

UNIVERSITY OF KWAZULU-NATAL

**CONSUMER PROTECTION LEGISLATION IN SOUTH AFRICA – IS IT REALLY  
NECESSARY?**

By

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## DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this Dissertation contains my own work except where specifically acknowledged.

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Signed..........

Date.....27/03/2019.....

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# **CONSUMER PROTECTION LEGISLATION IN SOUTH AFRICA – IS IT REALLY NECESSARY?**

## **ABSTRACT**

The South African government tries to protect its consumers, many of whom are historically disadvantaged, in the transactions they enter into with suppliers, especially in the financial services industry, where they are more vulnerable. Government aims to do this through legislation. Consumer protection legislation is heavily criticised because it adds to the burden of compliance imposed on suppliers by legislation. Another criticism is that consumers are ultimately prejudiced because the costs of compliance are inevitably passed on the consumers. This calls to question whether consumer protection measures are really necessary, and do they really benefit consumers.

This mini dissertation examines the reasons why government consistently seeks to pass legislation to protect consumers. Chapter one commences with an outline of legislation introduced since democracy to protect consumers of general goods and services, of credit and of financial services and products. This is followed by a discussion of the advantages and criticism of this legislation which should reveal whether it was due for review and possible overhaul. This study is relevant because the South African financial services industry is currently migrating to the Twin Peaks model of regulation. Legislation has been passed and more is in the pipeline to establish a Prudential Authority within the South African Reserve Bank focusing on market stability, and a Market Conduct Regulator to focus on the fair treatment of consumers of financial products and services. Chapter four examines the reasons why government is introducing this new legislation, its aims and the important provisions. Critics argue that the new legislation will fail to achieve its aims of protecting consumers because the creation of additional regulators does not result in consumer protection and the financial market is too dynamic for legislation to keep up with developments. However, the dissertation concludes that the government may still salvage the situation by focusing on two areas that are the key to achieving its aims: enforcement of the legislation and consumer education.

## TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	
1.1. Background	1
1.2. Problem statement	5
1.3. Rationale for this study	7
1.4. Research questions	8
1.5. Limitations of this study	8
1.6. Methodology	9
1.7. Structure	9
<b>2. THE NEED FOR CONSUMER PROTECTION LEGISLATION</b>	
2.1. The reasons for introducing specific legislation to protect consumers	10
2.1.1. Access to the markets including the credit market	11
2.1.2. Unfair contract terms	13
2.1.3. Unconscionable conduct	14
2.1.4. Access to redress	15
2.1.5. Upgrade and rationalization of existing consumer protection measures	16
2.1.6. The common law	18
2.1.7. Over-indebtedness	19
2.2. Advantages of introducing consumer protection legislation	20
2.2.1. Certainty	20
2.2.2. Freedom of contract	21
2.2.3. Access to redress	22
2.3. Criticism of consumer protection legislation	22
2.3.1. Costs	23
2.3.2. Over-regulation	23
2.3.3. Economic digression	24
2.4. Concluding remarks	25

<b>3. SOUTH AFRICAN CONSUMER PROTECTION LEGISLATION</b>	
3.1. The National Credit Act	26
3.1.1. Aims of the legislation	26
3.1.2. Important provisions	27
3.1.2.1. Access to credit	27
3.1.2.2. Over-indebtedness and reckless lending	30
3.1.2.3. Access to redress	31
3.1.3. The National Credit Regulator	32
3.1.4. Criticism of the regulation of the credit market	33
3.1.5. Concluding remarks regarding the NCA	37
3.2. The Consumer Protection Act	38
3.2.1. Aims of the legislation	38
3.2.2. Important provisions	39
3.2.2.1. Access to the market	39
3.2.2.2. Access to redress	40
3.2.2.3. Unconscionable conduct	41
3.2.2.4. Unfair contract terms	42
3.2.3. Enforcement	43
3.2.4. Critique on the CPA	44
3.2.5. Concluding remarks regarding the CPA	45
3.3. Financial Services Legislation	46
3.3.1. Aims of the legislation	47
3.3.2. Important consumer protection measures	49
3.3.2.1. Registration of FSPs	50
3.3.2.2. The fit and proper requirements	50
3.3.2.3. Measures to ensure fairness	51
3.3.3. The Regulators	51
3.3.3.1. The Reserve Bank	51
3.3.3.2. The FSB	54
3.3.4. Dispute resolution	55
3.4. Concluding remarks regarding financial protection legislation	57

<b>4. THE NEW FINANCIAL SECTOR REGULATION</b>	
4.1. The need for the Twin Peaks Model	60
4.1.1. Stability	60
4.1.2. Consumer protection and market conduct	60
4.1.3. Expanding access and financial inclusion	62
4.1.4. Combating financial crime	63
4.2. The Twin Peaks Model	63
4.3. The Treating Customers Fairly Campaign	65
4.4. The Financial Sector Regulation Act	67
4.4.1. Aims of the legislation	67
4.4.2. Important provisions	67
4.4.2.1. Prudential Regulation	67
4.4.2.2. Enforcement	68
4.4.2.3. Dispute resolution	69
4.4.3. Criticisms of the Act	70
4.5. The Insurance Act	72
4.5.1. Aims of the legislation	72
4.5.2. Important provisions	73
4.5.3. Criticism of the Act	74
4.6. The Conduct of Financial Institutions Bill	75
4.6.1. Aims of the legislation	75
4.6.2. Important provisions	75
4.7. Concluding remarks	77
<b>5. CONCLUSION</b>	
5.1. Summation	78
5.2. Enforcement	78
5.3. Education	81
5.4. Concluding remarks	83
5.5. Final Recommendations	85
<b>BIBLIOGRAPHY</b>	87
<b>ABBREVIATIONS &amp; ACRONYMS</b>	106

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background

When the South African democratic government came into power in 1994, it intended that previously disadvantaged individuals and business be empowered.<sup>1</sup> This could be achieved by giving them access to credit and the markets. It was a specific goal in the Reconstruction and Distribution Programme (“RDP”) that consumers be protected from being exploited in the market by suppliers through poor or unfair practices.<sup>2</sup> This could be achieved by codifying and rationalising some of the rights and obligations applicable to the market, so that each contracting party knew where they stood.<sup>3</sup> In this way consumers would gain confidence and therefore demand more from suppliers, which would then boost competition.<sup>4</sup> Consumers would in return benefit from lower prices. Consumers also needed easier access to avenues where they could lay their complaints against the goods or treatment that they had received.<sup>5</sup> Whilst these circumstances necessitated a shift in government’s policy towards greater consumer protection in South Africa, this was also an opportunity to align the country’s legislation to international standards of regulation.<sup>6</sup> Internationally, consumer protection interventions had been on the agenda since the 1970s.<sup>7</sup>

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<sup>1</sup> A Hirsch *Season of Hope: Economic Reform under Mandela and Mbeki* (2005) UKZN Press 200 211.

<sup>2</sup> *Ibid.*

<sup>3</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (September 2004) available at [https://www.gov.za/sites/default/files/26774\\_1.pdf](https://www.gov.za/sites/default/files/26774_1.pdf), accessed on 27 April 2018 24.

<sup>4</sup> T Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ 2010 *Obiter* 228.

<sup>5</sup> T Woker ‘Consumer Protection and alternative dispute resolution’ 2016 *SA Merc LJ* 23 -24.

<sup>6</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 13.

<sup>7</sup> S Eiselen & T Naude ‘Introduction and Overview of the Consumer Protection Act’ in *Commentary on the Consumer Protection Act* (2014) paras 16 – 18; R Sharrock ‘Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act’ 2010 *SA Merc LJ* 297; E Van Eeden *Consumer Protection Law in South Africa* (2013) 1; According to: J Otto ‘Introduction and historical background to the National Credit Act’ in JW Scholtz (ed) in *Guide to the National Credit Act* (2008) 1: “in the past three of four decades legislatures worldwide have produced legislation covering consumer credit and various other fields of consumer protection. The United Kingdom was probably the forerunner as far as comprehensive consumer credit legislation is concerned, when it passed the Consumer Credit Act in 1974. The various Australian states promulgated legislation in the mid 1980’s. The European Union adopted a Directive on Consumer Credit in 1986 which led to a flood of consumer credit legislation in the 1990’s in Europe.”

In South Africa, the Consumer Protection Act<sup>8</sup> (“the CPA”) was adopted in 2011 as a comprehensive piece of legislation specifically geared to protect consumers.<sup>9</sup> The policy directed that the National Consumer Commission (“NCC”) be established as a consumer advocate, primarily focusing on enforcing the CPA and providing consumer education.<sup>10</sup>

A Policy Framework for Consumer Credit was crafted prior to this in 2004, with the aim of providing access to credit whilst managing the problem of over-indebtedness.<sup>11</sup> In 2002, the value of the credit market was estimated at R362 billion.<sup>12</sup> Government realised that one of the challenges to access to credit, was that consumers were struggling to repay their debts, especially micro-loans.<sup>13</sup> Government initially intervened to regulate the market because there was evidence that consumers were over-indebted and there was reckless behaviour by credit providers. Consumers were also exploited by micro-lenders, intermediaries, debt administrators and debt collectors.<sup>14</sup> These were problems affecting low income earners, who were also the target group for government’s initiatives to provide access to credit. The micro-lending industry in particular, was found to be out of control. Micro-loans were initially seen as a means for the poor or low income earners who had no assets to offer main-stream lenders as security, to access credit so they could uplift their lives.<sup>15</sup> However, though the micro-lending industry grew significantly, poverty did not reduce. Instead, consumers became over-indebted.<sup>16</sup>

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<sup>8</sup> Act 68 of 2008.

<sup>9</sup> The Act was only implemented in March 2011; Section 3(1), CPA.

<sup>10</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 41.

<sup>11</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (2004) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050608consumer.pdf>, accessed on 17 April 2018 13.

<sup>12</sup> By the time the National Credit Regulator (“NCR”) began its work it had doubled, and it now sits at R1,7 trillion - The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (August 2003) available at <https://www.ncr.org.za/documents/pages/research-reports/aug13/Summary%20of%20Findings.pdf>, accessed on 17 April 2019 15; NCR *Annual Report* (2007) 9; NCR *Annual Report* (2016/17) available at <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202017.pdf>, accessed on 30 September 2018 41.

<sup>13</sup> P Stoop ‘The South African consumer credit policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness’ 2009 21 *SA Merc LJ* 365.

<sup>14</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above); 4.

<sup>15</sup> The concept originated in India in the 1970’s; M Bateman ‘South Africa’s Post-Apartheid Micro-credit Driven Calamity’ 2014 *LDD* 92.

<sup>16</sup> In 2002, the total value of formal consumer credit market was estimated at R361 billion and the low income earner’s participation accounted for 25 per cent thereof -The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above); 14; In 2016, the value owed by consumers to credit providers sat at over a trillion rand, including a billion of new credit just in that year - NCR *Annual Report* (2015/16) 43.

The Micro Finance Regulatory Council (“MFRC”), the regulator that preceded the National Credit Regulator (“NCR”) was tasked to investigate why main stream credit providers were reluctant to lend to the low income market.<sup>17</sup> This reluctance was identified as the root cause of consumers turning to unregistered money lenders.<sup>18</sup> These money lenders, often referred to as “loan sharks” or *mashonisas* employed harmful practices to ensure that they were repaid their loans, at high interest rates. Over the years, this industry had grown significantly and was making it particularly difficult for consumers to exit the debt cycle.<sup>19</sup> The National Credit Act (“NCA”) was thus passed to address these challenges in the credit market.<sup>20</sup> The NCR was established, replacing the MFRC, to register and supervise credit providers, and to ensure that consumers had access to redressing their complaints against credit providers.<sup>21</sup>

Over and above these measures, government found it necessary to give consumers specific and unique protection in the financial market.<sup>22</sup> The financial services sector is a dynamic and profit-driven sector.<sup>23</sup> As a result of the tight competition, the sector is often marred by corporate scandals.<sup>24</sup> South Africa is currently being rocked by the VBS Mutual Bank (“VBS”)<sup>25</sup> scandal, where those in control of the bank’s affairs created and used fictitious transactions to pilfer up to R2billion of investor funds, and one of the investors is government.<sup>26</sup> Financial products are intangible and so for both users and regulators, they are difficult to manage or monitor.<sup>27</sup> These products are also complex and are therefore difficult for most consumers to understand.<sup>28</sup> Financial service providers (“FSPs”) generally have more knowledge of the market, market forces and the products that they sell. This knowledge can

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<sup>17</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 3 - 4.

<sup>18</sup> J Campbell ‘The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005’ 2007 *SA Merc LJ* 251 – 252.

<sup>19</sup> M Bateman ‘South Africa’s Post-Apartheid Micro-credit Driven Calamity’ 120.

<sup>20</sup> Act 34 of 2005.

<sup>21</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 34

<sup>22</sup> E Van Eeden *Consumer Protection Law* 581.

<sup>23</sup> D Millard & M Botha ‘Something’s got to give: The future of financial advisors and intermediaries as employees.’ 2012 65 *THRHR* 51 – 52.

<sup>24</sup> *Ibid* 51 – 52.

<sup>25</sup> VBS stands for Venda Mutual Bank, but the bank evolved into VBS Bank.

<sup>26</sup> Adv T Motau (SC) *VBS Mutual Bank: The Great Bank Heist: Investigators Report to the Prudential Authority* (10 October 2018) available at <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8830/VBS%20Mutual%20Bank%20-%20The%20Great%20Bank%20Heist.pdf>, accessed on 05 November 2018.

<sup>27</sup> E Van Eeden *Consumer Protection Law* 581 – 2.

<sup>28</sup> G Pearson, NP Stoop and M Kelly-Louw ‘Balancing Responsibilities - Financial Literacy’ 2017 *PELJ* 7- 9.

be abused to the detriment of consumers.<sup>29</sup> Moreover, failures in the financial services sector can be catastrophic and costly for consumers.<sup>30</sup>

In South Africa, financial services legislation has been in place for decades, administered by a number of regulators, with the most prominent two being the South African Reserve Bank (the “Reserve Bank”) and the Financial Services Board (“FSB”). The Reserve Bank was established in 1921 and it is the central bank and lead regulator of banks.<sup>31</sup> It fulfils the role of finding and maintaining stability in the South African financial market.<sup>32</sup> The FSB has been administering a suite of legislation that includes the Long-term Insurance Act<sup>33</sup> (“LTIA”) and the Short-term Insurance Act<sup>34</sup> (“STIA”), Financial Advisory and Intermediary Services Act<sup>35</sup> (“FAIS”) and the Financial Services Ombud Schemes Act<sup>36</sup> (“FSOS”).<sup>37</sup> The FSB has been working towards the following objectives:

1. “Fair treatment of consumers of financial services and products;
2. Financial soundness of financial institutions;
3. Systemic stability of financial services industries; and
4. Integrity of financial markets and institutions.”<sup>38</sup>

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<sup>29</sup> E Van Eeden *Consumer Protection Law* 580.

<sup>30</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (February 2011) available at <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> accessed on 17 April 2018 41 – 42; E Van Eeden *Consumer Protection Law* 581 – 2.

<sup>31</sup> In terms of the Currency and Banking Act 31 of 1920; L Swart & V Lawack-Davids ‘Understanding the South African Financial Markets: An overview of the Regulators’ 2010 *Obiter* 624.

<sup>32</sup> L Swart & V Lawack-Davids ‘Understanding the South African Financial Markets: An overview of the Regulators’ 624 – 625.

<sup>33</sup> Act 52 of 1998.

<sup>34</sup> Act 53 of 1998.

<sup>35</sup> Act 37 of 2002.

<sup>36</sup> Act 37 of 2004.

<sup>37</sup> Legislation supervised by the FSB includes: the Collective Investment Schemes Control Act, 45 of 2002; Financial Advisory and Intermediary Services Act, 37 of 2002; Financial Institutions (Protection of Funds) Act, 28 of 2001; Financial Services Board Act, 97 of 1990; Financial Services Ombud Schemes Act, 37 of 2004; Financial Supervision of the Road Accidents Fund Act, 8 of 1993; Friendly Societies Act, 25 of 1956; Inspection of Financial Institutions Act, 80 of 1998; Long-term Insurance Act, 52 of 1998; Pension Funds Act, 24 of 1956; Securities Services Act, 36 of 2004; Short-term Insurance Act, 53 of 1998 and subordinate legislation under the above Acts.

