   (ii) unfit for a particular purpose made known to the supplier or represented
        by the supplier to be a purpose for which the goods would be fit, and the
        goods cannot easily and within a reasonable time be remedied to make
        them fit for such purpose; or
(d) the goods are not of acceptable quality because they are unsafe.

manner of rejecting goods

(1) The consumer shall exercise the right conferred under this Act to reject goods by
notifying the supplier of the decision to reject the goods and of the ground or
grounds for the rejection.

(2) Where the consumer exercises the right to reject goods, the consumer shall return
the rejected goods to the supplier unless –
(a) because of -
   (i) the nature of the failure to comply with the guarantee in respect of
       which the consumer has the right to reject the goods; or
   (ii) the size or height or method of attachment, the goods cannot be
        returned or removed or transported without significant cost to the
consumer, in which case the supplier shall collect the goods at its own expense;
(b) because of the method of attachment, the goods cannot be returned or removed without significant damage to the property to which they are attached, in which case the supplier shall compensate the consumer for any loss or damage resulting from or consequent upon such removal; or
(c) the goods have already been returned to, or retrieved by, the supplier.

(3) Where the ownership in the goods has passed to the consumer before the consumer exercises the right of rejection, the ownership in the goods re-vests in the supplier upon notification of rejection.

Consumer's Option of Refund or Replacement

(1) Where the consumer exercises the right to reject goods conferred under this Act, the consumer may choose to have -
(a) a refund of any money paid or other consideration provided by the consumer in respect of the rejected goods; or
(b) goods of the same type and of similar value to replace the rejected goods where such goods are reasonably available to the supplier as part of the stock of the supplier, and the supplier shall make provision accordingly.

(2) A refund referred to in paragraph (1)(a) means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.

(3) The obligation to refund cannot be satisfied by permitting the consumer to acquire other goods from the supplier.

(4) Where a consumer obtains goods to replace rejected goods under paragraph (1)(b), the replacement goods shall, for the purposes of this Act, be deemed to be supplied by the supplier, and the guarantees and obligations under this Act relating to the supply of goods to a consumer shall apply to the replacement goods.
Assessment of Damages in case of Hire Purchase

The damages that a consumer may recover for a failure of goods supplied under a hire purchase agreement to comply with a guarantee under this Act shall be assessed, in the absence of evidence to the contrary, on the basis that the consumer will complete the purchase of the goods or would have completed the purchase if the goods had complied with the guarantee.

Liability for Representation

(1) Where goods assigned or procured to be assigned to the supplier by a person acting in trade (the "dealer") are supplied to a consumer, every representation made to the consumer by the dealer or by any person acting on the dealer's behalf in connection with, or in the course of negotiations leading to, the supply of the goods shall give the consumer -
   (a) as against the supplier the same rights as the consumer would have had under this Act if the representation had been made by the supplier personally; and
   (b) as against the dealer who made the representation and any person on whose behalf the dealer was acting in making it, the same rights against any or all of them personally as the consumer would have had under this Act if that person had supplied the goods to the consumer as a result of the negotiations.

(2) Without prejudice to any other rights or remedies to which a supplier may be entitled, a supplier shall be entitled, where the representation was made without his express or implied authority, to be indemnified by the dealer who made the representation and by any person on whose behalf the dealer was acting in making it, against any damage suffered by the supplier through the operation of subsection (1).
(F) **Provisions for Right of Redress against Manufacturers in respect of Guarantees in the Supply of Goods**

**Consumer's Right of Redress against Manufacturers**

A consumer shall have a right of redress against a manufacturer of goods where -

(a) the goods fail to comply with the implied guarantee as to acceptable quality;

(b) the goods fail to comply with the implied guarantee as to correspondence with description due to the failure of the goods to correspond with a material description applied to the goods by or on behalf of the manufacturer or with the express or implied consent of the manufacturer;

(c) the goods fail to comply with the implied guarantee as to repairs and spare parts;

(d) the goods fail, during the currency of the guarantee, to comply with any express guarantee given by the manufacturer that is binding on the manufacturer.

**Exceptions to Right of Redress against Manufacturers**

There shall be no right of redress against the manufacturer under this Act in respect of goods which fail to comply with the implied guarantee as to acceptable quality or compliance with description where the failure is due to -

(a) an act, default or omission of, or any representation made by, a person other than the manufacturer; or

(b) a cause independent of human control, occurring after the goods have left the control of the manufacturer.

**Options against Manufacturers where Goods do not comply with Guarantees**

(1) Where a consumer has a right of redress against the manufacturer in respect of the failure of any goods to comply with a guarantee, the consumer may obtain damages from the manufacturer -

(a) for the reduction in the value of the goods resulting from the manufacturer's failure, namely -

(i) the reduction below the price paid or payable by the consumer for the goods; or

(ii) the reduction below the average retail price of the goods at the time of
(b) for any loss or damage to the consumer resulting from the manufacturer's failure, other than loss or damage through a reduction in the value of the goods, which is proved to be a result or consequence of the failure.

(2) Where the consumer is entitled by an express guarantee given by the manufacturer to require the manufacturer to remedy the failure by -

(a) repairing the goods; or

(b) replacing the goods with goods of identical type,

no action shall be commenced under paragraph (1)(a) unless the consumer has required the manufacturer to remedy the failure and the manufacturer has refused or neglected to remedy, or has not succeeded in remedying, the failure within a reasonable time.
(G) **Provisions as to Guarantees in respect of Supply of Services**

**Implied Guarantee as To Reasonable Care and Skill**

Where services are supplied to a consumer, there shall be implied a guarantee that the services will be carried out with reasonable care and skill.

**Implied Guarantee as to Fitness for Particular Purpose**

(1) Where services are supplied to a consumer, there shall be implied a guarantee that the services, and any product resulting from the services, will be -
   (a) reasonably fit for any particular purpose; and
   (b) of such nature and quality that it can reasonably be expected to achieve any particular result, that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the services, as the particular purpose for which the services are required or the result that the consumer desires to achieve.

(2) The implied guarantees referred to in subsection (1) shall not apply where the circumstances show that -
   (a) the consumer does not rely on the supplier's skill or judgment; or
   (b) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

**Implied Guarantee as to Time of Completion**

(1) Where services are supplied to a consumer, there shall be implied a guarantee that the services will be completed within a reasonable time where the time for the services to be carried out is not -
   (a) determined by the contract;
   (b) left to be determined in a manner agreed by the contract; or
   (c) left to be determined by the course of dealing between the parties.
Implied Guarantee as To Price

(1) Where services are supplied to a consumer, there shall be implied a guarantee that the consumer shall not be liable to pay to the supplier more than the reasonable price for the services where the price for the services is not -
(a) determined by the contract;
(b) left to be determined in a manner agreed by the contract; or
(c) left to be determined by the course of dealing between the parties.

(2) Where there is a failure to comply with the implied guarantee under subsection (1), the consumer's only right of redress shall be to refuse to pay more than the reasonable price.

(3) For the purposes of this section, what is a "reasonable price" shall be a question of fact depending on the circumstances of each particular case, and where the price has been fixed under any written law, the reasonable price shall be as may be specified under that written law.
(H) **Provisions for Right of Redress against Suppliers in respect of Guarantees in the Supply of Services**

**Consumer's Right of Redress against Suppliers**

A consumer shall have a right of redress against a supplier of services where the services or product resulting from the services fail to comply with any of the implied guarantees.

**Exceptions to Right of Redress against Supplier in relation to Services**

There shall be no right of redress against the supplier under this Act in respect of the failure of the services or any product resulting from the services to comply with the implied guarantee as to fitness for a particular purpose or as to time of completion where the failure is due to -

(a) an act, default or omission of, or any representation made by, a person other than the supplier; or

(b) a cause independent of human control.

**Options against Suppliers where Services do not comply with Guarantees**

(1) Where a consumer has a right of redress against the supplier in respect of the failure of any services or any product resulting from the services to comply with a guarantee, the consumer may exercise the following remedies:

(a) where the failure is one that can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time;

(b) where the failure is one that cannot be remedied or is of a substantial character, the consumer may -

   (i) cancel the contract for the supply of the services; or

   (ii) obtain from the supplier damages in compensation for any reduction in the value of the product resulting from the services below the charge paid or payable by the consumer for the services.

(2) In addition to the remedies under subsection (1), the consumer may obtain from the supplier damages for any loss or damage suffered by the consumer, other than loss or damage through a reduction in the value of the product resulting from the services, which is proved to be a result or consequence of the failure.
(3) Where the supplier refuses or neglects to remedy the failure as required under paragraph (1)(a), or refuses or neglects to do so within a reasonable time, the consumer may -
(a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
(b) cancel the contract for the supply of the services.

**Loss of Right to cancel Contract**

The right conferred under this Act to cancel a contract shall not apply where -
(a) the services supplied under the contract is merely incidental to the supply of the goods; and
(b) the consumer has or had the right to reject the goods, whether or not he exercises that right.

**Failure of Substantial Character**

A failure to comply with a guarantee shall be of a substantial character where -
(a) the product resulting from the services
   (i) is substantially unfit for a purpose for which services of the type in question are commonly supplied; or
   (ii) is unfit for the particular purpose made known to the supplier, or of such a nature and quality that the product cannot be expected to achieve a particular result made known to the supplier,
   and the product cannot easily and within a reasonable time be remedied to make it fit for the particular purpose or to achieve the particular result; or
(b) the product resulting from the services is unsafe.

**Rules applying to Cancellation of Contract**

(1) A cancellation of a contract for the supply of services shall not take effect -
(a) before the time at which the cancellation is communicated to the supplier; or
(b) where it is not reasonably practicable to communicate with the supplier, before the time at which the consumer indicates to the
supplier, by means which are reasonable in the circumstances, his intention to cancel the contract.

(2) Subject to subsection (3), a cancellation of the contract may be communicated by words or conduct or both which indicate the intention of the consumer to cancel the contract, and it shall not be necessary to use any particular form of words, as long as the intention to cancel is clear.

(3) Where it is reasonably practicable to communicate with the supplier, subsection (2) shall take effect subject to any express provision in the contract requiring notice of cancellation to be in writing.

Effect of Cancellation of Contract

(1) Where the consumer exercises the right conferred under this Act to cancel a contract for the supply of services -
(a) the consumer shall be entitled to obtain from the supplier a refund of any money paid or other consideration provided in respect of the services unless a court orders that the supplier may retain the whole or any part of the money paid or other consideration provided by the consumer;
(b) in so far as the contract has been performed at the time of the cancellation, no party shall by reason of the cancellation be divested of any property transferred or money paid under the contract, except as provided under paragraph (a); and
(c) in so far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further.

(2) Nothing in subsection (1) shall affect -
(a) the right of a party to recover damages in respect of a misrepresentation or the repudiation or breach of the contract by another party;
(b) the right of the consumer to obtain damages for failure to comply with a guarantee; or
(c) the right of the consumer under this Act to reject goods supplied in connection with the services.
Power of Court to grant Ancillary Relief

(1) Where the consumer cancels a contract for the supply of services under this Act, a court, in any proceedings or on an application made for the purpose, may make any order or orders granting relief under this section as it thinks just and practicable to do so.

(2) An application for an order under this section may be made by -
   (a) the consumer;
   (b) the supplier; or
   (c) any other person who has suffered loss.

(3) An order under this section may -
   (a) vest in any party to the proceedings the whole or any part of any property that was the subject of the contract or was the whole or part of the consideration for it;
   (b) direct any party to the proceedings to transfer or assign to any other such party or to give him the possession of the whole or any part of any property that was the subject of the contract or was the whole or part of the consideration for it;
   (c) without prejudice to any right to recover damages, direct any party to the proceedings to pay to any other such party such sum as the court thinks just; or
   (d) permit a supplier to retain the whole or any part of any money paid or other consideration provided in respect of the services under the contract.

(4) An order under subsection (1) or any provision of it, may be made on and subject to such terms and conditions as the court thinks fit, not being a term or condition that would have the effect of preventing a claim for damages by any party.

(5) In considering whether to make an order under this section, and in considering the terms and conditions it proposes to impose, the court shall have regard to the following:
   (a) any benefit or advantage obtained by the consumer by reason of anything done by the supplier in or for the purpose of supplying the services;
   (b) the value, in the opinion of the court, of any work or services performed by the supplier in or for the purpose of supplying the services;
   (c) any expenditure incurred by the consumer or the supplier in or for the purpose of the performance of the services;
   (d) the extent to which the supplier or the consumer was or would have been able to perform the contract in whole or in part; and
   (e) such other matters as the court thinks fit.