<sup>38</sup> FSB *Annual Report* (2009) available at <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202009.pdf> accessed on 12 July 2018 1.

From the above discussion it can be seen that a host of legislation has been introduced to ensure the protection of South African consumers. This dissertation seeks to examine whether or not this legislation is really necessary.

## 1.2 Problem statement

The government's intervention in the functioning of the market by introducing measures to protect consumers has been heavily criticised, especially in the financial services sector.<sup>39</sup> Supporters of the free market argue that the regulation of the market produces no clear benefits to the consumers it aims to protect.<sup>40</sup> Since the market is dynamic and ever-changing, it is not capable of being controlled by government through regulation.<sup>41</sup> Moreover, the common law, itself as a form of regulation, has always been available and adequate to provide remedies for aggrieved consumers.<sup>42</sup> Therefore regulation, if at all necessary should be kept to minimum, especially since it comes at a cost. It is argued that the costs that suppliers incur in trying to comply with the legislation are inevitably passed on to consumers.<sup>43</sup> Moreover, the country becomes unattractive to investors because of the heavy regulation, which ultimately limits economic growth, thus perpetuating poverty.<sup>44</sup>

Notwithstanding the available consumer protection measures in place, a majority of consumers are still vulnerable and abusive practices especially in the financial market, persist.<sup>45</sup> Too many pieces of legislation and too many regulators have resulted in fragmentation. Consequently, some consumer problems have been slipping through the cracks undetected and/or

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<sup>39</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 218.

<sup>40</sup> FMF 'Submission on the Financial Advisory and Intermediary Services Act (FAIS)' available at <http://eolstoragewe.blob.core.windows.net/wm-122664-cmsimages/7FAIS.pdf> accessed on 1 November 2017 1.

<sup>41</sup> L Louw 'Financial Advisers Bill' 26 August 1999 available at <http://www.freemarketfoundation.com/article-view/financial-advisers-bill> accessed on 28 October 2017.

<sup>42</sup> FMF 'Submission on the Financial Advisory and Intermediaries Act (FAIS)' (note 40 above); 1.

<sup>43</sup> *Ibid.*

<sup>44</sup> L Louw 'Is South Africa Over-regulated?' (12 May 2009) available at <http://www.freemarketfoundation.com/article-view/is-south-africa-over-regulated> accessed on 04 April 2018; L Louw 'South Africa is buckling under excessive regulation' (7 January 2004) available at <http://www.freemarketfoundation.com/article-view/south-africa-is-buckling-under-excessive-regulation> accessed on 7 April 2018.

<sup>45</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* available at <https://www.fsb.co.za/Departments/communications/Documents/2014%2012%2012%20Draft%20Market%20Conduct%20Framework.pdf>, accessed on 08 May 2017.

unresolved.<sup>46</sup> These problems include events which have had the potential to upset the stability of the financial system. For example, three of the banks that have taken on the market dominated by the low income earners and previously disadvantaged persons: African Bank, Capitec Bank and VBS Bank, each have unsavoury reports and/or have been placed in curatorship.<sup>47</sup> Even though there is evidence of reckless lending, government has to intervene in these matter because of the implications of their collapse. If the major investors of these institutions withdraw their funds, the risk of collapse warrants government's intervention to protect the vulnerable investors, consumers.

The Twin Peaks Model is government's favoured solution to address the above challenges, amongst others. Briefly, the Twin Peaks Model introduces the Prudential Authority (within the Reserve Bank) and the Financial Sector Conduct Authority ("FSCA") (previously the FSB), as the two regulatory peaks, to which all financial institutions, including banks will submit.<sup>48</sup> The Prudential Authority will ensure that financial stability is maintained in South Africa from one peak, whilst the FSCA will regulate market conduct from the other peak.<sup>49</sup> The reshuffle aims to unify the regulators, simplify and clarify their work, and enable compliance by suppliers. In light of criticisms questioning the necessity of all this regulation to protect consumers, an examination into these and other aims of government, is warranted.<sup>50</sup>

### 1.3 Rationale for this study

As stated above the government has introduced a host of legislation to protect consumers. Despite this legislation, problems continue to plague consumers which necessitates further and

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<sup>46</sup> A Godwin, T Howse & I Ramsay 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' 2017 *SALJ* 669; National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above); 35.

<sup>47</sup> Viceroy Research Group *Capitec: A wolf in sheep's clothing* (30 January 2018), available at <https://viceroyresearch.files.wordpress.com/2018/01/capitec-30-jan-2017.pdf>, accessed on 31 August 2018; Adv T Motau (SC) (note 26 above); Adv JF Myburgh *Report in terms of S69A(11) of The Banks Act in Exparte: African Bank*, (12 May 2016) available at <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/7288/Report%20-%20Investigation%20in%20terms%20of%20s69A%20of%20the%20Banks%20Act,%20094%20of%201990.pdf>, accessed on 31 August 2018.

<sup>48</sup> National Treasury *Impact Study of the Twin Peaks Reforms* (April 2016) available at <https://www.fsb.co.za/NewsLibrary/2017.05.10%20Insurance%20Bill%20to%20Committee.pdf>, accessed on 13 November 2017 7.

<sup>49</sup> *Ibid.*

<sup>50</sup> National Treasury *Supplement to Impact study of the Twin Peaks Reforms* available at [http://www.treasury.gov.za/twinpeaks/impact%20assessment-%20supplementary-%20Levies%20Bill-%2028-03-2018\\_KS.pdf](http://www.treasury.gov.za/twinpeaks/impact%20assessment-%20supplementary-%20Levies%20Bill-%2028-03-2018_KS.pdf), accessed on 6 June 2018.

better legislation. This is costly for consumers and as the Free Market Foundations points out, these costs are passed on to consumers. There is no doubt that consumers must pay for this protection. The question which must then be answered is: is all this consumer protection legislation really necessary? This dissertation aims to consider the legislation in order to reach a conclusion about whether introducing further and better legislation is really going to achieve its aim of protecting consumers. The legislation will also consider whether or not there are alternatives to introducing costly legislation. In order to answer these questions, it is necessary to consider the reasons why the legislation was introduced, what the legislation is seeking to achieve and whether or not the legislation is in fact achieving its aims. Finally, it is necessary to consider whether or not there are some alternatives to introducing costly legislation which may better serve the government's intention to protect consumers.

#### **1.4 Research Questions**

The three questions that this mini-dissertation seeks to answer are:

1. What were the reasons that led government to enact legislation to protect consumers in the general market, the credit market and in the financial services sector?
2. What were the aims of the legislation and did the resultant legislation address the reasons for its introduction?
3. Is it necessary for government to introduce even more consumer protection legislation?

#### **1.5 Limitations of this study**

The purpose of this study is to consider some of the legislation that has been introduced by the South African government to protect consumers. This is a very broad topic for a mini-dissertation but the intention is to give the reader some insight into the attempts by government to protect consumers. The purpose is also to question whether introducing new legislation whenever new or recurrent problems are identified, is not in fact masking the problems the legislation is intended to resolve. This is particularly apparent with the introduction of the new Financial Sector Regulation Act<sup>51</sup> that was introduced on 1 April 2018, despite there being a

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<sup>51</sup> Act 9 of 2017.

myriad of laws already to regulate the financial services sector, as well as the NCA and the CPA.

I am of the view that it is necessary to cast the net of this research broadly although I am aware that I may be criticised for dealing with some issues in a rather superficial manner. I hope however that my conclusions as set out in Chapter 5 will justify the approach that has been adopted.

## **1.6 Methodology**

This research will be conducted as a desktop exercise; therefore no ethical issues are foreseen. The primary source documents are government policy documents as detailed above. Reference will be made to legislation relevant to consumer protection in South Africa, promulgated and yet to be promulgated. The methodology to be followed in conducting this research will be to critically analyse and discuss policy documents and legislation, as well as views expressed on the subject of consumer protection, in articles and textbooks written by academic scholars and other interested writers.

## 1.7 Structure of the dissertation

Hereafter, Chapter 2 examines government's reasons for introducing consumer protection legislation. The advantages and criticism of introducing the legislation will be discussed.

In Chapter 3, an overview of the existing consumer protection legislation will be provided. The overview will highlight the aims of the legislation and the important provisions that address the issues highlighted in Chapter 2.

In Chapter 4, the focus is on the proposed legislation that is currently and will in future be implemented in financial services sector. The reasons behind the legislation will be considered, whereafter, an overview of the proposed legislation will be provided.

Chapter 5 concludes this mini-dissertation with an analysis and finding on the question raised initially: whether all this consumer protection regulation is really necessary?

## CHAPTER 2

### THE NEED FOR CONSUMER PROTECTION LEGISLATION

The purpose of this chapter is to examine why the government believed it was necessary to introduce consumer protection legislation. This chapter will consider some of the major problems experienced by consumers.

#### 2.1 The reasons for introducing specific legislation to protect consumers

When the new South Africa's government came into power in 1994, it was confronted with a dysfunctional financial market.<sup>52</sup> It realised that the vast majority of consumers were not benefiting from the market because there was not enough competition amongst suppliers.<sup>53</sup> Government therefore sought to create an ideal modern market that was efficient, effective and just, where consumers could demand competitive prices and goods and services of better quality.<sup>54</sup> These confident consumers would also inspire innovation and enhanced performance by suppliers.<sup>55</sup> The new government decided that the existing legislation had to be changed, for it fulfil the following purposes:

1. to provide for and regulate consumers' access to markets, including the credit market;
2. protect consumers against unfair contract terms;
3. curb the over-indebtedness of consumers;
4. prohibit unfair marketing practices fueling over-indebtedness;
5. provide consumers with access to redress;
6. upgrade and rationalize existing consumer protection measures in terms of the existing legislation and the common law.<sup>56</sup>

Each of these needs are considered in more detail below.

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<sup>52</sup> M Bateman 'South Africa's Post-Apartheid Micro-credit Driven Calamity' 117.

<sup>53</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 4.

<sup>54</sup> M Bateman 'South Africa's Post-Apartheid Micro-credit Driven Calamity' 123 – 124.

<sup>55</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 4.

<sup>56</sup> E Van Eeden & J Barnard *Consumer Protection Law in South Africa* 2nd Edition (2017) 4 - 5.

### 2.1.1 Access to markets including the credit market

As a result of South Africa's historical legacy, the majority of consumers were regarded as vulnerable.<sup>57</sup> Broadly, these were consumers earning low incomes, from previously disadvantaged groups, living mostly in the rural areas. Inclusive in this category of people were minors and those with limited ability to read and understand information presented by suppliers.<sup>58</sup> Government found that the participation of vulnerable consumers in the market had increased over the years, and so was their exposure to risks such as defective and counterfeit goods, against which they had to be protected.<sup>59</sup>

Government sought to empower vulnerable consumers by giving them access to credit, so they could access more opportunities and gain capital.<sup>60</sup> It was expected that this would lead to economic reform.<sup>61</sup> However, the credit market was particularly problematic due to credit providers' charging exorbitant fees and interest for extending credit.<sup>62</sup> The lack of competition contributed to the high interest rates that were being charged.<sup>63</sup> Additionally, main stream credit providers or the formal credit market was avoiding the low income sector, because this sector was not considered profitable.<sup>64</sup>

Initially, government tried to exempt micro-loans from the legislation applicable at the time.<sup>65</sup> The main Acts were the Credit Agreements Act<sup>66</sup> and the Usury Act.<sup>67</sup> The purpose of the exemption was to facilitate better access to credit and to encourage credit providers to lend to low-income people who were unable to provide security for their loans.

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<sup>57</sup> Y Mupangavanhu 'An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008' 2015 *PELJ* 321; The DTI, *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 22.

<sup>58</sup> Section 3(b)(i) – (iv).

<sup>59</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 23.

<sup>60</sup> M Kelly-Louw, 'The Prevention and Alleviation of Consumer Over-indebtedness' 2008 *SA Merc LJ* 203-4.

<sup>61</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above); 16 – 19

<sup>62</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above); 18.

<sup>63</sup> *Ibid*; M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 224 - 5.

<sup>64</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above); 18- 19.

<sup>65</sup> GN 3451 in GG 14498 of 31 December 1992; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) 8.

<sup>66</sup> Act 75 of 1980.

<sup>67</sup> Act 73 of 1968.

The result was the mushrooming of the micro-lending industry where interest rates were even higher than the formal credit market.<sup>68</sup> Initially, the exemption only applied to loans of less than R6000 repayable over a short period of time (six months). This was later increased to loans of less than R10 000. Then government tried to tighten the conditions of the exemption, by requiring credit providers to register and comply with the rules of the then regulator, the MFRC.<sup>69</sup> This move was challenged by the micro-lending industry, but the exemption notices, the MFRC and its rules passed the constitutionality test.<sup>70</sup> This challenge showed that a balance had to be found between the competing interests of credit providers who sought to make profits, and consumers who needed protection from unfair lending practices.<sup>71</sup>

The reality was that consumers faced many difficulties in trying to access the credit market.<sup>72</sup> The credit market lacked transparency and many consumers were ignorant of the cost of credit.<sup>73</sup> The information given to consumers was not enough to enable them to make informed decisions. This lack of adequate information effected the bargaining power between contracting parties; hence consumers were regular victims of unfair contract terms.<sup>74</sup> Essentially, consumers often entered into contracts without reading or understanding what they were committing to.<sup>75</sup> Poor and misleading marketing and selling practices by suppliers caused consumers to lose their confidence, contrary to what government was trying to achieve.<sup>76</sup>

To address this, measures had to be introduced so that a supplier would have to disclose the cost of credit and/or provide the proper description of the goods or services, at the time of transacting, in order to allow consumers to exercise their options and make proper decisions.<sup>77</sup>

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<sup>68</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* (note 65 above) 10.

<sup>69</sup> GN 713 in GG 20145 of 1 June 1999 and GN 911 in GG 20307 of 16 July 1999.

<sup>70</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* (note 65 above) 63 – 64.

<sup>71</sup> N Grove & J Otto *Basic Principles of Consumer Credit Law* 2<sup>nd</sup> Edition (2002) 259.

<sup>72</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 23, 29 – 30.

<sup>73</sup> The disclosure of finance charges was a requirement under the Usury Act; The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 12, 23.

<sup>74</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 30.

<sup>75</sup> T Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' 2006 3 *STELL LR* 363.

<sup>76</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 25.

<sup>77</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 29 – 30; The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 23.

Another measure to facilitate better access, was that contracts would have to be drafted in plain language, in order to make them more user-friendly for consumers.<sup>78</sup>

### 2.1.2 *Unfair contract terms*

Unfair contract terms had to be regulated specifically.<sup>79</sup> With the increased use of standard contract forms in the market, contract terms that were drafted heavily in favour of suppliers were commonly used.<sup>80</sup> This still persists in the current financial market as standard form contracts are popular with suppliers because they are a means to transact with consumers efficiently and cost-effectively.<sup>81</sup> They involve far less administration, especially for a business that enters into numerous contracts, on a daily basis.<sup>82</sup>

However, standard contract forms are often presented and concluded in manner that exposes consumers to the risk of unfair terms which they are not unaware of or do not understand.<sup>83</sup> Standard contract forms are characterized by detailed and comprehensive terms and conditions of the transaction, compressed in fine print into the minimum pages possible.<sup>84</sup> These types of contracts are often presented at the last minute and presented in a 'take it or leave it' manner, such that consumers cannot really exercise their freedom to contract or not.<sup>85</sup> Transparency and consensus are necessary elements for equitable contracting, however, these elements are often shrewdly compromised in standard contract forms.<sup>86</sup> Moreover, these contracts often conceal terms that limit rights, such as exemption clauses.<sup>87</sup> Exemption clauses are clauses

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<sup>78</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 31.