(6) No order under paragraph (3)(a) shall be made if it would have the effect of depriving a person, not being a party to the contract, of the possession of, or any
interest in, any property acquired by him in good faith and for valuable consideration.

(7) No order shall be made under this section in respect of any property if any party to the contract has so altered his position in relation to the property, whether before or after the cancellation of the contract, that having regard to all the relevant circumstances, it would, in the opinion of the court, be inequitable to any party to make such an order.
(I) Provisions for Safety of Goods and Services

Safety Standards

(1) The Minister may by regulations prescribe the safety standards in respect of -
(a) any goods or class of goods; and
(b) any services or class of services,
and may prescribe different safety standards for different goods or services, or classes of goods or services.

(2) The safety standard in relation to goods may relate to any or all of the following matters:
(a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;
(b) the testing of the goods during or after manufacture or processing;
(c) the form and content of markings, warnings or instructions to accompany the goods.

(3) Where no safety standard has been prescribed under subsection (1), the person supplying or offering to supply the goods or services shall adopt and observe a reasonable standard of safety to be expected by a reasonable consumer, due regard being had to the nature of the goods or services concerned.

Compliance with Safety Standards

(1) No person shall supply, or offer to or advertise for supply, any goods or services which do not comply with the prescribed safety standards.

(2) Goods or services shall not be regarded as failing to comply with safety requirements, where it is shown that -
(a) the alleged failure is attributable to compliance with a requirement imposed by law; or
(b) the alleged failure is a failure to do more in relation to any matter than may be required by prescribed standards.

(3) In any proceedings for an offence, it shall be a defence for the person charged to show that at the time he supplied, or offered or agreed to supply, or exposed or possessed for supply, the goods or services, he -
(a) had no knowledge; and
(b) had no reasonable ground to believe,  
that the goods or services failed to comply with safety requirements.

(4) Subsection (3) shall not apply in relation to manufacturers.

**General Safety Requirement for Goods**

(1) No person shall supply, or offer to or advertise for supply, any goods which are not reasonably safe having regard to all the circumstances, including -
(a) the manner in which, and the purposes for which, the goods are being or will be marketed;
(b) the get-up of the goods;
(c) the use of any mark in relation to the goods; and
(d) instructions or warnings in respect of the keeping, use or consumption of the goods.

(2) In any proceedings for an offence, it shall be a defence for the person charged to prove -
(a) that the contravention was due to -
   (i) reasonable mistake on his part;
   (ii) reasonable reliance on information supplied to him;
   (iii) the act or default of another person; or
   (iv) a cause beyond his control; and
(b) that he took reasonable precautions and exercised all due diligence to avoid such contravention by himself or by any person under his control.

**Defence of Innocent Publication of Advertisement**

Where an offence is committed by the publication of an advertisement, it shall be a defence in any proceedings for the offence for the person charged to prove that-
(a) his business is that of publishing or arranging for the publication of advertisements;
(b) he received the advertisement or the information contained in the advertisement, as the case may be, for publication in the ordinary course of business; and
(c) he did not know and had no reason to suspect that the publication of the advertisement would constitute an offence.
Power of Court to Grant Ancillary Relief

(1) Where, in any proceedings under this Part, or on the application of any person, the court finds that such person, whether or not he is a party to the proceedings, has suffered or is likely to suffer loss or damage by the conduct of any other person that constitutes or would constitute –
   (a) contravention of;
   (b) aiding, abetting, counselling or procuring the contravention of;
   (c) inducing by threats, promises or otherwise the contravention of;
   (d) being in any way knowingly concerned in or party to, whether directly or indirectly, the contravention of; or
   (e) conspiring with any other person in the contravention of, any of the provisions of this Part, the court may, without prejudice to any other relief it may grant, make any or all of the orders referred to in subsection (2).

(2) For the purposes of this section, the court may make the following orders:
   (a) an order declaring -
       (i) the whole or any part of a contract made between the person who suffered or is likely to suffer the loss or damage and the person who engaged in the conduct referred to in subsection (1); or
       (ii) the whole or any part of a collateral arrangement relating to such a contract, to be void and, if the court thinks fit, to be void \textit{ab initio} or at all times on and after such date, before the date on which the order is made, as may be specified in the order;
   (b) an order varying the contract or arrangement in such manner as may be specified in the order and, if the court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date, before the date on which the order is made, as may be specified in the order;
   (c) an order directing the person who engaged in the conduct referred to in subsection (1) -
       (i) to refund the money or return the property;
       (ii) to pay the amount of the loss or damage;
       (iii) at the person's own expense, to repair or provide parts for goods that have been supplied by him;
       (iv) at the person's own expense, to supply specified services, to the person who suffered, or is likely to suffer, the loss or damage, as the case may be.

(3) In an application for an order against a person under this section, a finding of fact made in proceedings for an offence, being proceedings in which that person was found to have engaged in conduct of the kind referred to in subsection (1), shall be \textit{prima facie} evidence of that fact and the finding may be proved by the production of a document under the seal of the court in which the finding was made.
Prohibition against Unsafe Goods

(1) The Minister may by order published in the Gazette, declare any goods or any class of goods to be prohibited goods where the goods or goods of that class have caused or are likely to cause injury to any person or property or is otherwise unsafe.

(2) An order made under subsection (1) may require the supplier, in such manner and within such period as may be specified in the order, and at the supplier's own expense, to do any or all of the following:
   (a) recall the prohibited goods;
   (b) stop the supply of, or the offer to supply, the prohibited goods;
   (c) stop the advertisement of the prohibited goods;
   (d) disclose to the public any information relating to -
      (i) the characteristics of the prohibited goods which render them unsafe;
      (ii) the circumstances in which use of the prohibited goods are unsafe;
      (iii) any other matter relating to the prohibited goods or the use of the prohibited goods as may be specified;
   (e) repair or replace the prohibited goods;
   (f) refund to any person to whom the prohibited goods were supplied the price paid or the value of the consideration given for the prohibited goods or any lesser amount as may be reasonable having regard to the use that that person has had of the prohibited goods.

(3) Where an order under subsection (1) is in effect -
   (a) no person shall supply, or offer to or advertise for supply, any prohibited goods; and
   (b) no supplier shall -
      (i) where the notice identifies a defect in, or a dangerous characteristic of, the prohibited goods, supply goods of a kind to which the order relates which contain the defect or have the characteristic; or
      (ii) in any other case, supply goods of a kind to which the order relates.