<sup>79</sup> The SALC Media Statement: Investigation Into Unreasonable Stipulations In Contracts And The Rectification of Contracts (12 May 1998) Pretoria, available at [http://www.justice.gov.za/salrc/media/1998\\_prj47.pdf](http://www.justice.gov.za/salrc/media/1998_prj47.pdf) accessed on 21 October 2017 1.

<sup>80</sup> D Hutchison (ed) *The law of Contract in South Africa* 2<sup>nd</sup> Edition (2009) 24 – 25.

<sup>81</sup> P Stoop 'Background to the regulation of fairness in consumer contracts' 2015 *SA Merc LJ* 194; R Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act' 296.

<sup>82</sup> P Stoop 'Background to the regulation of fairness in consumer contracts' 194.

<sup>83</sup> P Stoop 'Background to the regulation of fairness in consumer contracts' 193 – 194; R Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act' 296 – 297.

<sup>84</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 227.

<sup>85</sup> T Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' 368; P Stoop 'Background to the regulation of fairness in consumer contracts' 2015 *SA Merc LJ* 193 – 194; L Hawthorne 'Contract Law's choice of architecture' (2009) *THRHR* 611.

<sup>86</sup> P Stoop, 'Background to the regulation of fairness in consumer contracts' 194 – 5.

<sup>87</sup> *Ibid* 193 – 194; L Hawthorne 'Contract Law's choice of architecture' 611 -612; T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 227.

that exclude supplier liability when consumers suffer damages as a result of being supplied defective goods and services.<sup>88</sup> This usually means that consumers have no one to hold accountable for their loss.<sup>89</sup>

So government stepped in to protect vulnerable consumers because they were the main victims of inequitable or unjust contracts, especially due to their ignorance or their lack of resources to approach courts for assistance when aggrieved.<sup>90</sup> Government determined that legislation was the most appropriate means to protect consumers against unfair terms. It was necessary to prohibit “contractual unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced”.<sup>91</sup>

### 2.1.3 *Unconscionable conduct*

Consumers had to be protected from unfair business practices, such as fraudulent investment schemes, and pyramids schemes. Following various investigations by the Business Practices Committee (“BPC”), a number of get-rich-quick schemes were declared illegal, but only as and when they were identified.<sup>92</sup> In 1999, the BPC was empowered to investigate certain general business practices with a view of having them declared ‘unfair’.<sup>93</sup> Concerned role-players, including the Reserve Bank, FSB and South African Police Service (“SAPS”), prompted an investigation by the BPC into get-rich-quick schemes.<sup>94</sup> Consequently, multiplication schemes, chain letters and pyramid promotional schemes were declared to be unfair business practices, by the Minister of Trade and Industry (the “Minister”).<sup>95</sup> The common factor in these schemes was that investors were duped into investing large sums of

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<sup>88</sup> RH Christie & GB Bradfield (eds) *The law of Contract in South Africa* 7<sup>th</sup> Edition (2016) 216.

<sup>89</sup> *Ibid*.

<sup>90</sup> The SALC: Media Statement: Investigation Into Unreasonable Stipulations In Contracts And The Rectification of Contracts (note 79 above) 1.

<sup>91</sup> *Ibid* 2.

<sup>92</sup> T Woker ‘If it sounds too good to be true it probably is: Pyramid schemes and other related frauds’ 2003 *SA Merc LJ* 239 – 240.

<sup>93</sup> Sections 8 – 12 and specifically sub-section 8(1)(b), Consumer Affairs (Unfair Business Practices) Act 71 of 1988, as amended by Act 23 of 1999.

<sup>94</sup> Renamed the Consumer Affairs Committee (“CAFCOM”); T Woker ‘If it sounds too good to be true it probably is: Pyramid schemes and other related frauds’ 239.

<sup>95</sup> See T Woker ‘Fundamental Consumer Rights’ in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 42 – 11, 43-4; GN 1135 GG 20169 of 9 June 1999.

money, often their lifesavings, with the promise of unrealistically high returns, which were not met. Investors were ordinary consumers, and often the elderly.<sup>96</sup> Law enforcement agencies were failing to prevent this type of conduct as the owners or promoters of these schemes were also very innovative.<sup>97</sup> Hence, government determined that legislation was the best means of controlling this type of conduct.<sup>98</sup>

#### 2.1.4 Access to redress

Government argued that when consumers had been treated unfairly by suppliers, through contract terms or conduct, they had limited or no access to redress through the courts.<sup>99</sup> Consumer complaints could only be enforced by the National Prosecuting Authority (“NPA”) after investigation by the SAPS.<sup>100</sup> The conduct complained of had to have been declared an unfair business practice by the Minister first, based on the recommendations of the regulator.<sup>101</sup> Essentially, individual consumer complaints had to wade through bureaucracy, only to compete with criminal matters in the justice system.<sup>102</sup>

It was also not a viable option for most consumers to exercise their common law remedies through civil suits.<sup>103</sup> Besides the cost implications, courts were not user friendly for ordinary consumers who were not so knowledgeable about available options, court processes or technical legal aspects.<sup>104</sup> Court decisions also had a limited effect; the relief obtained by a particular litigant was often limited to that specific supplier.<sup>105</sup> Judgment was obtained after years of litigation, which could be catastrophic for a consumer, especially in the financial

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<sup>96</sup> T Woker ‘If it sounds too good to be true it probably is: Pyramid schemes and other related frauds’ 240 – 246.

<sup>97</sup> *Ibid* 247 – 248.

<sup>98</sup> T Woker ‘Fundamental Consumer Rights’ (note 95 above) 42 – 10, 43-3.

<sup>99</sup> The SALC: Media Statement: Investigation into Unreasonable Stipulations in Contracts And The Rectification of Contracts (note 79 above) 3 -4; T Woker ‘Consumer Protection and alternative dispute resolution’ 23 -24.

<sup>100</sup> In terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 38.

<sup>101</sup> Initially this was the BCP, and later Consumer Affairs Committee (“CAFCOM”).

<sup>102</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 38.

<sup>103</sup> E Van Eeden & J Barnard *Consumer Protection Law in South Africa* 4.

<sup>104</sup> T Woker ‘Consumer Protection and alternative dispute resolution’ 24.

<sup>105</sup> T Naude ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ 380; T Woker ‘Consumer Protection and alternative dispute resolution’ 23 -24.

services sector where the loss could be their life savings.<sup>106</sup> A means had to be found so that consumers could have their complaints resolved through a cheaper and more accessible alternative to the courts.<sup>107</sup>

### 2.1.5 Upgrade and rationalization of existing consumer protection measures

It was necessary to upgrade South Africa's legislation to be in line with international developments because since democracy and with the increase in international trade, consumers had been exposed to greater risks, such as counterfeit goods.<sup>108</sup> The United Nations Guidelines on Consumer Protection encouraged the South African government to develop a strong consumer protection policy.<sup>109</sup> Government also drew from regulatory developments in New Zealand, United Kingdom, Canada, and Australia in relation to consumer protection.<sup>110</sup> These countries had long passed the necessary legislation to regulate poor practices in the market, including outlawing unfair contract terms and establishing institutions to enforce the legislation.<sup>111</sup>

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<sup>106</sup> T Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' 380; Y Mupangavhu 'An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008' 321.

<sup>107</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (1998) available at [http://www.justice.gov.za/salrc/reports/r\\_prj47\\_contracts\\_1998apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj47_contracts_1998apr.pdf), accessed on 18 April 2018 77 – 103; See N Melville 'Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution' 2010 *SA Merc LJ* 50 – Ombud was adopted by the legislature as a gender-neutral term, however ombudsman is a Swedish term, unrelated to gender, for the office or function.

<sup>108</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 230.

<sup>109</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 23 – 24; UN *United Nations Guidelines for Consumer Protection* (2003) Available at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf), accessed on 17 April 2018 2 -The following are the UN's guiding objectives:

- “(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.”

<sup>110</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 23 – 24.

<sup>111</sup> E Van Eeden & J Barnard *Consumer Protection Law in South Africa* 5; ML Du Preez 'The Consumer Protection Bill: A few Preliminary Comments' 2009 *TSAR* 62.

In the South African context it was necessary to rationalize consumer protection measures that were scattered across various pieces of legislation regulating specific industries or products.<sup>112</sup> Government was of the view that this fragmentation rendered the available measures ineffective.<sup>113</sup> The Consumer Affairs (Unfair Business Practices) Act<sup>114</sup> was the only available, specific consumer protection legislation. It mainly provided for certain business practices to be declared unfair and later, harmful to be controlled or prohibited.<sup>115</sup> However, this piece of legislation was considered ineffective because of enforcement challenges and it did not provide consumers with adequate access to redress.<sup>116</sup> As discussed above, the torment of pyramid schemes and other scams that were slipping through the regulatory cracks, motivated for tighter regulation.<sup>117</sup> Despite investigations and the illegal status of fraudulent schemes, the problem persisted.<sup>118</sup> The existing legislation had to be overhauled and replaced with a simple, comprehensive and accessible consumer law.<sup>119</sup>

In respect of the credit market, the existing legislation was regarded as being outdated as it was being circumvented by credit providers through innovative fees and charges, to the detriment of consumers.<sup>120</sup> As a result of inconsistencies arising from this legislation, there were two co-existing economies or markets in the country.<sup>121</sup> There was a high end market where borrowers had access to mortgages and loans at prime linked rates, and a low income market characterized by microloans, hire purchases and store cards with a higher cost of credit.<sup>122</sup> The existing legislation regulated different and sometimes overlapping areas of the granting of credit.<sup>123</sup>

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<sup>112</sup> Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 2010 *Obiter* 218 -219.

<sup>113</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 23.

<sup>114</sup> Act 71 of 1988, as amended by the Harmful Business Practices Amendment Act 23 of 1999.

<sup>115</sup> The constitutionality of the Act and the definition of harmful business practice was unsuccessfully challenged in *Janse Van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 CC.

<sup>116</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 219 - 220.

<sup>117</sup> T Woker 'If it sounds too good to be true it probably is: Pyramid schemes and other related frauds' 239 – 240.

<sup>118</sup> *Ibid* 248.

<sup>119</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 24.

<sup>120</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 13; M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 226, 214.

<sup>121</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 12.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* 22; For more detail, see N Grove & J Otto *Basic Principles of Consumer Credit Law* (2002).

Government determined that a single law to deal with all forms of credit transactions comprehensively was necessary, in order to promote a fair, yet competitive market.<sup>124</sup>

#### 2.1.6 *The common law*

During the policy reviews, some commentators also argued that age-old protections within the common law were (*and continue to be*) available, on which consumers could rely in the event that they were dissatisfied with a product or service.<sup>125</sup> There were views that the common law had already developed to a point where courts in certain circumstances were willing to strike down contracts that were contrary to public policy.<sup>126</sup> It was argued that the legislation was not only unnecessary, but it would bind courts to the statute, a death knell for the common law, which had provided justice in the area of contract law for the past centuries.<sup>127</sup>

Be that as it may, one of the challenges with the common law of contract, was that it still presumed equality between bargaining or contracting parties.<sup>128</sup> This presupposition is evident in one of the common law rules - *caveat subscripto* - meaning that which is written and signed, is the agreement between the parties and must be preserved, for the all-important purpose of certainty, *pacta sunt servanda*.<sup>129</sup> This is one of the rules that assume that parties are in a position to make free and informed choices and have adequate information to make proper decisions.<sup>130</sup> In reality though, some suppliers conduct themselves in an undesirable and even prohibited manner.<sup>131</sup> For example, consumers often had to rely on the information provided

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<sup>124</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 23.

<sup>125</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 223.

<sup>126</sup> The SALC *Report: Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (1998) available at [http://www.justice.gov.za/salrc/reports/r\\_prj47\\_contracts\\_1998apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj47_contracts_1998apr.pdf), accessed on 18 April 2018 39; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A).

<sup>127</sup> The SALC *Report: Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 39.

<sup>128</sup> L Hawthorne, 'Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention' 2008 71 *THRHR* 441.

<sup>129</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 227.

<sup>130</sup> L Hawthorne 'Contract Law's choice of architecture' 619.

<sup>131</sup> L Hawthorne 'Public governance: Unpacking the Consumer Protection Act 68 of 2008' 2012 *THRHR* 356.

by suppliers, which could be incomplete or false.<sup>132</sup> Also, consumers generally did not have the time or the ability to read long complicated contracts, some of which are not in their home language.<sup>133</sup> Nevertheless, the common law required that consumers abide by contracts they were told to sign.<sup>134</sup>

Lastly, the pace at which the common law was developing to be a vehicle for consumer protection, was slow.<sup>135</sup> Therefore, legislation was seen as the most viable and effective method to effect legal reform.<sup>136</sup>

### 2.1.7 Over-indebtedness

Lastly, whilst there was a need to provide access to credit, it became evident that many consumers were over-indebted, and unable to repay their existing debts.<sup>137</sup> In 2002, the total value of the formal consumer credit market was estimated at R361 billion and the low income earner's participation accounted for 25 per cent thereof.<sup>138</sup> One of the problems was that low income earners were obtaining credit not to start businesses but to help them get by, at higher rates.<sup>139</sup> The credit market had inflated over the years, however, so had the bad debts book.<sup>140</sup> Reckless lending was identified as one of the root causes.<sup>141</sup> Due to low literacy levels, these consumers were largely ignorant of the total repayments they were committing to when taking on debt.<sup>142</sup> Measures had to be introduced so that credit providers stopped extending credit to

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<sup>132</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 231.

<sup>133</sup> R Sharrock 'Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act' 296.

<sup>134</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 59; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

<sup>135</sup> In *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd* 2003 (2) All SA 167 (SCA), the SCA declined to hold a drug manufacturer strictly liable, where the user had been paralysed by a drug.

<sup>136</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 59.

<sup>137</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above); 30.

<sup>138</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 14; In 2016, the value owed by consumers to credit providers sat at over a trillion rand, including a billion of new credit just in that year - NCR *Annual Report 2015/16* available at <http://www.ncr.org.za/annual-reports> accessed on 27 February 2018 43.

<sup>139</sup> J Campbell 'The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005' 253.

<sup>140</sup> *Ibid.*

<sup>141</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 30.

<sup>142</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 17.

consumers who could not repay their debts.<sup>143</sup> Credit providers were being innovative and providing unsolicited credit, which lured consumers to take on more credit, fuelling the problem of over-indebtedness.<sup>144</sup> Together with debt collection measures employed by the credit providers, it was difficult for consumers to exit the debt cycle.<sup>145</sup> These issues amongst others, prompted government to introduce consumer protection legislation.

## 2.2 Advantages of consumer protection legislation

There were a number of advantages to introducing consumer protection legislation. For the purposes of this mini-dissertation the following are highlighted:

1. legislation leads to certainty;
2. legislation encourages true freedom of contract; and
3. legislation provides better access to redress.

### 2.2.1 Certainty

Consumer protection legislation brought about certainty by rationalising the existing scattered consumer protection measures and codifying a significant number of common law protections.<sup>146</sup> The main challenges with common law remedies were that some were defunct or limited in their application and they were enforceable only through the courts.<sup>147</sup> Moreover, the courts had been slow in developing the common law for it to replicate social justice.<sup>148</sup> The slow pace of reform was demonstrated in the battle that the courts were having to advance the concept of “good faith” into the realm of private contract law.<sup>149</sup> The issue, was the

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<sup>143</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 30 – 31; N Grove & J Otto *Basic Principles of Consumer Credit Law* 272.

<sup>144</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 30.

<sup>145</sup> M Kelly-Louw ‘The Prevention and Alleviation of Consumer Over-indebtedness’ 223.

<sup>146</sup> T Naude ‘The impact of the CPA on the Law of Contract and on Specific Contracts in Naude & Eiselen (eds) *Commentary on the Consumer Protection Act (2014)* para 5 – 18; The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 13.

<sup>147</sup> The SALC *Report: Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 39 – 41; T Naude ‘Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective’ 2010 *SALJ* 516-517; P Stoop ‘Background to the regulation of fairness in consumer contracts’ 216.