(4) The importation of any goods or services or any class of goods or services which do not comply with the provisions of this Part shall be prohibited.
(J) **Product Liability**

**Meaning of "Defect"**

(1) Subject to subsections (2) and (3), there is a defect in a product for the purposes of this Part if the safety of the product is not such as a person is generally entitled to expect.

(2) In determining what a person is generally entitled to expect in relation to a product, all relevant circumstances shall be taken into account including:
   (a) the manner in which, and the purposes for which, the product has been marketed;
   (b) the get-up of the product;
   (c) the use of any mark in relation to the product;
   (d) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product;
   (e) what may reasonably be expected to be done with, or in relation to, the product; and
   (f) the time when the product was supplied by its producer to another person.

(3) Nothing in this section shall require a defect to be inferred from the mere fact that the safety of a product which is subsequently supplied is greater than the safety of the product in question.

(4) For the purposes of this section, "safety", in relation to a product, shall include:
   (a) safety with respect to products comprised therein;
   (b) safety in the context of risk of damage to property; and
   (c) safety in the context of risk of death or personal injury.

**Liability for Defective Products**

(1) Where any damage is caused wholly or partly by a defect in a product, the following persons shall be liable for the damage:
   (a) the manufacturer of the product;
   (b) the person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the manufacturer of the product; and
   (c) the person who has, in the course of his business, imported the product into Mauritius in order to supply it to another person.
(2) Where damage is caused wholly or partly by a defect in a product, the person who suffered the damage may within a reasonable period after the damage occurs request the supplier to identify any or all of the persons referred to in subsection (1), whether or not he is or they are still in existence.

(3) For the purpose, of subsection (2), it is immaterial whether the supplier supplied the defective product to
(a) the person who suffered the damage;
(b) the producer of a product in which the defective product is comprised therein; or
(c) any other person.

(4) Where the supplier fails to comply with a request under subsection (2) within a reasonable time having regard to all the circumstances, the supplier shall be held liable for the loss or damage.

(5) Where two or more persons are liable under this Part for the same damage, their liability shall be joint and several.

Extent of Liability for Loss or Damage

(1) Where any damage is caused wholly or partly by a defect in a product, the liability of the person liable for the damage shall not include the loss of or damage to
(a) the defective product;
(b) the whole or any part of the product which comprises the defective product; or
(c) any property which at the time it is lost or damaged is not
   (i) of a description of property ordinarily intended for private use, occupation or consumption; and
   (ii) intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.

(2) For the purposes of paragraph (1)(c), loss or damage to property shall be deemed to have occurred at the earliest time at which a person with an interest in the property has knowledge of the material facts about the loss or damage.

(3) For the purposes of subsection (2)-
(a) the material facts about any loss of or damage to any property are such facts about the loss or damage as would lead a reasonable person with an interest in the property to consider the loss or damage sufficiently serious to justify his instituting proceedings for damages against a defendant who does not dispute liability and is able to satisfy a judgment against him;

(b) a person's knowledge includes knowledge which he may reasonably be expected to acquire

   (i) from facts observable or ascertainable by him; or
   (ii) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek:

Provided that a person shall not be deemed to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain and where appropriate, to act on that advice.

Prohibition on Exclusion from Liability

The liability of a person under this Part to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependent of such a person, shall not be limited or excluded by any contract term, notice or other provision.
Defences

In any civil proceeding under this Part against any person in respect of a defect in a product, it shall be a defence for that person to show
(a) that the defect is attributable to compliance with any requirement imposed under any law;
(b) that he did not at any time supply the defective product to another person;
(c) that the defect did not exist in the product at the relevant time;
(d) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question may reasonably be expected to discover the defect if it had existed in his product while it was under his control; or
(e) that the defect
   (i) is a defect in a product in which the product in question is comprised therein (the "subsequent product"); and
   (ii) is wholly attributable to-
      1. the design of the subsequent product; or
      2. compliance by the producer of the product in question with instructions given by the producer of the subsequent product.
(K) **Provisions regarding Unfair Contract Terms in Consumer Agreements**

**Prohibited transactions, agreements, terms or conditions**

(1) A supplier must not make a transaction or agreement subject to any term or condition if—

(a) its general purpose or effect is to—

(i) defeat the purposes and policy of this Act;

(ii) mislead or deceive the consumer; or

(iii) subject the consumer to fraudulent conduct;

(b) it directly or indirectly purports to—

(i) waive or deprive a consumer of a right in terms of this Act;

(ii) avoid a supplier’s obligation or duty in terms of this Act;

(iii) set aside or override the effect of any provision of this Act; or

(iv) authorise the supplier to do anything that is unlawful in terms of this Act, or fail to do anything that is required in terms of this Act;

(c) it purports to—

(i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;

(ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or

(iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier;

(d) it falsely expresses an acknowledgement by the consumer that the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;

(e) it requires the consumer to forfeit any money to the supplier—

(i) if the consumer exercises any right in terms of this Act; or

(ii) to which the supplier is not entitled in terms of this Act or any other law;

(f) it imposes the compulsory referral to arbitration pursuant to a unilateral arbitration clause; or

(g) authorize the provider or supplier to unilaterally cancel, repudiate or rescind the contract.

(2) A purported transaction or agreement, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section.
Unfair, unreasonable or unjust contract terms

(1) A supplier must not—
   (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
       (i) at a price that is unfair, unreasonable or unjust; or
       (ii) on terms that are unfair, unreasonable or unjust;
   (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
   (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
       (i) to waive any rights;
       (ii) assume any obligation; or
       (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
   (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
   (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
   (c) the consumer relied upon a false, misleading or deceptive representation, or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.

Powers of court to ensure fair and just conduct, terms and conditions

(1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that this Act does not provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).
(2) In any matter contemplated in subsection (1), the court must consider—
   (a) the fair value of the goods or services in question;
   (b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
   (c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
   (d) the conduct of the supplier and the consumer, respectively;
   (e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
   (f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
   (g) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular term of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any—
      (i) custom of trade; and
      (ii) any previous dealings between the parties;
   (h) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
   (i) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

(3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—
   (a) make a declaration to that effect; and
   (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
      (i) to restore money or property to the consumer;
      (ii) to compensate the consumer for losses or expenses relating to the transaction or agreement, or the proceedings of the court; and
      (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier’s conduct.