<sup>148</sup> Y Mupangavanhu ‘Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008’ 2015 *De Jure* 118; P Stoop ‘Background to the regulation of fairness in consumer contracts’ 216.

<sup>149</sup> Justice Brand F ‘The role of good faith, equity and fairness in the South African Law of Contract: The influence of the Common Law and the Constitution.’ 2009 *SALJ* 84 – 86; *Bank of Lisbon and South Africa Ltd v*

ambiguousness of concepts of fairness and good faith.<sup>150</sup> It was feared that judges were likely to give different subjective interpretations to these concepts, leading to uncertainty.<sup>151</sup> Therefore the legislated prohibition against unfair terms (even detailing what will constitute an unfair term) was to bring about certainty in contracts, for business as well.<sup>152</sup> Suppliers would clearly understand their obligations and consumers would know what to expect. It was hoped that clear legislation would encourage suppliers to avoid unfair business practices. The ultimate aim of the legislation was to change the mind-set of suppliers that would, in time, simply act fairly towards consumers.<sup>153</sup>

### 2.2.2 *Freedom of contract*

Consumer protection legislation also requires that suppliers provide consumers with certain minimum information, which encourages or supports the consumer's freedom to contract or their freedom of choice.<sup>154</sup> Rules on the form and substance of the information to be disclosed, ensure that certain information must be laid bare for the consumer's attention. An example is the exemptions and exclusions that the consumer should be aware of, before contracting.<sup>155</sup> The advantage of this, is that consumers are more confident and able to contract freely.<sup>156</sup> This also improves competition between suppliers, as consumers are able to compare, and exercise their options.<sup>157</sup>

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*De Ornelas* 1988 (3) SA 580 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA); *Barkhuizen v Napier* 2007 1 SA 323 CC; R Sharrock 'Unfair enforcement of a contract: a step in the right direction? *Botha v Rich and Combined Developers v Arun Holdings*' 2015 SA Merc LJ 174 – 190.

<sup>150</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 19.

<sup>151</sup> D Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' 2007 *SALJ* 276. See also P Stoop 'The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract' 2008 *SA Merc LJ* 509.

<sup>152</sup> T Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' 382.

<sup>153</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 217, 230.

<sup>154</sup> L Hawthorne 'Contract Law's choice of architecture' 615.

<sup>155</sup> L Hawthorne 'Contract Law's choice of architecture' 618; L Hawthorne 'Public governance: Unpacking the Consumer Protection Act 68 of 2008' 356.

<sup>156</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 23.

<sup>157</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 37.

### 2.2.3 Access to redress

As discussed above, a business practice could be declared unfair and the offenders criminally investigated and prosecuted, but this did not translate to redress for consumers.<sup>158</sup> Government had a vision of a harmonised and more effective legislative framework and infrastructure, focusing on “awareness and education programmes, early warning systems, dispute resolution and complaints handling systems”.<sup>159</sup> The legislation would open, and direct consumers, to specific avenues where they could complain and seek redress.<sup>160</sup> By recognising alternative dispute resolution (“ADR”) mechanisms, the legislation would make justice more affordable to consumers.<sup>161</sup> These measures were crucial, because without access to redress, any rights consumers were entitled to were meaningless.<sup>162</sup>

## 2.3 Criticism of consumer protection legislation

One of the main problems with consumer protection legislation is that it comes at a cost.<sup>163</sup> Another problem is that when there is too much regulation, trade is affected and this can lead to an economic downturn.<sup>164</sup> These criticisms are considered briefly below.

### 2.3.1 Costs

Supporters of the free market argue that the costs of regulation outweigh the benefits, if any.<sup>165</sup> Regulation increases the costs of doing business because suppliers incur costs in having to comply with legislation and these costs are inevitably passed on to consumers.<sup>166</sup> This conclusion makes sense when considering the argument that profits do not fall after new

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<sup>158</sup> T Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ 220.

<sup>159</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 7.

<sup>160</sup> C Van Heerden ‘Consumers’ Rights to be Heard and Obtain Redress’ in Naude & Eiselen (eds), *Commentary on the Consumer Protection Act* (2014) 69 – 1.

<sup>161</sup> T Woker, ‘Consumer Protection and alternative dispute resolution’ 23, 26 – 27.

<sup>162</sup> *Ibid* 25.

<sup>163</sup> E Van Eeden, *Consumer Protection Law in South Africa* 19.

<sup>164</sup> T Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ 218.

<sup>165</sup> L Louw ‘Financial Advisers Bill’ FMF’ (note 41 above).

<sup>166</sup> S Rencke, M Roestoff, F Haupt ‘The National Credit Act: New parameters for the granting of Credit in South Africa.’ (2007) *Obiter* 270. See also E Davie & T Nolutshungu ‘Submission of the Free Market Foundation: Consumer Protection Bill, 2006’ (26 April 2006) available at <http://www.freemarketfoundation.com/publications-view/submission-consumer-protection-bill>, accessed on 15 March 2017 6 - 7.

legislation is introduced.<sup>167</sup> The Free Market Foundation (“FMF”) protests that before passing legislation, government does not conduct proper economic impact assessments to quantify the costs that consumers must ultimately bear.<sup>168</sup> As such, it is also not possible to quantify the benefits of regulation.

### 2.3.2 Over-regulation

Critics have also argued that government is always trying to fill gaps and fix problems through regulation, when regulation itself is the problem and should be minimized.<sup>169</sup> Supporters of the free market argue that imposing legislation in the free market, compromises the sanctity of contracts and therefore certainty.<sup>170</sup> The financial services, particularly the banking sector, strongly opposed the idea of consumer protection legislation, warning that the uncertainty will drive away investors and the market will malfunction.<sup>171</sup>

Essentially, it is argued that the rules of contract support and work best, in a free market.<sup>172</sup> Supporters of the free market believe in freedom of contract – that each party will negotiate to protect and/or achieve their interest, resulting in the compromise, which is the contract.<sup>173</sup> Underpinning this, is the presupposition that if a consumer is not happy with the terms they are getting, they are free not to contract and even to find another supplier with more acceptable terms.<sup>174</sup> Thus, the common law was incorrectly overlooked by government when it decided

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<sup>167</sup> Davie E & Nolutshungu T ‘Submission of the Free Market Foundation: Consumer Protection Bill, 2006’ (note 168 above) 6 - 7.

<sup>168</sup> L Louw ‘Financial Advisers Bill’ FMF’ (note 41 above).

<sup>169</sup> E Davie & T Nolutshungu ‘Submission of the Free Market Foundation: Consumer Protection Bill, 2006’ (note 168 above) 7; L Louw ‘Financial Advisers Bill’ FMF’ (note 41 above). Louw argues:

“Once problems have been identified and quantified, and those for whom they are a problem identified, then, and only then, might a new law be warranted. But, even then, what caused the problem should be established first. More often than not real and imagined problems are the unintended consequence of earlier policies that were equally ill-considered, and were supposed to have solved earlier problems, if not the same problem. Thus, solutions beget problems, which beget solutions, and so on, in a never-ending spiral of over-regulation that suffocates productive economic activity.”

<sup>170</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 6.

<sup>171</sup> *Ibid* 20.

<sup>172</sup> CJ Pretorius ‘The basis and underpinnings of the Caveat Subscriptor Rule’ 2008 *THRHR* 669.

<sup>173</sup> L Hawthorne ‘Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention’ 441.

<sup>174</sup> D Bhana ‘The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)’ 276.

to pass consumer protection legislation.<sup>175</sup> Moreover, the existing legislation was sufficient to protect consumers, and where lacking could be amended ad hoc, as opposed to the over-regulation of the market.<sup>176</sup>

### 2.3.3 *Economic digression*

Supporters of the free market argue that less regulation of the market by government fosters economic freedom and which leads to economic growth.<sup>177</sup> Less regulation encourages free competition amongst suppliers, resulting in enhanced innovation which increases choices for consumers.<sup>178</sup> When there is choice for consumers, prices are likely to come down. Consumers can then benefit from savings and good product choices because suppliers invest in giving consumers what they want, instead of having to comply with legislation.<sup>179</sup> Conversely, the argument is that regulation has no tangible benefits for consumers, but instead stifles economic growth, a direct correlation to poverty.<sup>180</sup>

Even the regulation of the credit market has come under heavy criticism because it appeared to be counter-productive as levels of consumer over-indebtedness continued to rise.<sup>181</sup> Despite existing means of regulation, access to credit was still limited; rates were higher and/or credit providers were finding innovative ways of dealing with the low income groups.<sup>182</sup>

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<sup>175</sup> B Benfield 'Give back to the people their common law rights' (31 July 2012) available at <http://www.freemarketfoundation.com/article-view/give-back-to-the-people-their-common-law-rights> accessed on 7 April 2018; The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 6

<sup>176</sup> The SALC Report: *Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 47 -49.

<sup>177</sup> L Louw 'Is South Africa Over-regulated?' (note 44 above); J Dorfman 'Ten Free Market Reasons to be Thankful' (23 November 2016) available at <https://www.forbes.com/sites/jeffreydorfman/2016/11/23/ten-free-market-economic-reasons-to-be-thankful/#d5004056db7c>, accessed on 19 November 2017; Holcombe R, 'Economic Freedom and Economic Growth' (01 February 1998) available at <https://fec.org/articles/economic-freedom-and-economic-growth/> accessed on 04 April 2018.

<sup>178</sup> E Davie & T Nolutshungu 'Submission of the Free Market Foundation: Consumer Protection Bill, 2006' (note 168 above); 1.

<sup>179</sup> Dorfman J 'Ten Free Market Reasons to be Thankful' (note 177 above).

<sup>180</sup> E Davie & T Nolutshungu 'Submission of the Free Market Foundation: Consumer Protection Bill, 2006' (note 168 above) 2-4.

<sup>181</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 18, 31; P Stoop 'The South African consumer credit policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' 365.

<sup>182</sup> P Stoop 'The South African consumer credit policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' 365.

## 2.4 Concluding remarks

Despite these and other criticisms during government's review of its policies, government remained steadfast that legislation was necessary to protect consumers and address the challenges they were facing in the market.<sup>183</sup> This would make the market function better and would be to the benefit of consumers.<sup>184</sup> Government argued that the certainty that the legislation would create, would alleviate the fears of uncertainty and mayhem expressed by critics.<sup>185</sup> The next chapter will provide an overview of some of the most important statutes that have been introduced to protect consumers in the market generally, in the credit market and the financial services sector.

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<sup>183</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 37.

<sup>184</sup> *Ibid.*

<sup>185</sup> The SALC *Report: Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (note 107 above) 59.

## CHAPTER THREE

### SOUTH AFRICAN CONSUMER PROTECTION LEGISLATION

The purpose of this chapter is to consider the important consumer protection measures in South Africa. Since 1994, many significant pieces of legislation have been introduced but given the limitations of this mini-dissertation it is not possible to discuss them all. Therefore, only the following will be examined in more detail:

1. the National Credit Act;
2. the Consumer Protection Act; and
3. important consumer protection measures in the financial services sector.

#### 3.1 The National Credit Act

The NCA was the first piece of comprehensive legislation dealing with credit matters, replacing the Usury Act<sup>186</sup> and the Credit Agreements Act.<sup>187</sup> Generally, its purpose is to regulate access to credit and ensure the effective functioning of the credit market in South Africa.<sup>188</sup>

##### 3.1.1 Aims of the legislation

The NCA aims to promote and advance the economic welfare of consumers in South Africa by various means listed in section 3 of the Act. Its main aim is to give historically disadvantaged consumers access to credit and to encourage responsible borrowing whilst discouraging over-indebtedness and reckless lending.<sup>189</sup> It must be highlighted that unlike the CPA, the NCA was designed to balance the interests of both credit providers and consumers and it implores courts to try and find this delicate balance.<sup>190</sup>

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<sup>186</sup> Act 73 of 1968.

<sup>187</sup> Act 75 of 1980; J Otto, C Van Heerden & J Barnard 'Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement' 2014 *SA Merc LJ* 256; M Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' 203.

<sup>188</sup> Woker T 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 2010 *Obiter* 218 -219; J Otto *The National Credit Act Explained* (2006) 2-3.

<sup>189</sup> Subsections 3(a) – (c), (e).

<sup>190</sup> *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) 33 - the court held that the legislature's intention was "to protect the consumer from exploitation by credit providers by, inter alia, preventing predatory lending practices; to ameliorate the financial harm which a consumer may suffer where unable to meet his obligations

However, the intention is not to create a debtors' paradise – the interest of creditors in having the debt repaid must also be weighed in.<sup>191</sup> The logic is that when consumers are able to repay their debts through the relief offered by the Act against over-indebtedness, credit providers should be more financially stable, and thus able to offer more credit.<sup>192</sup> Access to credit and thus financial inclusion is improved and consumers potentially benefit from lower rates.<sup>193</sup> A recent example of the courts finding this balance is in *Absa Bank Limited v Mokebe*.<sup>194</sup> This judgment recognised creditors' rights to execute on immovable property, but determined that a reserve price had to be set. The consumer's investment in the property is taken into account before the property is sold. Previously, creditors were able to sell properties at very low prices, often leaving the consumer owing the bank a substantial amount. It also meant that the consumer lost whatever they had invested in the property.

### 3.1.2 Important provisions

For the purposes of this mini-dissertation the following important aspects of the Act highlighted:

1. access to credit;
2. over-indebtedness and reckless lending;
3. access to redress.

#### 3.1.2.1 Access to credit

The Act provides a consumer accessing the credit market with various rights and protections. These include the following:

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under a credit agreement; and generally to achieve equity in the lending market by levelling the playing field between parties who do not have equal bargaining power.”

<sup>191</sup> *Nkata v FirstRand Bank Limited and Others* 2016 (4) SA 257 (CC). In this case, the debtor was able to successfully argue for the reinstatement of a mortgage bond, after debt collection processes had been initiated, because the arrears had been brought up to date.

<sup>192</sup> Subsection 3(d); *Firstrand Bank v Seyffert and three similar cases* 2010 (6) SA 429 (GSJ) 10; *SA Taxi Securitization v Mbatha* 2011 (1) SA 310 (GSJ) 30 – 38.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485 (12 September 2018).

1. the right to apply for credit and not to be discriminated against;<sup>195</sup>
2. the right to be given reasons when credit is declined;<sup>196</sup>
3. the right to be given documents in an official language;<sup>197</sup>
4. the right to be given documents in plain and understandable language;<sup>198</sup>
5. the right to be given documents related to the credit transaction,<sup>199</sup> and
6. the right to confidential treatment.<sup>200</sup>

Additionally, the Act protects consumers against the existence of unscrupulous participants in the market, by providing for the registration and regulation of credit providers, debt counsellors, credit bureaus, payment distribution agents and alternative dispute resolution agents.<sup>201</sup> One effect of this, is that credit agreements concluded with unregistered and non-compliant credit providers, are unlawful.<sup>202</sup>

The need to regulate credit bureaus was identified because of inconsistencies in their conduct and the information they kept hampered the risk assessments that credit providers had to undertake before offering credit, therefore affecting access to credit.<sup>203</sup> Consumers have the right to access and challenge information held by credit bureaus, and a right to receive periodic statements from credit providers.<sup>204</sup> The Act requires credit bureaus to verify information before blacklisting consumers and for processes to clear consumers' records.<sup>205</sup>

Addressing the issue of transparency, suppliers are required to give consumers quotations that provide details regarding all the relevant information relating to the credit agreement. These

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<sup>195</sup> Sections 26 and 27, NCA.

<sup>196</sup> Section 62, NCA.

<sup>197</sup> Section 63, NCA.

<sup>198</sup> Section 64, NCA.

<sup>199</sup> Section 65, NCA.

<sup>200</sup> Section 68, NCA.

<sup>201</sup> Section 40, 43 and 44, NCA. The requirement for the registration of payment distribution agents and ADR agents was as result of the National Credit Act Amendment Act 19 of 2014.

<sup>202</sup> Section 89(2), NCA.

<sup>203</sup> In terms of Section 43, NCA, Credit bureaus must now be registered with the NCR; The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* August 2003, available at <https://www.ncr.org.za/documents/pages/research-reports/aug13/Summary%20of%20Findings.pdf>, accessed on 17 April 2019 20.

<sup>204</sup> Section 72, NCA.

<sup>205</sup> Sections 70 and 71, respectively.

quotations must remain valid for acceptance for five business days.<sup>206</sup> Credit providers may not make unilateral changes to the credit agreements, including changes to credit limits.<sup>207</sup> This is an important consumer protection measure because previously, credit providers could increase credit limits without investigating whether or not consumers were in a position to cope with the increased credit.<sup>208</sup> This often led to consumers becoming over indebted.<sup>209</sup>

The NCA regulates the charges that may be levied when a consumer takes on credit.<sup>210</sup> There are now limits regarding the initiation fees, monthly fees and most importantly interest, which credit providers are entitled to charge.<sup>211</sup> Also very importantly, any advertising and marketing of credit must contain prescribed information on the cost of credit so that consumers are aware of how much they will ultimately have to pay should they choose to access credit.<sup>212</sup> It is for this reason that shops which sell goods on credit are obliged to show both the cash price for an item and the price which consumers will have to pay should they choose to buy the goods on credit.<sup>213</sup> It is hoped that consumers will think very carefully before purchasing something on credit when they become aware how much they will ultimately have to pay for the item.<sup>214</sup> Negative option marketing and credit sales at a person's home or work are stringently limited.<sup>215</sup> The NCA also regulates the terms which must not be included in credit agreements.<sup>216</sup> These include terms that are in conflict or circumvent the NCA or the permissible debt collection processes and terms that waive the rights and obligations arising

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<sup>206</sup> Section 92 and 93, NCA; Regulations 28 to 31.

<sup>207</sup> Part E, Chapter 5, NCA; M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 214 – 215.

<sup>208</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above); 30.

<sup>209</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 214 – 211.

<sup>210</sup> Part C of Chapter 5, NCA.

<sup>211</sup> Sections 100 – 106, NCA and Regulations 39 – 48. The Review of Limitations of Fees and Interest Rates Regulations came into effect on 5 May 2016. By amending the regulations of 2006 dealing with acceptable charges, the 2016 regulations prescribe the maximum initiation fees, service fees and interest rates that may be charged against the different types from credit, from mortgage bonds to short-term loans. The impact on the micro-lending industry was to cap the maximum interest over a single month at 5%, and any other subsequent or repeat loans were capped at 3%, for the calendar year. Also, the maximum service fee was increased to R60. An association representing micro-financiers sought to review and set aside the regulations on the basis that the prescriptions were low, and they would soon be out of business. Consumers would also be prejudiced and end up the grips of the unregulated or non-compliant lenders. The Gauteng High Court granted the application, setting aside the regulations in so far as they relate to short-term credit. See *Micro Finance South Africa v Minister of Trade and Industry* (GP) unreported case no 16746/16 of 21 November 2016.

<sup>212</sup> Section 76 and 77, NCA.

<sup>213</sup> Section 76, NCA; Regulations 21 and 22.

<sup>214</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 212.

<sup>215</sup> Sections 74 and 75, NCA.

<sup>216</sup> Sections 90, NCA.

from the Act as well the common law. A clause requiring the consumer to surrender their identity document or bank card to the creditor is also unlawful. If such clauses are included in credit agreements, they may be declared void by the courts, amongst other just and equitable relief.<sup>217</sup>

### 3.1.2.2 *Over-indebtedness and reckless lending*

A very important aim of the NCA is to prevent consumers from becoming over-indebted. For this reason the NCA regulates lending practices strictly. Reckless lending on the part of credit providers is prohibited.<sup>218</sup> The Act provides relief for consumers who are over indebted or to whom credit has been provided recklessly.<sup>219</sup> Over indebted consumers are those who are unable to repay their debts at all or timeously and consistently.<sup>220</sup> Addressing this, credit providers are required to conduct affordability assessments, to determine whether a consumer can afford to repay the debt, otherwise they face the risk of the transaction being declared reckless lending.<sup>221</sup> A court or NCT has the power to set aside, suspend or restructure consumer obligations resulting from reckless lending or where after assessment, the consumer is declared over-indebted.<sup>222</sup>

In addition, debt counselling has been introduced to enable over-indebted consumers to restructure their debts with the hope that they will be able to exit the vicious debt cycle.<sup>223</sup> This development was well received, because previously the debt collection processes concluded with the consumer being sequestered or with consumers finding themselves forever in debt with no possibility of settling the debt.<sup>224</sup> Whilst the Act creates obligations on lenders to lend responsibly, it also expects of the consumer to deal with the lender honestly, including repaying

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<sup>217</sup> Section 89 (particularly subsection (5), read with sections 90 and 91), NCA. See also Regulation 32.

<sup>218</sup> Sections 80 to 84, NCA.

<sup>219</sup> Part D of Chapter 5, NCA.

<sup>220</sup> Section 79, NCA.

<sup>221</sup> Section 82(3), NCA.

<sup>222</sup> Sections 83 - 87, NCA. The effect of setting the agreement aside is to restore the status quo, as if the transaction never existed, whilst the suspension of the agreement gives the consumer a breather, until they able to repay the debt in full, as determined by the court or Tribunal. Just the application for

<sup>223</sup> Section 86, NCA.

<sup>224</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 223; *University of Stellenbosch Legal Aid Clinic & Others v Min of Justice & Others* (2016) 37 ILJ 2730 (CC) 15.

the debt and also engaging with notices they receive from lenders who try to enforce the provisions of the Act when collecting the debt.<sup>225</sup>

### 3.1.2.3 Access to redress

The NCA addressed the problem of consumers not being able to access redress by creating a number of different ADR agents that consumers can turn to when they have a problem. Consumers may lodge a complaint with either one of the following: the National Credit Regulator (“NCR”)<sup>226</sup>; an ombudsman with jurisdiction, the National Consumer Tribunal (“NCT”)<sup>227</sup> or an ADR agent.<sup>228</sup> The NCR may investigate the complaint, resolve it by dismissing it or issuing a compliance notice, or the NCR may refer the matter for adjudication to the NCT.<sup>229</sup> The NCT is established in terms of section 26, to adjudicate on disputes arising out of credit agreements and/or the Act, including the determination and remedying of prohibited conduct.<sup>230</sup> The NCT’s orders have the status of High Court orders, and a wide range of powers are available such as interdicting prohibited conduct and issuing administrative fines up to R1 million or 10 per cent of the defaulter’s turnover.<sup>231</sup>

The NCA supports alternative dispute resolution mechanisms. If the complaints concern a financial institution, the complaint can be resolved by an ombud with jurisdiction. These are ombuds which have registered for the financial services sector with the Financial Services Ombud Schemes Council in terms of the Financial Ombud Schemes Act (“FSOS Act”).<sup>232</sup> A provincial consumer court or a registered ADR agent can also be approached.<sup>233</sup> An ADR

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<sup>225</sup> *Kubanya v Standard Bank* 2014 (3) SA 56 (CC) 37 – 38.

<sup>226</sup> Section 15 and 136, NCA.

<sup>227</sup> Section 137 and 141, NCA.

<sup>228</sup> Section 134, NCA.

<sup>229</sup> Part C, Chapter 4 NCA.

<sup>230</sup> Section 27, NCA.

<sup>231</sup> Section 150, 151, 152, NCA.

<sup>232</sup> Act 37 of 2004. This process is currently being revised. The Financial Sector Regulation Act, 2017 which came into operation on 1 April 2017 will significantly change the manner in which the financial services sector is regulated. Part of the overhaul will include a re-modeling of the ombudsman in the financial services sector. These ombudsmen include those for the banking sector, long term and short term insurance sector, the credit information sector and the Johannesburg Securities Exchange - National Treasury *A Known a Trusted Ombud System for All* (2017), available at [http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc\\_A%20known%20and%20trusted%20ombuds%20system%20for%20all\\_September2017.pdf](http://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf), accessed on 30 September 2018 14.

<sup>233</sup> Section 134, NCA.

agent is simply one who facilitates the resolution of disputes through conciliation, mediation and/or arbitration.<sup>234</sup> ADR can result in consent orders, made official by the NCT.<sup>235</sup>

### 3.1.3 *The National Credit Regulator*

The NCR was established to enforce the Act as well as promote access to redress and consumer education.<sup>236</sup> Also, there was a need for a single regulator to deal with all credit related matters.<sup>237</sup> Its predecessor, the MFRC had performed poorly in enforcement and in limiting inconsistencies arising from the fragmentation of the legislation.<sup>238</sup> The NCR registers and regulates the conduct of credit providers and those entities that are required to be registered<sup>239</sup> It monitors the credit market and facilitates the resolution of consumer complaints through investigation and the referral of prohibited conduct/matters to the NCT for hearing and determination.<sup>240</sup>

Whenever a credit provider engages in conduct which is prohibited by the NCA or fails to engage in conduct which is required in terms of the NCA, this is prohibited conduct.<sup>241</sup> The NCR may issue compliance notices and where there is continued non-compliance, the matter may be referred to the NPA if an offence has been committed, or the NCT for an appropriate order.<sup>242</sup> In addition to enforcing the Act, the NCR has an obligation to educate consumers. Its efforts include publications in all forms of media in all eleven official languages.<sup>243</sup>

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<sup>234</sup> Section 1, NCA; T Woker 'Consumer Protection and Alternative Dispute Resolution' 28 – 29.

<sup>235</sup> Section 135, NCA.

<sup>236</sup> Sections 12, 15 and 16, NCA; S Rencke, M Roestoff, F Haupt 'The National Credit Act: New parameters for the granting of Credit in South Africa.' 229 – 270; The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 34; NCR *Annual Report 2015/16* (Note 138 above) 14.

<sup>237</sup> The DTI *Credit Law Review: Summary of the Findings of the Technical Committee* (note 12 above) 13.

<sup>238</sup> The DTI *Consumer Credit Reform: Policy Framework for Consumer Credit* (note 11 above) 22.

<sup>239</sup> Sections 14, NCA and Chapter 3.

<sup>240</sup> Sections 13, 15, 55, 136, 137, 139, NCA; In 2016, the NCR reported that it had received a hundred thousand telephone calls from consumers and just under 8000 written complaints, the majority of which were resolved recovering about R4 million for consumers -NCR *Annual Report 2015/16* (Note 138 above) 31.

<sup>241</sup> Section 164, NCA.

<sup>242</sup> Section 55, NCA. In 2016 the NCR referred a number of furniture stores, including known brands, to the NCT for amongst other offences the miss-selling of insurance products - NCR *Annual Report 2015/16* (Note 138 above) 33 – 35.

<sup>243</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 210. Its efforts have included extensive public relations management, through mediums such as radio and TV interviews, roadshows, imbizos and generally campaigning and advertising - NCR *Annual Report 2015/16* (Note 138 above) 27.

### 3.1.4 Criticisms of the regulation of the credit market

Despite the existence of the NCA, from a practical point of view many credit providers have not really changed their ways of doing business and consumers continue to take on new and/or different types of credit.<sup>244</sup> As at March 2017, South Africans owe R1,7 trillion in debt, with numbers increasing in respect of store credit, unsecured loans and micro-loans.<sup>245</sup> Statistics from credit bureaus indicated that there were about 14 million credit active consumers in 2017, and 39 per cent had impaired records.<sup>246</sup> This signifies the growing levels of over-indebtedness as consumers are struggling to pay their debts. High levels of over-indebtedness have stimulated labour unrest in the country, leading up to the Marikana massacre in 2012, where 34 miners lost their lives.<sup>247</sup> In *University of Stellenbosch Legal Aid Clinic & Others v Min of Justice & Others*,<sup>248</sup> the Constitutional Court ruled that courts had a greater role to play in curbing over-indebtedness, because of the prevalence of debt collection malpractices.<sup>249</sup>

Notwithstanding regulation, unsecured loans of up to R200 000 are to date still marketed to consumers via popular media including email and personal messaging, without stipulating that the consumer must be able to afford the loan or that this will be assessed.<sup>250</sup> Consumers are also taking up loans of smaller amounts, over longer periods. With these types of loans, consumers end up repaying more because of the interest and it is the poor and marginalized who suffer at the end of the day.<sup>251</sup>

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<sup>244</sup> Nortje B 'Unforeseen effects undermine consumer protection initiatives' (24 August 2017) Business Day available at <https://www.pressreader.com/south-africa/business-day/20170824/281509341309866> accessed on 04 April 2018.

<sup>245</sup> NCR *Annual Report* (2016/17) 43.

<sup>246</sup> *Ibid* 43.

<sup>247</sup> M Bateman 'South Africa's Post-Apartheid Micro-Credit Driven Calamity' 133 – 134; P Bond 'Debt, Uneven Development and Capitalist Crisis in South Africa: from Moody's Macroeconomic Monitoring to Marikana Microfinance Mashonisa' (2013) *Third World Quarterly* 580 – 583; M Rees, 'Financially illiterate miners debt shocker' (1 October 2012) available at <http://www.moneyweb.co.za/moneyweb-special-investigations/financially-illiterate-miners-debt-shocker-fraud-a>, accessed on 13 February 2019.

<sup>248</sup> (2016) 37 ILJ 2730 (CC).

<sup>249</sup> In this case, the legal aid clinic represented 15 farm labourers, who had obtained microloans and fell into arrears, but these had been given illegally and debt collection processes employed were also in contravention of regulation. For instance, emoluments attachment orders were issued in Magistrates Courts far from where the debtors resided. This judgment has resulted in an amendment of some of the rules applicable to debt collection. See the Courts of Law Amendment Act 7 of 2017.

<sup>250</sup> B Nortje 'Unforeseen effects undermine consumer protection initiatives' (note 242 above).

<sup>251</sup> *Ibid*; M Bateman 'South Africa's Post-Apartheid Micro-credit Driven Calamity' 133 – 4.

Since its introduction, the NCA has been amended on a number of occasions as government attempts to control the credit market to ensure that it operates according to the aims of the Act and the policies of government. To combat over-indebtedness, in 2013 the NCR attempted to clarify the responsibilities of credit providers and other role players in the debt restructuring process.<sup>252</sup> The Act was amended in 2015, to clarify consumers' liability for old debt and the amount of time that credit bureaus could keep this adverse information.<sup>253</sup> The threshold for registration as a credit provider was also lowered, with the hope of limiting the activities of unregistered loan sharks.<sup>254</sup> Also in 2015, Regulations were published strictly requiring credit providers to conduct affordability assessment and requiring this to be supported by proof of income.<sup>255</sup> The fees and interest rates that credit providers could charge were also capped.<sup>256</sup> Regulations have been passed in 2017 to regulate the provision and charging of credit life insurance.<sup>257</sup>

At present there are amendments to the NCA before Parliament in an attempt to deal with over-indebtedness of poor consumers and to further prevent reckless lending.<sup>258</sup> When the NCA was introduced, debt counselling and debt review provided alternatives to sequestration and ruthless debt collection mechanisms, to relieve consumer over-indebtedness.<sup>259</sup> These existing measures are now being revised because they are not yielding results.<sup>260</sup> It seems that these measures are not assisting consumers to exit the debt cycle. Reports show that poor consumers hardly ever manage to repay their debts.<sup>261</sup> It is hoped that further debt intervention measures, in addition to the existing measures for debt restructuring, will provide a new means for the poorest of the poor to be able to exit the debt cycle.<sup>262</sup>

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<sup>252</sup> The Credit Providers Code of Conduct to Combat Over-Indebtedness, the Debt Counsellors Code of Conduct for Debt Review and the Payment Distribution Agencies Code of Conduct for Debt Review, were amended in April 2013.

<sup>253</sup> The National Credit Amendment Act 19 of 2014, passed on 13 March 2015

<sup>254</sup> This was amended again in 2016 - Final Determination of Threshold for Credit Provider Registration notice no. 514 in GG no. 3998, 11 May 2016.

<sup>255</sup> Affordability Assessment Regulations, Notice 202 in GG no. 38557, September 2015.

<sup>256</sup> Limitation on Fees and Interest Rate Regulations, Notice 1080 in GG no. 39379, 6 November 2015.