(4) If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice
to which a transaction or agreement is purportedly subject, is void in terms of this Act, the court may—
(a) make an order
   (i) in the case of a term or notice that is void in terms of any provision of this Act, severing any part of the relevant agreement, term or notice, or altering it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, term or notice as a whole; or
   (ii) declaring the entire agreement, term or notice void as from the date that it purportedly took effect; and
(b) make any further order that is just and reasonable in the circumstances with respect to that agreement, term or notice, as the case may be.
(L) Provisions relating to Unfair Business Practices

Prohibition on Unfair Commercial Practices

(1) A trader shall not engage in an unfair commercial practice.

(2) A commercial practice is unfair if it—
   (a) is contrary to one or both of the following requirements:
       (i) the general principle of good faith in the trader’s field of activity;
       (ii) the standard of skill and care that the trader may reasonably be
            expected to exercise in respect of consumers, and
   (b) would be likely to—
       (i) cause appreciable impairment of the average consumer’s ability to
           make an informed choice in relation to the product concerned, and
       (ii) cause the average consumer to make a transactional decision that
            the average consumer would not otherwise make.

(3) In determining whether a commercial practice is unfair under subsection (2), the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.

Misleading Commercial Practices

(1) A trader shall not engage in a misleading commercial practice.

(2) A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision (“material information”) and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(3) A commercial practice is misleading if it includes the provision of false information in relation to any matter set out in subsection (5) and that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(4) A commercial practice is misleading if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection
and to make a transactional decision that the average consumer would not otherwise make.

(5) The following matters are set out for the purposes of subsections (2) and (3):
   (a) the existence or nature of a product;
   (b) the main characteristics of a product, including, without limitation, any of the following:
      (i) its geographical origin or commercial origin;
      (ii) its availability, including, without limitation, its availability at a particular time or place or at a particular price;
      (iii) its quantity, weight or volume;
      (iv) its benefits or fitness for purpose;
      (v) the results to be expected from it;
      (vi) the risks it presents to consumers;
      (vii) its usage or prior history;
      (viii) its composition, ingredients, components or accessories;
      (ix) the specifications of the product, including, without limitation, the grade, standard, style, status or model of the product;
      (x) the after-supply customer assistance available to consumers in relation to the product;
      (xi) the handling of consumer complaints in relation to the product;
      (xii) the method or date of—
          (I) the product’s delivery, supply or provision, or
          (II) in the case of goods, the product’s manufacture;
      (xiii) the results and material features of tests or checks carried out on the product;
      (xiv) in relation to a service, its execution or performance;
   (c) the price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage;
   (d) the need for any part, replacement, servicing or repair in relation to the product;
   (e) the existence, extent or nature of any approval or sponsorship (direct or indirect) of the product by others;
   (f) the nature, attributes or rights of the trader, including, without limitation, the following:
      (i) the trader’s identity, qualifications, assets or status;
      (ii) the trader’s affiliation or connection with others;
      (iii) the existence, extent or nature of—
          (I) any industrial, commercial or intellectual property rights the trader may have, or
          (II) any award, distinction, approval or sponsorship (direct or indirect) the trader has or has received;
   (g) the extent of the trader’s commitments;
   (h) the trader’s motives for the commercial practice;
   (i) the nature of the trader’s supply process;
the legal rights of a consumer (whether contractual or otherwise) or matters respecting when, how or in what circumstances those rights may be exercised.

(6) If the commercial practice in subsection (4) involves the provision of information, it is not a defence in any proceeding to show that the information is factually correct.

(7) In determining whether a commercial practice under subsection (3) or (4) is misleading, the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.

(8) Without limiting subsection (7)—

(a) if the commercial practice involves a representation or creates an impression (whether in advertising, marketing or otherwise) that a product was previously offered at a different price or at a particular price, consideration shall be given as to whether the product was previously offered openly and in good faith at that price and at the same place for a reasonable period of time before the representation was made, and

(b) if the commercial practice involves a representation or creates an impression (whether in advertising, marketing or otherwise) that a product is being offered by a trader at or below a price recommended by the manufacturer, producer or supplier of the product (other than the trader), consideration shall be given to whether that recommended price was one recommended in good faith by that manufacturer, producer or supplier.

(9) In determining the geographical origin of goods the manufacture or production of which involves more than one country, consideration shall be given to where the goods underwent their last substantial and economically justified processing or working (in a place equipped for that purpose), resulting in the manufacture of new goods or representing an important stage of the manufacture or production.
Misleading Marketing or Advertising

(1) A commercial practice involving marketing or advertising is misleading if it would be likely to cause the average consumer—
   (a) to confuse—
      (i) a competitor’s product with the trader’s product, or
      (ii) a competitor’s trade name, trade mark or some other distinguishing feature or mark with that of the trader, and
   (c) to make a transactional decision that the average consumer would not otherwise make.

(2) In determining whether a commercial practice is misleading under subsection (1), the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.

Aggressive Commercial Practices

(1) A trader shall not engage in an aggressive commercial practice.

(2) A commercial practice is aggressive if by harassment, coercion or undue influence it would be likely to—
   (a) cause significant impairment of the average consumer’s freedom of choice or conduct in relation to the product concerned, and
   (b) cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(3) In determining whether a commercial practice is aggressive under subsection (2), the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.

(4) Without limiting subsection (3), in determining whether the commercial practice employs harassment, coercion or undue influence, the following shall be taken into account:
   (a) the timing, location, nature or persistence of the commercial practice;
   (b) the use of threatening or abusive language or behaviour by the trader;
   (c) the exploitation of a consumer’s misfortune or circumstance when the trader is aware that the consumer’s judgment is impaired as a result of the gravity of the misfortune or circumstance, in order to influence the consumer’s transactional decision;
   (d) the imposition of onerous or disproportionate non-contractual barriers by the trader when the consumer wishes to terminate the contract, exercise a contractual right or switch to another product or trader;
(e) the use of threats by the trader to—
   (i) take action or initiate proceedings against the consumer when the trader has no legal basis for taking such action or initiating such proceedings, or
   (ii) do something unlawful.

(5) In this section, “undue influence” means exploiting a position of power in relation to a consumer so as to apply pressure (without necessarily using or threatening to use physical force) in a way that significantly limits the consumer’s ability to make an informed choice in relation to the trader’s product.