<sup>257</sup> Credit Life Insurance Regulations, Notice 103 in GG no. 40606, 9 February 2017.

<sup>258</sup> National Credit Amendment Bill, 2018.

<sup>259</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 223.

<sup>260</sup> Roestoff M *Ferris v Firstrand Bank Ltd* 2014 3 SA 39 (CC); Enforcement of a credit agreement after breach of a debt rearrangement order and the ineffectiveness of debt review in terms of the National Credit Act' 2016 *De Jure* 134 – 155.

<sup>261</sup> *Ibid.*

<sup>262</sup> Clause 1, National Credit Amendment Bill, 2018.

People who earn less than R7500 and owe less than R50 000 may apply to have these debts written off.<sup>263</sup> These applicants must have no sellable assets and the debt owed must be unsecured credit. The application will be reviewed by the NCR and if supported referred to the NCT, which may determine if there has been reckless lending and/or that the applicant should be placed under debt intervention. During debt intervention, the debt is suspended and may not be collected. If the debtor is still unable to repay the debt after a prescribed period, the NCT may determine that the debt be extinguished.<sup>264</sup> Reckless lenders may be fined or jailed and credit life insurance is made compulsory in credit agreements for over R50 000.<sup>265</sup> These measures have been hailed by some as a lifeline for low income earners and the previously disadvantaged who are now exceptionally over-indebted, but they are not without criticism.<sup>266</sup>

Critics argue that allowing certain debts to be written off in terms of the proposed amendments will lead to declining investment in South Africa.<sup>267</sup> These fears are fuelled by reports indicating that most of the country's debt owed, may well be written off because it appears to be reckless lending.<sup>268</sup> The banking sector argues this uncertainty will certainly increase their cost of doing business which will increase the cost of credit.<sup>269</sup> Ultimately, banks have a responsibility to protect their depositors' funds and ultimately the low income earners will suffer because banks will be reluctant to extend credit to them.<sup>270</sup> Other critics have simply questioned the capacity of the existing institutions, the NCR and the NCT, to enforce these new measures.<sup>271</sup>

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<sup>263</sup> Clause 14, National Credit Amendment Bill, 2018.

<sup>264</sup> *Ibid.*

<sup>265</sup> Clause 11, National Credit Amendment Bill, 2018.

<sup>266</sup> L Omarjee 'MP's get personal as debt relief bill passed' (12 September 2018) available at <https://www.fin24.com/Economy/mps-get-personal-as-debt-relief-bill-passed-20180912>, accessed on 1 October 2018.

<sup>267</sup> The Banking Association of South Africa, 'Submission in terms of comments on the Draft National Credit Amendment Bill' (22 January 2018), available at <http://www.banking.org.za/docs/default-source/presentations/18-01-22-submission-draft-national-credit-amendment-bill.pdf?sfvrsn=12>, accessed on 02 October 2018.

<sup>268</sup> 'Nearly half of SA's debt from top creditors 'appears reckless' (27 August 2018), available at <https://www.fin24.com/Companies/Financial-Services/nearly-half-of-sas-debt-from-top-creditors-appears-reckless-20180827>, accessed on 1 October 2018.

<sup>269</sup> L Daniel 'National Credit Amendment Bill: Making it harder for South Africans to loan money' (27 August 2018), available at <https://www.thesouthafrican.com/national-credit-amendment-bill-harder-to-loan/>, accessed on 1 October 2018.

<sup>270</sup> *Ibid.*

<sup>271</sup> L Omarjee 'MP's get personal as debt relief bill passed' (note 266 above).

The NCR, was recently interrogated by Parliament amidst claims of its poor performance.<sup>272</sup> The NCR is alleged to have failed to refer sufficient cases to the NCT for adjudication or the NPA for prosecution as required by the NCA.<sup>273</sup> Specific examples include the regulatory failures associated with the collapse of African Bank.<sup>274</sup> African Bank negotiated a R20 million settlement with the NCR, when it was alerted that the NCR had referred a case of reckless lending to the NCT, seeking a R300 million administrative fine.<sup>275</sup> Other factors had contributed to the bank's downfall such as the unprofitable purchase of Ellerrines furniture stores, but the main reasons were its aggressive but poor lending practices, poor corporate governance and failure to adhere to the Reserve Bank's requirements for the stability of banks.<sup>276</sup>

When the Reserve Bank eventually placed African Bank under curatorship, it also facilitated a bail-out. The bail-out plan included the Reserve Bank acquiring the failed bank's bad debt book of R17 billion, at a price of R7 billion. The good debt book, valued at R26 billion would be transferred to the newly established good bank, of which the Reserve Bank, the Public Investment Corporation and a consortium of the major banks are shareholders. The Good bank was to also receive a R10 billion injection from the consortium.<sup>277</sup> The justification for the bailout was that although the bank was a small player in the market, its investors and creditors were systemically important institutions. The bank's collapse could have had a ripple effect on the financial system, as was the case during the 2008 world-wide financial crisis following the collapse of certain banks in the United States of America.<sup>278</sup>

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<sup>272</sup> A Arde 'NCR in hot water over enforcement' available at <https://www.iol.co.za/personal-finance/ncr-in-hot-water-over-enforcement-2004166>, accessed on 28 February 2018.

<sup>273</sup> A Arde 'Credit Regulator to be probed for failing consumers' (26 November 2016) available at <https://www.iol.co.za/business-report/credit-regulator-to-be-probed-for-failing-consumers-2093581>, accessed on 1 March 2018.

<sup>274</sup> *Ibid.*

<sup>275</sup> The referral was in 2013, after an investigation that had commenced in 2011; *Report in terms of S69A (11) of The Banks Act in Exparte: African Bank* (note 47 above) 204 - 206.

<sup>276</sup> *Ibid* 273-274.

<sup>277</sup> G Marcus 'Remarks at Press Conference in Connection with African Bank Limited' Pretoria, (10 August 2014) available at <https://www.bis.org/review/r140812a.pdf> accessed on 30 September 2018 3.

<sup>278</sup> *Minutes of the Finance Standing Committee: African Bank and the Myburgh Report: SARB briefing* (24 May 2016) available at <https://pmg.org.za/committee-meeting/22601/>, accessed on 31 August 2018.

The NCR has strongly refuted claims of its failure to enforce the legislation.<sup>279</sup> However, more poor lending practices have since surfaced.<sup>280</sup> The recent Viceroy Report calls for Capitec Bank to be placed under curatorship, because of apprehension that greater problems lie beneath what the bank has been reporting for compliance purposes.<sup>281</sup> The report indicates that the NCR is not adequately monitoring and reporting accurate data in respect of unsecured loans and the default rate thereon.<sup>282</sup> Also it is alleged that it is not acting quickly enough to save consumers from loss, particularly because it is not able to keep up with illegal and reckless lenders.<sup>283</sup>

### 3.1.6 Concluding remarks regarding the NCA

The purpose of the above discussion has been to explain the reasons why government considered it necessary to introduce the NCA, to highlight the major sections which address these reasons and to identify points of concern. There is no doubt that there were legitimate reasons for further and better regulation of the credit market in South Africa but it appears that many of these concerns have not yet been addressed. Over-indebtedness and reckless lending are recurrent problems and government is yet again having to amend the legislation to deal with these issues.

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<sup>279</sup> A Arde 'Tribunal slaps down NCR's bullying of debt counsellor' (23 July 2017) available at <https://www.businesslive.co.za/bt/business-and-economy/2017-07-22-tribunal-slaps-down-ncrs-bullying-of-debt-counsellor/>, accessed on 31 August 2018. The NCR sought to deregister Deborah Solomon, a registered debt counsellor after she released a press statement entitled: '*NCR sleeps as African Bank and consumers crash and burn*'. She also challenged a debt mediation project the NCR sought to pilot, alleged to be in contravention of the NCA's debt restructuring provisions.

<sup>280</sup> Viceroy Research Group *Capitec: A wolf in sheep's clothing* (note 47 above).

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid* 33.

<sup>283</sup> A Arde 'NCR in hot water over enforcement' (note 272 above); Meeting of the Trade and Industry Committee National Credit Regulator on its *Annual Report 2015/16*' (8 March 2017) available at <https://pmg.org.za/committee-meeting/24105/>, accessed on 27 July 2018.

### 3.2 The Consumer Protection Act

The CPA came into effect in 2011, to specifically regulate issues arising out of the interaction between consumers and suppliers in the market, such as marketing and selling practices, contracts, warranties, product safety and labelling.<sup>284</sup> There are areas where the CPA and the NCA overlap, but credit agreements are expressly excluded from the ambit of the CPA.<sup>285</sup> As discussed above, the NCA was designed to balance the rights of consumers and credit providers.<sup>286</sup> For all other transactions, the CPA focuses far more on consumer protection and so it must be interpreted in a consumer friendly manner.<sup>287</sup>

#### 3.2.1 Aims of the legislation

The purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa.<sup>288</sup> It aims to give consumers access to a market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.<sup>289</sup> This is done by reducing the challenges that vulnerable consumers face when accessing any supply of goods or services, by promoting fairness in the contracts and supplier conduct. As mentioned above, informed consumers are confident consumers, who choose and can demand

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<sup>284</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 9.

<sup>285</sup> See Section 5(2)(d), CPA. See section 2(9) for resolution where the overlap results in conflicts. An example of the overlap is in relation to marketing practices. Section 75 of the NCA restricts certain marketing practices and parts of the CPA also regulate unwanted direct marketing; Part B of ch 2 of the CPA; N Melville & R Palmer 'The applicability of the Consumer Protection Act 2008 to credit agreements' 2010 *SA Merc LJ* 277, 276.

<sup>286</sup> This evidences the legislature's intention that the NCR exercise full and unrivalled control over all matters credit related, hence the high expectations that it act in matters such as the African Bank saga; *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) 235B – E, where court found that a complex agreement that compromised on the plain language requirements and on presentation, distorted the balance the NCA sought to create, thus defeating its purposes.

<sup>287</sup> See for example the NCT ruling in *JK Ngoza v Roque Motors* NCT/79905/2017/73(3) &-75(1)(b). In this matter, the consumer had bought a second hand car which broke down within 4 months, and the dealership was not willing to take responsibility or repair the vehicle. After his own attempts at resolving the matter whilst the vehicle was incurring storage costs at a repairer, the consumer eventually referred the matter to the motor industry ombud, who issued a ruling in the consumer's favour but which was not implemented by the dealership. The matter was referred to the NCC which then raised the issue that the consumer's claim had prescribed. Granting leave for the consumer's matter to be heard on its merits, the NCT held that prescription had been interrupted by the consumer's referral of the matter to the ombud, this being a recognised alternative avenue that the consumer had to exhaust prior to approaching the courts, as per section 69 of the CPA. This was an interpretation, promoting the objects of the CPA in line with section 4(2), that gave effect to the consumer's right to access to redress.

<sup>288</sup> Section 3(1), CPA.

<sup>289</sup> Section 3(1), CPA.

satisfactory goods and services. Another purpose of the legislation is to provide aggrieved consumers with access to redress.

### 3.2.2 *Important provisions*

It is not possible to discuss all the provisions of the CPA as this is an extensive piece of legislation so only those sections that highlight the following issues are dealt with in detail below:

1. access to the market;
2. access to redress;
3. unconscionable conduct; and
4. unfair contract terms.

#### 3.2.2.1 *Access to the market*

Consumers are granted fundamental consumer rights that secure the consumer's position in the market.<sup>290</sup> The Act gives special attention to vulnerable groups.<sup>291</sup> The simplest right which impacts vulnerable consumers is the right to information in plain and understandable language.<sup>292</sup> This does not require suppliers to produce contract documents in all official languages but it has prompted many suppliers to alter the format of their contracts.<sup>293</sup> Other rights include: the right to disclosure of information; to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; the right to fair value, good quality and safety; and the right to accountability by suppliers.<sup>294</sup>

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<sup>290</sup> Chapter 2 of the CPA; the right to equality in the market; the right to privacy; the right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms; the right to fair value, good quality and safety; and the right to the supplier's accountability.

<sup>291</sup> See section 3(1)(b) read with Section 4(2)(a). See paragraph 2.1.1 for a description of vulnerable persons.

<sup>292</sup> Section 22 CPA.

<sup>293</sup> E De Stadler & L Van Zyl 'Plain Language Contracts: Challenges and Opportunities' 2017 *SA Merc LJ* 107 - 108.

<sup>294</sup> Chapter 2, CPA.

### 3.2.2.2 Access to redress

The rights that the CPA grants consumers are realized by giving consumers access to redress.<sup>295</sup> Consumers alleging that their rights have been infringed or threatened, or that there is prohibited conduct by a supplier, may approach an appropriate forum in order to access redress.<sup>296</sup> Aggrieved consumers may approach the NCC<sup>297</sup>, NCT<sup>298</sup>, an ombud with jurisdiction<sup>299</sup>, a recognized ombud<sup>300</sup>, a provincial consumer court<sup>301</sup> or an ADR agent.<sup>302</sup> This is in terms of section 69 of the Act, which seemingly also inherently limits the consumer's right to access redress.<sup>303</sup> This section requires consumers to exhaust alternative means before approaching the civil courts for relief.<sup>304</sup> This has been confirmed by the courts.<sup>305</sup> Perhaps, the intention was to ensure that the forums provided for are actually utilised, by all consumers across the board, so as to avoid their decomposition into white elephants, as with some of government's institutions.<sup>306</sup>

The CPA further supports ADR mechanisms and allows for the recognition of means of self-regulation i.e. voluntary codes.<sup>307</sup> The main advantage of ADR is that it takes pressure off state resources, in that these may be more efficient and cost effective than state-resourced institutions.<sup>308</sup> The aim of voluntary codes of conduct is to provide guidance to the member businesses on offering consumers quality goods or services as well as information, whilst

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<sup>295</sup> Section 4 CPA.

<sup>296</sup> Section 4(1) read with section 69 CPA.

<sup>297</sup> Section 99, 100 CPA.

<sup>298</sup> Section 75, CPA.

<sup>299</sup> Section 70, CPA.

<sup>300</sup> Recognized in terms of section 82, CPA.

<sup>301</sup> Various provinces have passed legislation, making provision of the establishment of provincial consumer courts or tribunals and offices of the consumer protector, to facilitate consumers enforcing their rights through the forums provided through the CPA. In KwaZulu-Natal, an Office of the Consumer Protector was established in terms of the KwaZulu-Natal Consumer Protection Act, 4 of 2013, but has not been active and the establishment of the court is still pending.

<sup>302</sup> Section 70, CPA.

<sup>303</sup> T Woker Consumer protection and alternative dispute resolution 26; T Naude 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' 526.

<sup>304</sup> See T Naude 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' and T Woker 'Access to Redress for Consumers' 28.

<sup>305</sup> *Joroy 4440 CC v Potgieter and Another NO* 2016 (3) SA 465 (FB).

<sup>306</sup> T Woker 'Consumer Protection and Alternative Dispute Resolution' 28.

<sup>307</sup> Section 82, CPA.

<sup>308</sup> F Van Zyl 'Code of Conduct for the financial services industry' 2006 2 *STELL LR* 337 -339.

abiding by the applicable laws.<sup>309</sup> Voluntary codes allow for a particular industry to assume responsibility for regulating itself by setting its own rules and introducing its own form of dispute resolution mechanisms.<sup>310</sup> The CPA allows for the Minister of Trade and Industry to recognize applicant ombud schemes and their codes of conduct.<sup>311</sup> All those who participate in that particular industry are then obliged to abide by the code and to be subject to the jurisdiction of the particular ombud.<sup>312</sup> Both the motor vehicle industry and the goods and services industry have recognized ombuds and codes of conduct.<sup>313</sup>

Lastly, the CPA overcomes the difficulties identified with the common law and access to redress discussed in Chapter 2. Section 4(2) of the CPA directs a court or the NCT to develop the common law as necessary to improve the realisation and enjoyment of consumer rights, whilst promoting the spirit and purposes of the CPA i.e. *consumer protection (own emphasis)*.<sup>314</sup> Moreover, the court or NCT is encouraged to make appropriate orders to give practical effect to the consumer's right to access to redress, including any innovative order that better advances the realisation of consumer rights.<sup>315</sup>

### 3.2.2.3 *Unconscionable Conduct*

One of the reasons a consumer may seek redress is if they have experienced unconscionable conduct by a supplier.<sup>316</sup> Conduct such as undue influence, duress, harassment and even the use of physical force as means to obtain the consensus of the consumer improperly, is

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<sup>309</sup> *Ibid* 335.

<sup>310</sup> T Woker 'Consumer Protection and alternative dispute resolution' 31 – 32.

<sup>311</sup> Section 82, CPA.

<sup>312</sup> T Woker 'Consumer Protection and alternative dispute resolution' 41 – 42.

<sup>313</sup> GN 817 in GG 38107 of 17 October 2014 and GN 217 in GG 38637 of 30 March 2015.

<sup>314</sup> *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG) 91. Here the court, based on sub-section 4(3), CPA, favoured an interpretation of goods to include a second hand good, in this case a used BMW engine, that had mechanically failed.

<sup>315</sup> Section 4(2), CPA; *JK Ngoza v Roque Motors*.

<sup>316</sup> The concept of unconscionable conduct appears to have been borrowed from Australia. However, the predecessor to the NCA, had already outlawed "unfair business practices" defined as any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers; unreasonably prejudicing any consumer; deceiving any consumer; or unfairly affecting any consumer; Du Plessis J, 'Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008' 2012 *THRHR* 24; J Du Plessis in Naude & Eiselen (eds), *Commentary on the Consumer Protection Act* (2014) 3 at 40-2.

prohibited.<sup>317</sup> Unconscionable conduct includes any conduct that is unethical or improper enough to shock the conscience of a reasonable person.<sup>318</sup> The CPA prohibits this type of conduct and specifies that it will be unconscionable for a supplier, knowing that the consumer has a weakness such as being less literate, to take advantage of this.<sup>319</sup> The Act also covers the bargaining stage of contracting, prohibiting suppliers from making false, misleading or deceptive representations of the consumers.<sup>320</sup>

#### 3.2.2.4 *Unfair contract terms*

Contract terms that unfair are also prohibited.<sup>321</sup> Terms that are excessively one-sided or those so adverse to consumers so as to be inequitable, are examples of unfair terms.<sup>322</sup> Not only must agreements that suppliers present to consumers be presented in fair, clear and understandable terms, but the consumer's attention must be drawn to the controversial clauses contained in the agreement, such as exemption clauses.<sup>323</sup> Exemption clauses must be in plain language, be brought to the consumers' attention in a conspicuous manner and consumers must have an opportunity to consider the exemption.<sup>324</sup> However, the appropriateness of the exemption clause will always be determined by the circumstances of the case, taking into account the supplier's compliance with the CPA, the nature of what is being excluded and the risk involved.<sup>325</sup>

The CPA contains a so-called "blacklist" of prohibited transactions or terms.<sup>326</sup> Having a list of terms that are prohibited curtails the use of unfair terms and promotes certainty.<sup>327</sup> One such prohibited terms is an exemption clause that excludes a supplier's liability for gross

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<sup>317</sup> Section 40(1), CPA; Naude & Eiselen (eds), *Commentary on the Consumer Protection Act (2014)* 3 Contract – 10.

<sup>318</sup> Section 40(1), CPA.

<sup>319</sup> Subsection (2).

<sup>320</sup> Section 41, CPA.

<sup>321</sup> Section 48, CPA.

<sup>322</sup> Section 48(2)

<sup>323</sup> Section 49, CPA.

<sup>324</sup> Section 49, CPA.

<sup>325</sup> M Tait & N Newman 'Exemption Provisions and the Consumer Protection Act, 2008: Some preliminary comments' 2010 *Obiter* 642.

<sup>326</sup> Section 51, CPA.

<sup>327</sup> T Naude, 'The use of black and grey lists in unfair contract terms legislation in comparative perspective' 2007 *SALJ* 131.

negligence.<sup>328</sup> A “so-called” grey list of prohibited terms has also been included in the regulations following recommendations.<sup>329</sup> The difference between a black list and a grey list of prohibited terms is that the former terms are “invalid under all circumstances, whereas a grey list is a list of terms which may be unfair, but the final decision depends on the circumstances of the particular case.”<sup>330</sup> Thus, it is evident that the CPA now requires suppliers to take extra care in drafting contracts, especially standard form contracts.<sup>331</sup> Hopefully these consumer protection measures nudge suppliers to bring such clauses to the attention of consumers, however this is no guarantee that consumers will have the choice to challenge these clauses or walk away to find an alternative.<sup>332</sup>

### 3.2.3 Enforcement

The primary body tasked with the enforcement of the CPA is the NCC.<sup>333</sup> The NCC does this by receiving and evaluating complaints concerning prohibited conduct or other contraventions of the CPA.<sup>334</sup> The NCC promotes the informal resolution of disputes between consumers and a supplier.<sup>335</sup> It monitors the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted.<sup>336</sup> It has the power to issue and enforce compliance notices. The NCC can refer matters directly to the NPA or the relevant court. It can also investigate matters and facilitate the issuing of consent orders from a court or from the NCT.<sup>337</sup>

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<sup>328</sup> Section 51(1)(c)

<sup>329</sup> Regulation 44; R Sharrock ‘Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act’ 321, 323.

<sup>330</sup> T Naude ‘The use of black and grey lists in unfair contract terms legislation in comparative perspective’ 130.

<sup>331</sup> S Newman ‘The Influence of Plain Language and Structure on the Readability of Contracts’ 2010 *Obiter* 745.

<sup>332</sup> Pretorius CJ, ‘Exemption clauses and mistake: *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)’ 2010 *THRHR* 491- 501.

<sup>333</sup> Established in terms of section 85 and with powers in section 92 of the CPA; R Lake ‘The consumer's right to redress- is National Consumer Commission fulfilling its mandate?’ (September 2011) *De Rebus* 46.

<sup>334</sup> M Vessio ‘What does the National Credit Regulator regulate? 2008 *SA Merc LJ* 227 – 242.

<sup>335</sup> Section 99, CPA.

<sup>336</sup> Section 100, CPA.

<sup>337</sup> NCR *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market* available at [https://www.ncr.org.za/documents/pages/research-reports/jun13/NCR\\_NCA%20IMPACT%20LITERATURE%20REVIEW\\_FINAL%20REPORT\\_260612.pdf](https://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf), accessed on 15 November 2016 85.

### 3.2.4 Critique on the CPA

The effectiveness of the CPA has been compromised by the lack of or poor enforcement by the NCC in particular.<sup>338</sup> The consumer advocate has experienced teething problems since establishment. Many consumers are unaware of the NCC or its work and sometimes refer complaints falling outside of its jurisdiction, which unfortunately contributes to the backlog of complaints.<sup>339</sup> The NCC's track record with the NCT reveals that it is often found wanting in procedural compliance, resulting in consumers failing at attempting to find redress.<sup>340</sup> Given its limited success in mediating and conciliating disputes, the NCC has moved away from individual consumer complaints to monitoring and targeting larger scale undesirable market conduct.<sup>341</sup> However, despite the active monitoring of market conduct, the NCC has also been identified with regulatory inefficiency when it comes to fraudulent investment schemes.<sup>342</sup> For example, the popularised MMM Ponzi scheme collapsed in 2016 and revived again in 2017, whilst being under investigation by the NCC since 2015.<sup>343</sup> Despite specific provisions of the CPA applying and the NCC being aware of its activities, the NCC applied to court for a declaratory order in order to establish whether the CPA was applicable.<sup>344</sup>

The approach of the NCC has also been to either refer individual consumers to ADR agents, or issue a notice of non-referral, so that consumers can approach the NCT directly.<sup>345</sup> Although, ADR processes are cheaper and more convenient for consumers compared to High Court litigation for example, these processes have their shortcomings as well.<sup>346</sup> The voluntariness of industry codes has presented a problem in that they are self-funded, which

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<sup>338</sup> M Magaqa 'The NCC and the NCT walk the long road to consumer protection' 2015 *SA Merc LJ* 32 – 57.

<sup>339</sup> R Lake 'The consumer's right to redress- is National Consumer Commission fulfilling its mandate?' (September 2011) *De Rebus* 46.

<sup>340</sup> M Magaqa 'The NCC and the NCT walk the long road to consumer protection' 47 – 51.

<sup>341</sup> T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' 2017 *SA Merc LJ* 6 – 7, 14 - 15. This is based on the incorrect reliance on sub-section 99(a), CPA in isolation.

<sup>342</sup> T Woker, 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' 2017 *SA Merc LJ* 7-8.

<sup>343</sup> *Ibid*, see fn 40; E Du Preez 'Ponzi Scheme Alert as nine businesses under scrutiny' 17 September 2015, available at <https://www.fin24.com/Companies/Financial-Services/Ponzi-scheme-alert-as-9-businesses-under-scrutiny-20150917>, accessed on 05 November 2018.

<sup>344</sup> NCC *Annual Report* (2016/17) 24.

<sup>345</sup> T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' 2017 *SA Merc LJ* 12 – 13.

<sup>346</sup> See T Naude 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' 527 – 8.

means their success or failure depends largely on the participation of members, including due payment of membership fees or levies.<sup>347</sup> There is also a perception that they are often biased in favour of suppliers.<sup>348</sup>

### 3.2.6 Concluding remarks regarding the CPA

The CPA was enacted to protect consumers against poor practices in the market, where the rules of contract had been slow to replicate social justice.<sup>349</sup> Just some of the measures discussed were the consumer's right to just, fair and reasonable terms. These provisions go a long way in clarifying rights and obligations where it counts, such as exemption clauses.<sup>350</sup> This is headway towards changing the attitude of suppliers when drafting contracts.<sup>351</sup> However as shown above, the crux of the matter is that, consumers will not be afforded the protection of the CPA, if the NCC fails to enforce the CPA by prosecuting prohibited conduct.<sup>352</sup>

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<sup>347</sup> J Krige 'Preventing the wool being pulled over consumers' eyes: The consumer goods and services industry code of conduct and ombud' (August 2015) *De Rebus* 132 20.

<sup>348</sup> F Van Zyl 'Code of Conduct for the financial services industry' 342.

<sup>349</sup> Y Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' 129.

<sup>350</sup> *Ibid* 118.

<sup>351</sup> *Ibid* 129.

<sup>352</sup> T Woker 'Evaluating the role of the national consumer commission in ensuring that consumers have access to redress' 2017 *SA Merc LJ* 16.

### 3.3 Financial Services Legislation

The purpose of this section is to highlight important legislation that has been in place to protect consumers in the financial services sector. It is important to note that the scope of the consumer protection measures contained in the NCA and CPA end where financial services legislation starts operating.<sup>353</sup> Initially, government wanted to regulate unfair conduct across all market segments.<sup>354</sup> However, government realised that the financial services sector needed careful regulation because of its uniqueness.<sup>355</sup> As a result, insurance companies, pension funds, collective investment schemes and the security services industry were excluded from the application of a majority of provisions of the CPA.<sup>356</sup> In 2013, amendments were made to financial services legislation to align it with consumer protection measures in the CPA, if not improve on them.<sup>357</sup> However, because of the importance of financial services, government has introduced new legislation to regulate this sector. This new legislation is discussed in detail in chapter 4.

This long list of legislation has applied to the financial services sector to date:<sup>358</sup>

1. Pension Funds Act, 24 of 1956;
2. Friendly Societies Act, 25 of 1956;
3. Banks Act, 94 of 1990;
4. Financial Services Board Act, 97 of 1990;
5. Financial Supervision of the Road Accident Fund Act, 3 of 1993;

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<sup>353</sup> Naude & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 1 para 2. See also section 28(2)(b) of the FSB Act 97 of 1990.

<sup>354</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 27 -28.

<sup>355</sup> National Treasury, *A Safer Financial Sector to serve South Africa Better* (note 30 above) 41; imposing a cooling-off period on a share trading transaction for example, to protect a single investing consumer at a time, would most likely upset the functioning of the market, risking its failure.

<sup>356</sup> This was initially for a period of 18 months. Item 10, Schedule 2, CPA; Notice to Exempt the Pension Fund Industry, the Collective Investment Schemes Industry and the Security Services Industry GN 533 in GG 34400 of 27 June 2011. Banks were excluded from the application of section 14, GN 511 in GG 34399 of 27 June 2011.

<sup>357</sup> Item 10, Schedule 2 CPA; Financial Services Laws General Amendment Act 45 of 2013. This Act exempted any financial service, product or institution regulated by the FSB and the FSB from the scope of the Consumer Protection Act, as higher standards of consumer protection are being implemented in terms of financial sector legislation. See also National Treasury *Financial Services Laws General Amendment Bill, 2012: Motivation for Proposed Amendments* available at <http://www.treasury.gov.za/public%20comments/FSL/Clause%20by%20clause.pdf>.

<sup>358</sup> Schedule 1, FSR Act.

6. Mutual Banks Act, 124 of 1993;
7. Long-term Insurance Act, 52 of 1998;
8. Short-term Insurance Act, 53 of 1998;
9. Financial Institutions (Protection of Funds) Act, 28 of 2001;
10. Financial Advisory and Intermediary Services Act, 37 of 2002;
11. Collective Investment Schemes Control Act, 45 of 2002;
12. Co-operative Banks Act, 40 of 2007;
13. Financial Markets Act, 19 of 2012;
14. Credit Rating Services Act, 24 of 2012.

The discussion below is limited to providing a broad understanding of the provisions that contain the main protections available to consumers of financial services and products.

### *3.3.1 Aims of the legislation*

The common element in financial sector legislation is the aim to regulate and supervise different financial service providers (“FSPs”), mainly for the purpose of ensuring that consumers of financial products and services are protected. For example, the Pension Funds Act<sup>359</sup> and Friendly Societies Act<sup>360</sup> were enacted to provide for the regulation of pension funds and friendly societies, respectively. The Banks Act<sup>361</sup> was enacted to provide for the regulation and supervision of banks which take deposits from the general public. This is so that consumers who deposit their money with banks can have confidence that their money will be protected. The Long-term Insurance Act<sup>362</sup> (“LTIA”) and Short Term Insurance Act<sup>363</sup> (“STIA”) provide for the registration of insurance companies. It is important for consumers who invest in insurance products to know that when they need to claim from insurance companies the funds will be there to pay out.

Other important legislative measures include the Financial Markets Act<sup>364</sup>, which recently replaced the Securities Services Act, 2004 in regulating the functioning of financial markets.

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<sup>359</sup> Act 24 of 1956.

<sup>360</sup> Act 25 of 1956.

<sup>361</sup> Act 94 of 1990.

<sup>362</sup> Act 52 of 1998.

<sup>363</sup> Act 53 of 1998.

<sup>364</sup> Act 19 of 2012.

The Financial Institutions (Protection of Funds) Act<sup>365</sup> was passed to regulate investments with financial institutions and to enable the FSB to protect and ensure the proper administration of such funds and trust property. The Inspection of Financial Institutions Act<sup>366</sup> provides for the inspection of the affairs of financial institutions as well as unregistered entities conducting the business of financial institutions.

The Financial Advisory and Intermediary Services Act<sup>367</sup> (commonly known as “FAIS”) was introduced after many vulnerable consumers continued to be victims of fraudulent schemes, which government had tried to regulate since the 1980s.<sup>368</sup> FAIS was introduced after the Nel Commission of Inquiry investigated the Masterbond scheme and found that financial services and investment opportunities marketed to consumers were not adequately regulated.<sup>369</sup> Masterbond was an investment opportunity that came into operation in the 1980’s. The scheme collapsed in 1991. What followed was years of criminal prosecution and curatorship.<sup>370</sup> The scheme began as an investment facility financed through debentures, some of which later emerged as false. About 22000 investors were lured into funding large projects to the tune of R595 million, which later turned out to be property syndications.<sup>371</sup> These investors were promised substantial returns on their investments but Masterbond turned out to be a pyramid scheme, and after a while, it could no longer afford to pay out the interest to investors and the investment opportunity collapsed.<sup>372</sup>

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<sup>365</sup> Act 28 of 2001.