Prohibited Commercial Practices

(1) A trader shall not engage in any of the following commercial practices:
   (a) a representation that the trader has an approval, authorisation or endorsement that the trader does not have, or making such a representation when the trader is not in compliance with that approval, authorisation or endorsement;
   (b) a representation that the trader is signatory to a code of practice, if the trader is not;
   (c) a representation that the trader is about to cease trading or move premises, if the trader is not;
   (d) a representation that a product has an approval, authorisation or endorsement that it does not have, or making such a representation when the trader is not in compliance with that approval, authorisation or endorsement;
   (e) a representation that a product is able to facilitate winning in games of chance;
   (f) a representation that supply of a product is legal, if it is not, or creating such an impression;
   (g) a representation that a product is able to cure an illness, dysfunction or malformation, if it cannot;
   (h) a representation that describes a product as “gratis”, “free”, “without charge” or anything similar, if a consumer has to pay anything other than the necessary and reasonable cost of—
      (i) responding to the representation, and
      (ii) collecting the product or having it delivered;
   (i) a representation that a commercial practice of the trader has an approval, authorisation or endorsement that it does not have, or making such a representation when the trader is not in compliance with the approval, authorisation or endorsement;
   (j) a representation that a code of practice has an approval or other endorsement that it does not have;
   (k) displaying a quality, standard or mark or symbol, without having obtained necessary authorisation to do so;
(l) making an invitation to purchase a product without disclosing the existence of any reasonable grounds the trader may have for believing that the trader will not be able to supply, or procure another trader to supply, the product or an equivalent product at the price specified in the invitation, or to do so for a reasonable period of time or in reasonable quantities, having regard to the scale of any marketing or advertising of the product and the price specified (bait advertising);

(m) making an invitation to purchase a product, then—
   (i) demonstrating a defective sample of the product, or
   (ii) refusing to—
      (I) show or display the product to the consumer,
      (II) take an order from the consumer for the product, or
      (III) deliver the product to the consumer within a reasonable period of time, with the intention of promoting a different product (bait and switch);

(n) making a false representation that a product is available only for a limited time, or on particular terms for a limited time, in order to elicit an immediate decision from a consumer, depriving the consumer of sufficient opportunity or time to make an informed choice in relation to the trader’s product;

(o) making a representation or creating an impression that a right given to consumers under an enactment is a distinctive feature of the trader’s promotion or supply;

(p) using editorial content in the media to promote a product (if a trader has paid for that promotion) if it is not made clear that the promotion is a paid promotion, whether in the content itself or in any oral, written, visual or descriptive representation in the promotion;

(q) making a representation to a consumer that is materially inaccurate in respect of the nature and extent of risk to the consumer’s personal security, or that of other members of the consumer’s household, if the consumer does not purchase the trader’s product;

(r) promoting a product (similar to that of another manufacturer) in such a manner as to deliberately mislead or deceive a consumer into thinking that the product is manufactured by that manufacturer, when it is not;

(s) making a representation to a consumer that is inaccurate to a material degree in respect of market conditions, or in respect of the possibility of finding a product, with the intention of inducing the consumer to purchase a product at conditions less favourable than normal market conditions;

(t) operating, running or promoting a competition or prize promotion without awarding the prizes described or reasonable equivalents;

(u) making a representation or creating an impression that a consumer has won or will win a prize or other equivalent benefit, if—
   (i) there is no prize or equivalent benefit, or
   (ii) in claiming the prize, the consumer has to make a payment or incur a loss;

(v) including in marketing material an invoice or any similar document seeking payment from a consumer for a product that the consumer has not ordered;
(w) making a representation or creating an impression that the trader—
   (i) is not acting for purposes related to the trader’s trade, business or
   profession, when the trader is so acting, or
   (ii) is acting as a consumer, when the trader is not;
(x) making a representation or creating an impression that after-supply service in
   relation to a product is available, when it is not so available.

(2) A trader shall not engage in any of the following commercial practices:
(a) making a representation or creating an impression that a consumer cannot
   leave the premises until a contract is formed;
(b) failing to comply with a consumer’s request to leave the consumer’s
   residence or not to return (except in circumstances and to the extent justified
   or permitted by or under law in order to enforce a contractual obligation);
(c) persistently failing to comply with a consumer’s request to cease—
   (i) communicating or initiating unwanted or unsolicited contact with, or
   (ii) making or sending unwanted or unsolicited representations to, the
   consumer by telephone, fax, email or any other electronic means or remote
   media (except in circumstances and to the extent justified or permitted by or
   under law in order to enforce a contractual obligation);
(d) including in an advertisement a direct exhortation to children to—
   (i) purchase a product, or
   (ii) persuade a parent or adult to purchase the product for them;
(e) in relation to any product that a consumer does not solicit, demanding that
   the consumer—
   (i) make immediate or deferred payment for the product, or
   (ii) return or keep the product safe;
(f) explicitly informing a consumer that if the consumer does not purchase a
   product, the trader’s job or livelihood will be in jeopardy.
Referral selling

(1) Subject to subsection (2) of this section, no person shall induce another person to acquire goods or services by representing that the person acquiring the goods or services will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission, or other benefit in return for giving that person the names of prospective customers or otherwise assisting that person to supply goods or services to other users or consumers, if receipt of the rebate, commission, or other benefit is contingent on an event occurring after that contract is made.

(2) Nothing in subsection (1) of this section applies to the acquisition of goods for resupply.

Pyramid Selling

(1) A person shall not—
(a) establish, operate or promote a pyramid promotional scheme,
(b) knowingly participate in such a scheme, or
(c) induce or attempt to induce another person to participate in such a scheme.

(2) For the purposes of this section, the term "pyramid promotional scheme" means a scheme by which a person gives consideration in money or money’s worth, or gives a gift in money or money’s worth, for an opportunity to receive compensation derived primarily from the introduction of other persons into the scheme rather than from the supply or consumption of a product.
Assertion of Right to Payment for Unsolicited Goods or Services

A trader shall not assert a right to payment from another person for unsolicited goods or services unless the trader has reasonable cause to believe that there is a right to the payment.

Liability of Recipient of Unsolicited Goods

(1) A person to whom unsolicited goods are supplied by a trader is not liable to make any payment for the loss of or damage to the goods other than loss or damage resulting from the doing by the first-mentioned person of a wilful and unlawful act in relation to the goods during the period specified in subsection (5).

(2) Subject to subsection (3), where a supplier sends unsolicited goods to a person-

(a) neither the supplier nor any person claiming under the supplier is entitled after the expiration of the time specified in subsection (5) to take action for the recovery of the goods from the person to whom the goods were sent; and

(b) upon the expiration of that time, the goods become by virtue of this section the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.

(3) Subsection (2) does not apply to or in relation to unsolicited goods sent to a person if

(a) the person has during the period specified in subsection (5) unreasonably refused to permit the sender or the owner of the goods to take possession of the goods;

(b) the sender or the owner of the goods has within that time taken possession of the goods; or

(c) the goods were received by the person in circumstances in which he knew, or might reasonably be expected to have known, that the goods were not intended for him.

(4) The supplier is liable to pay to the recipient of unsolicited goods such reasonable costs as are incurred in respect of the storage of those goods.

(5) The period referred to in subsections (1), (2) and (3) is,

(a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with subsection (6),

(i) the period of one month next following the day on which the notice is given; or

(ii) the period of 3 months next following the day on which the person received the goods, whichever first expires;
(b) in any other case, the period of 3 months next following the day on which the person received the goods.

(6) A notice under subsection (5) shall be in writing and shall
(a) state the name and address of the person who received the goods;
(b) state the address at which possession may be taken of the goods if it is an address other than that of that person; and
(c) contain a statement to the effect that the goods are unsolicited goods.

Liability of Recipient for Unsolicited Services

If a trader supplies unsolicited services to another person, the other person:
(a) is not liable to make any payment for the services; and
(b) is not liable for loss or damage as a result of the supply of the services.

Agreements with persons lacking legal capacity

(1) An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer—
(a) is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order; or
(b) is voidable at the option of the consumer, if—
   (i) at the time the agreement was made the consumer was an un-emancipated minor;
   (ii) the agreement was made without the consent of an adult responsible for that minor; and
   (iii) the agreement has not been ratified by either—
         (A) an adult responsible for that minor; or
         (B) the consumer after being emancipated or becoming an adult.

(2) Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission—
(a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or
(b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract
(M) **Provisions for Control of Distance Selling**

**Distance Selling Regulations**

(1) The Minister may by regulations under this section ("distance selling regulations") make such provision as he considers appropriate for the purpose of protecting consumers in relation to distance contracts.

(2) Without prejudice to the generality of subsection (1), distance selling regulations may contain provisions
   (a) regulating the advertising and marketing (including advertising and marketing by mail-order or doorstep selling) of business that is to be conducted by way of distance contracts;
   (b) with respect to the information that must be supplied to persons to whom distance contracts are offered;
   (c) with respect to the transparency, clarity and fairness of distance contracts;
   (d) requiring information to be given to any such person as may be determined by or under the regulations for the purpose of enabling that person to exercise any function conferred on him by the regulations;
   (e) for the resolution of disputes and differences between parties to distance contracts, including resolution of such disputes and differences otherwise than by a court; and
   (f) creating offences for contraventions of the regulations.

(3) Without prejudice as aforesaid, distance selling regulations may
   (a) contain different provisions for different cases;
   (b) provide for exemptions from or exceptions to any provisions of the regulations;
   (c) contain such supplemental, consequential and transitional provisions as the Minister considers appropriate.

(4) In this section,

"distance contract" means a contract concerning goods or services concluded between a supplier and a consumer under a scheme operated by the supplier, who, for the purposes of the contract, makes exclusive use of one or more means of distance communication up to and including the point at which the contract is concluded;

"means of distance communication" means a means which, without the simultaneous presence of the supplier and the consumer, may be used for the conclusion of a contract between the parties.
Provisions relating to Consumer Credit

Responsible Lending Conduct

(1) No dealer shall enter into a credit contract with a consumer unless he has ascertained the credit contract will meet the consumer’s requirements and that the consumer has the capacity to fulfill his obligations under the contract.

(2) “Dealer” has the same meaning as assigned to it in the Hire Purchase and Credit Sale Act.
(O) Provisions for the Establishment and Operation of a National Consumer Council

Establishment of a National Consumer Council

There is established a National Consumer Council, which shall be a body corporate.

Functions of National Consumer Council

The functions of the Council shall be to-
(a) encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers;
(b) advise the Minister on research to be conducted on consumer issues;
(c) formulate and submit to the Minister policy and legislative proposals in the interest of consumers; and
(d) advise the Minister on consumer education programs and activities.

Composition of National Consumer Council

(1) The Council shall consist of
(a) a Chairperson;
(b) Three members, who shall be representatives of Government;
(c) Three members who shall be representatives of consumer organizations and other non-governmental organizations; and
(d) Three representatives of business organizations.

(2) The Chairperson and members shall be appointed by the Minister for a term of three years and shall be eligible for re-appointment.

(3) The Chairperson and members shall draw such as allowances as may be determined by the Minister.
Meetings of the Council

(1) A meeting of the Council shall be held at least once every two months at such time and place as the Chairperson may direct.

(2) Notwithstanding subsection (1), the Chairperson may at any time call a meeting of the Council and shall call such a meeting within 15 days of receiving a request signed by no fewer than 5 members.

(3) Five members shall constitute a quorum.

(4) Subject to this section, the Council shall regulate its meetings and proceedings in such manner as it thinks fit.

Annual report

The Council shall every year submit to the Minister a report on its activities.
(P) **Provisions relating to Enforcement and Remedies**

**Duties of Enforcement Authority**

(1) It shall be the duty of the Enforcement Authority
    (a) to administer this Act; and
    (b) to enforce the provisions of this Act.

(2) For the purposes of its duty under subsection (1)(b), the Enforcement Authority may institute and carry on such proceedings in respect of contraventions of the provisions of this Act as may be necessary to ensure observance of those provisions; and any officer of the Enforcement Authority may institute and carry on any such proceedings.

**Complaints to Enforcement Authority**

(1) Any person may file a complaint with the Enforcement Authority alleging that a person has acted in a manner inconsistent with this Act.

(2) The Enforcement Authority may directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or—
    (a) when directed to do so by the Minister; or
    (b) on the request of a consumer protection group.

**Power of Enforcement Authority to obtain information**

(1) If in pursuance of its duty under this Act, the Enforcement Authority considers that it needs information which another person is likely to be able to furnish, it may serve on that other person a notice under this section.

(2) A notice served on a person under this section may require that person
    (a) to furnish to the Enforcement Authority, within a period specified in the notice, such information as is so specified;
    (b) to produce such records as are specified in the notice at a time and place so specified, and to permit an officer of the Enforcement Authority to take copies of the records at that time and place.
(3) A person shall be guilty of an offence if he
(a) fails, without reasonable cause, to comply with a notice served on him under this section; or
(b) in purporting to comply with a requirement which by virtue of paragraph (a) of subsection (2) is contained in such a notice
   (i) furnishes information which he knows is false in a material particular; or
   (ii) recklessly furnishes information which is false in a material particular.

Search by Warrant

(1) If it appears to a Magistrate, upon written information on oath, that there is reasonable cause to believe that in any premises there is or has been any contravention of this Act, the Magistrate may issue a warrant authorizing any officer of the Enforcement Authority to enter the premises at any reasonable time by day or by night, with or without assistance and if need be by force, and there to
   (a) search for and seize any goods, thing, book, document, record or other article that is reasonably believed to furnish evidence of the contravention of this Act;
   (b) take samples of any goods or thing found in the premises for the purpose of ascertaining, by testing or otherwise, whether an offence has been committed; and
   (c) make copies of or take extracts from any book, document, record or other article found in the premises.

(2) Where, by reason of their nature, size or amount, it is not practicable to remove any goods, thing, book, document, record or other article seized under subsection (1), an officer of the Enforcement Authority shall, by any means, seal such goods, thing, book, document, record or other article in the premises or container in which they are found.

(3) It shall be an offence for any person without lawful authority to break, tamper with or damage the seal referred to in subsection (2) or to remove any goods, thing, book, document, record or other article under seal or to attempt to do so.

(4) An officer of the Enforcement Authority may in the exercise of his powers under this section, if it is necessary so to do-
   (a) break open any outer or inner door of the premises and enter into the premises;
(b) forcibly enter the premises and every part of the premises; and
(c) remove by force any obstruction to entry, search, seizure or removal as he is empowered to effect.

Power of Seizure

(1) Except as provided in subsection (2), where any goods, things, books, documents, records or other articles are seized under this Part, the seizing officer shall prepare a list of the things seized and immediately deliver a copy signed by him to the occupier of the premises which has been searched, or to his agent or servant, at those premises.

(2) Where the premises are unoccupied, the seizing officer shall whenever possible post a list of the things seized conspicuously on the premises.

Forfeiture of Goods Seized

(1) Any goods, thing, book, document, record or other article seized in exercise of any power conferred under this Act shall be liable to forfeiture.

(2) An order for the forfeiture or for the release of any goods, thing, book, document, record or other article seized in exercise of any power conferred under this Act shall be made by the court before which the prosecution with regard thereto has been held and an order for the forfeiture of the goods, thing, book, document, record or other article shall be made if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the goods, thing, book, document, record or other article was the subject-matter of or was used in the commission of the offence, notwithstanding that no person may have been convicted of such offence.
Costs or Damages arising from Seizure

No person shall, in any proceedings before any court in respect of the seizure of any goods, thing, book, document, record or other article seized in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause.

Obstruction of Officer

No person shall
(a) obstruct an officer of the Enforcement Authority in the performance of his powers of search;
(b) fail or refuse to give to an officer such information as he may reasonably require in the performance of such functions.

Protection from liability

No liability, civil or criminal, shall attach to the Permanent Secretary or an officer in respect of anything done in good faith in the exercise of his powers under this Act.

Power to accept and enforce undertakings

(1) The Enforcement Authority may accept a written undertaking given by a person for the purposes of this section in connection with a matter under this Act.

(2) A person who gave an undertaking under subsection (1) may withdraw or vary the undertaking at any time, but only with the consent of the Enforcement Authority.

(3) If the Enforcement Authority considers that a person who gave such an undertaking has breached any of its terms, one of its officers may apply to the Supreme Court for an order under subsection (4).
(4) If on such an application the Supreme Court is satisfied that a person who gave an undertaking under subsection (1) has breached a term of the undertaking, the court may make all or any of the following orders:
   (a) an order directing the person to comply with the terms of the undertaking;
   (b) an order directing the person to pay to the Government an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
   (c) an order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
   (d) any other order that the court considers appropriate.

**Injunctions**

(1) The Supreme Court may, on the application of an officer of the Enforcement Authority, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute any of the following:
   (a) a contravention of any of the provisions of this Act;
   (b) any attempt to contravene such a provision;
   (c) aiding, abetting, counselling or procuring any other person to contravene such a provision;
   (d) inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision;
   (e) being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision;
   (f) conspiring with any other person to contravene such a provision.

(2) The Supreme Court may at any time rescind or vary an injunction granted under this section.

(3) Where an application is made to the Supreme Court under this section for the grant of an injunction restraining a person from engaging in conduct of a particular kind, it may,
   (a) if it is satisfied that the person has engaged in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or
   (b) if in the opinion of the court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind, whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.
(4) Where an application is made to the court under this section for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the court may,

(a) if it appears to the court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) if in the opinion of the court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind, whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

Powers of Court to enforce consumer rights

(1) In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may—

(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.

(2) Where the court is satisfied that a person has engaged in conduct constituting a contravention of any of the provisions of this Act, the court may, whether or not that person has previously engaged in such conduct, make either or both of the following orders:

(a) an order requiring that person, or any other person involved in the contravention, to disclose, at that person's own expense, to the public, or to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that person has access;

(b) an order requiring that person, or any other person involved in the contravention, to publish, at that person's own expense, in such manner and at such times as are specified in the order, corrective statements the terms of which are specified in, or are to be determined in accordance with, the order.
Alternative dispute resolution

(1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes.

(2) If the alternative dispute resolution person concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, he may terminate the process by notice to the parties, where after the party who referred the matter may file a complaint with the Enforcement Authority.

(3) If an alternative dispute resolution person has resolved, or assisted parties in resolving their dispute, he 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 a competent 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.

Offences and penalties

(1) Any person who contravenes this Act or any regulations made under it, shall commit an offence and shall, on conviction, be liable—
   (a) in the case of a first offence, to a fine of not less than 10,000 rupees and not exceeding 100,000 rupees; and
   (b) in the case of a second or subsequent offence, to a fine of not less than 25,000 rupees and not exceeding 250,000 rupees and to imprisonment for a term not exceeding 12 months.

(2) Notwithstanding section 114 of the Courts Act and section 72 of the District and Intermediate Courts (Criminal Jurisdiction) Act, a Magistrate shall have jurisdiction to try an offence under this Act and may impose any penalty provided by this Act.

(3) Sections 152 and 153 of the Criminal Procedure Act shall not apply to an offence under this Act.