<sup>366</sup> Act 80 of 1998.

<sup>367</sup> Act 37 of 2002, effective 15 November 2002.

<sup>368</sup> In terms of the Harmful Business Practices Act 79 of 1988; T Woker ‘If it sounds too good to be true it probably is: Pyramid schemes and other related frauds’ 239 – 240.

<sup>369</sup> Nel Commission *The Final Report of the Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa* (April 2001) Vol 2, available at [http://www.justice.gov.za/commissions/comm\\_nel/chapter8\\_14.pdf](http://www.justice.gov.za/commissions/comm_nel/chapter8_14.pdf), accessed on 30 August 2018.

<sup>370</sup> ‘It’s a wrap for Masterbond’ (14 March 2015), available at <https://www.fin24.com/Companies/Its-a-wrap-for-Masterbond-20050314>, accessed on 29 August 2018; The saga was only concluded in 2015 after curators appointed by the High Court were able to recover a fraction of the funds for the mostly elderly investors.

<sup>371</sup> Masterbond Curatorship Concluded? (15 March 2005), available at <https://mg.co.za/article/2005-03-15-masterbond-curatorship-concluded>, accessed on 30 August 2018.

<sup>372</sup> Nel Commission *The Final Report of the Commission of Inquiry into the Affairs of the Masterbond Group* (note 369 above) 160.

Many consumers, especially senior citizens, lost their investments.<sup>373</sup> The Nel Commission lamented that the FSB was not doing what was expected of a regulator, that is, licensing, monitoring and supervising advisers and representatives in respect of all financial products.<sup>374</sup> In an attempt to resolve this, FAIS was implemented in November 2002. It was hoped that FAIS would hold advisers accountable for the bad advice given to consumers who eventually suffered losses as a result of that bad advice.<sup>375</sup> Unfortunately, FAIS was not introduced in time to avert investments in similar schemes which subsequently collapsed.<sup>376</sup> Specific examples are the Fidentia and Tannenbaum investment schemes that collapsed in 2007 and 2009 respectively.<sup>377</sup> Nevertheless, for the purposes of this mini-dissertation FAIS remains an important consumer protection measure in the financial services sector.

### 3.3.2 Important consumer protection measures

Some of the important consumer protection measures from the above mentioned legislation, are highlighted below, namely:

1. the registration of FSPs;
2. the fit and proper requirements;
3. measures to ensure fairness.

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<sup>373</sup> Many investors could not recoup their losses even through the courts. See *Cooper and Others NNO v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA), the Court could not come to the rescue of a consumer who had invested in Masterbond, allegedly on the advice of his broker. It was determined that the broker had given advice at least one, that the consumer make the short term investment, maturing in a year, because of Masterbond rates were good. The consumer, eventually losing out because of Masterbond being placed under curatorship, could not prove in court, that he had relied on the continued advice of the broker, when he reinvested his funds.

<sup>374</sup> Nel Commission *The Final Report of the Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa* (note 369 above) 56 – 57.

<sup>375</sup> T Woker 'If it sounds too good to be true it probably is: Pyramid schemes and other related frauds' 249.

<sup>376</sup> T Woker 'Property Syndications v Property scam: who decides? A critical examination of the regulation of property syndications in South Africa' 2013 *Obiter* 236; L Du Preez 'A Trickle of Relief for Syndication Investors' *Business Day* (05 August 2018), available at <https://www.businesslive.co.za/bt/money/2018-08-04-trickle-of-relief-for-syndication-investors/>, accessed on 22 August 2018; Statement by the Minister of Finance on the Placement of Saambou Bank Limited under Curatorship, in terms of Section 69 of the Banks Act, to Parliament on Thursday 14 February 2002, available at [http://www.treasury.gov.za/comm\\_media/speeches/2002/2002021401.pdf](http://www.treasury.gov.za/comm_media/speeches/2002/2002021401.pdf), accessed on 30 August 2018.

<sup>377</sup> See B Cameron 'The R10bn betrayal' (11 June 2009) available at [www.iol.co.za/news/south-africa/the-r10bn-betrayal-446062](http://www.iol.co.za/news/south-africa/the-r10bn-betrayal-446062), accessed on 12 April 2018 and J Cobbet 'How the fidentias blew a billion' (17 July 2013) available at <https://www.moneyweb.co.za/archive/how-fidentias-brown-blew-a-billion>, for more detail; L Louw 'No hiding the fact that FAIS has failed to perform' (3 July 2013), available at <https://www.businesslive.co.za/bd/opinion/columnists/2013-07-03-no-hiding-the-fact-that-fais-failed-to-perform/>, accessed on 29 August 2018.

### 3.3.2.1 Registration of FSPs

Banks have thus far, been licensed and supervised by the Reserve Bank.<sup>378</sup> Financial institutions other than banks have been licensed and supervised by the FSB, in terms of the FSB Act and across a number of industry specific regulations.<sup>379</sup> The insurance legislation provided for the FSB to register and authorize providers of long term and short term insurance respectively, and without which, the insurance business would be conducted illegally.<sup>380</sup> Similarly, all advisers and intermediaries had to be registered and authorized in terms of FAIS to advise on and sell financial products.<sup>381</sup>

The FSB could, subject to consultation and by notice in the Government Gazette, declare certain business practices undesirable.<sup>382</sup> For example, the FSB has had the power to prohibit any short term insurer from carrying business in certain circumstances such as where the business is making material misrepresentations to the public.<sup>383</sup> The FSB could also procure the removal of representatives of that short term insurer, who are no longer fit and proper.<sup>384</sup>

### 3.3.2.2 The fit and proper requirements

FAIS has protected consumers by screening financial services providers and intermediaries in terms of the fit and proper requirements<sup>385</sup>. The purpose of this is to ensure that financial products or services are provided by individuals who have integrity, are honest, competent and solvent.<sup>386</sup> The combined experience, qualification and regulatory examination requirements that are applicable to all financial services providers, key individuals and representatives aim to confirm that they have the requisite knowledge and skill to provide these services and

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<sup>378</sup> V Lawack 'The South African Banking System' in R Sharrock et al, *The Law of Banking and Payment in South Africa* (2016) 67, 71 – 73.

<sup>379</sup> Section 2, FAIS; section 2, LTIA; section 2, STIA; and section 3B of the Pensions Fund Act 24 of 1956. E Van Eeden, *Consumer Protection Law* 589.

<sup>380</sup> Section 8, LTIA and section 7 - 9, STIA; E Van Eeden *Consumer Protection Law*. 607 – 8.

<sup>381</sup> Sections 7 & 8, FAIS.

<sup>382</sup> Section 34, FAIS, Section 49(1) of the STIA and 50(1) of the LTIA.

<sup>383</sup> Section 12 of the STIA; E Van Eeden *Consumer Protection Law* 610.

<sup>384</sup> Section 21 STIA.

<sup>385</sup> Section 8, Chapter 2 and 3, FAIS. E Van Eeden *Consumer Protection Law* 600.

<sup>386</sup> FSB *The fit and proper requirements* available at <https://www.fsb.co.za/Departments/fais/requirements/Pages/requirements.aspx>, accessed on 5 May 2018; D Millard & M Botha 'Something's got to give: The future of financial advisors and intermediaries as employees.' 46 – 47.

products.<sup>387</sup> Additionally they must demonstrate financial soundness by maintaining full and proper accounting records, to be evaluated by the FSB that they hold sufficient liquid assets to be able to continue servicing consumers, even in a crisis.<sup>388</sup>

### 3.3.2.3 *Measures to ensure fairness*

There are prohibitions on certain contracts and provisions in financial services contracts in order to ensure fairness. For example, a long term insurance policy may not be used as security for a loan.<sup>389</sup> Provisions excluding liability of product suppliers or distributors or waiving rights that consumers are entitled to in terms of the legislation are void.<sup>390</sup> Undesirable practices are prohibited and the FSB has the power to declare certain practices as such.<sup>391</sup> This includes practices that deceive or unreasonably prejudice clients, unfair treatment, or practices that are harmful to the relations between the financial services providers and consumers.

Additional consumer protection measures are found in the Policyholder Protection Rules, published by the Minister in terms of the STIA and the LTIA. They regulate and restrict direct marketing, set disclosure requirements, and additional obligations for insurers when rejecting claims. In addition, a Code of Conduct is published to regulate the manner in which brokers and insurance companies conduct themselves in relation to consumers.<sup>392</sup>

### 3.3.3 *The Regulators*

#### 3.3.3.1 *The Reserve Bank*

Established in 1921, the Reserve Bank is the central bank of the country.<sup>393</sup> The bank is a constitutionally protected, legislated company with both private individuals/bodies and

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<sup>387</sup> *Ibid.*

<sup>388</sup> Section 19 FAIS, read with Items 6 and 9 of FSB Board Notice 106 of 2008.

<sup>389</sup> Section 54 LTIA.

<sup>390</sup> Section 56, LTIA and section 51 STIA.

<sup>391</sup> Section 37, FAIS.

<sup>392</sup> Section 16, FAIS requires the Code to ensure that providers, inter alia, act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services sector, as well as act with circumspection and treat clients fairly in a situation of conflicting interests.

<sup>393</sup> The Reserve Bank currently functioning in terms of the South African Reserve Bank Act 90 of 1989; According to B Bekink and C Botha 'The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence' 2009 *SA Merc LJ* 75: "Central banks were established throughout the world because of the realisation that under typical, normal conditions of

government as shareholders.<sup>394</sup> The primary objective of the bank is to protect financial stability in the interest of balanced and sustainable economic growth in the Republic.<sup>395</sup> “Financial stability entails the detection and reduction of threats to the financial system as a whole”<sup>396</sup> As regulator of all banks, it enforces the prudential requirements to promote the soundness of banks through the effective application of international regulatory and supervisory standards.<sup>397</sup> The prudential requirements include the licensing of banks and the minimum capital reserves that banks must maintain, in order to demonstrate solvency.<sup>398</sup> The bank also monitors risks to investors and the market in its entirety.<sup>399</sup> As the guardian of the economy, the bank also protects consumers by controlling and adjusting monetary and inflation policies.<sup>400</sup> When uncontrolled, inflation can lead to low consumer spending levels due to affordability especially in the low income group, and also corporate failures.<sup>401</sup> The bank is also responsible for the country’s currency, exchange control and the national payment system.

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Saambou, Unibank, and other smaller banks failed in 2002 and this had a contagion effect on even the bigger banks at the time, thus threatening the entire financial market.<sup>403</sup> These events, as well as the 2008 financial crisis confirmed the need for tighter regulation.<sup>404</sup> It was necessary to have a stable and safe but functional financial market whilst managing risks for example that

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banking and financial business, it was advantageous to have centralised monetary reserves, currency control and credit management that enjoyed the support of the state and were subject to some form of governmental supervision and participation.”

<sup>394</sup> Section 223 – 225 of the Constitution; the South African Reserve Bank Act 90 of 1989; B Bekink and C Botha ‘The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence’ 77 - 78.

<sup>395</sup> Section 3, SARB Act; B Bekink and C Botha ‘The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence’ 75.

<sup>396</sup> B Bekink and C Botha ‘The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence’ 88.

<sup>397</sup> J De Jager ‘The South African Reserve Bank: An Evaluation of the Origin, Evolution and Status of a Central Bank (Part 2) 2006 *SA Merc LJ* 280.

<sup>398</sup> In terms of the Banks Act, 94 of 1990 and the Mutual Banks Act, 124 of 1993; V Lawack, ‘The South African Banking System’ 67, 71 – 73, 77.

<sup>399</sup> V Lawack ‘The South African Banking System’ 77.

<sup>400</sup> Bekink B & Botha C, ‘The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public Law Angle of Incidence’ 2009 21 *SA Merc LJ* 86-87; J De Jager ‘The South African Reserve Bank: An Evaluation of the Origin, Evolution and Status of a Central Bank’ 274.

<sup>401</sup> B Bekink and C Botha ‘The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence’ 86.

<sup>402</sup> Exchange Control Regulations, as promulgated by GN R1111 of 1 December 1961, as amended; Section 10 SARB Act; National Payment System Act 78 of 1998.

<sup>403</sup> SARB *Annual Report* (2002) 7-12.

<sup>404</sup> E Van Eeden *Consumer Protection Law in South Africa* 573.

one small bank, lending recklessly, could crash the country's financial system.<sup>405</sup> Following the Masterbond saga, the Reserve Bank acknowledged the need to work closely with the FSB in fulfilling their supervisory roles and this was to be implemented by entering into a Memorandum of Understanding.<sup>406</sup>

Lastly, the South African government has so far maintained the central bank's independence of the state, in order for it to better fulfil its objective of stability.<sup>407</sup> However, the state necessarily gets involved when banks have to be bailed out.<sup>408</sup> Through the recent collapse of VBS, the Reserve Bank has been able to demonstrate this independence. The Reserve Bank placed VBS under curatorship in March 2018 and VBS is due to be liquidated because there are no prospects of its recovery. VBS was initially hailed as the first black bank, the prototype of financial inclusion.<sup>409</sup> An investigation commissioned by the Reserve Bank revealed that VBS failed to remain liquid after depositors' funds were looted by its shareholders.<sup>410</sup> VBS also issued substantial loans and paid commissions for the recruitment of depositors.<sup>411</sup> Whilst the funds looted amount to approximately R2 billion, some of the depositors who have lost their investments include pensioners and local municipalities.<sup>412</sup> Problems with VBS began as far back as 2016, and evidently, could not be avoided by the Reserve Bank.<sup>413</sup> The Reserve

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<sup>405</sup> *Ibid.*

<sup>406</sup> SARB *Annual Report* (1998) 15.

<sup>407</sup> J De Jager 'The South African Reserve Bank Blowing Winds of Change (Part 2)' 2013 *SA Merc LJ* 503 – 506.

<sup>408</sup> J De Jager 'The South African Reserve Bank Blowing Winds of Change (Part 2)' 505. Recently, there have been calls for the Reserve Bank to be nationalized, but so far government has not welcomed this approach; M Mahlase & A Basson 'Ramaphosa fiercely defends SARB's independence' (25 May 2018) available at <https://www.fin24.com/Economy/ramaphosa-fiercely-defends-sarbs-independence-20180525>, accessed on 27 July 2018; South African Reserve Bank Bill: GG No. 41657 of 25 May 2018 <https://www.parliament.gov.za/storage/app/media/Docs/bill/acae4cfa-4826-4356-a032-f84f64dc73bc.pdf>, accessed on 27 July 2018.

<sup>409</sup> S Stone 'VBS: The Story of a Good Project Gone Bad' (11 July 2018) available at <https://citypress.news24.com/News/vbs-the-story-of-a-good-project-gone-bad-20180711>, accessed on 5 October 2018.

<sup>410</sup> Adv T Motau (SC) (note 26 above).

<sup>411</sup> *Ibid* 19, 42, 49.

<sup>412</sup> *Ibid* 36, 41, 47, 113-114. Municipalities are precluded by the Regulations to the Municipal Finance Management Act from investing in Mutual Banks. One of the Municipalities was able to recover the funds invested, upon enforcing the expiry of the deposit period. The Public Investment Corporation ("PIC"), a state-owned asset management company, managing the government employee pension fund, was one of the shareholders in VBS Bank.

<sup>413</sup> S Stone 'VBS: The Story of a Good Project Gone Bad' (note 407 above).

Bank has forwarded the investigators report for further criminal investigation and possible prosecution.<sup>414</sup>

### 3.3.3.2 *The FSB*

The FSB was introduced to oversee the non-banking financial services sector. This sector includes retirement funds, short-term & long-term insurance, companies, funeral insurance, schemes, collective investment schemes (unit trusts and the stock market) and financial advisors and brokers.<sup>415</sup> The main function of the FSB is to supervise the long list of financial services laws detailed in the introductory paragraph to this section.<sup>416</sup> For the purposes of this mini-dissertation, the most important consumer protection measure the FSB is obliged to enforce, is FAIS.<sup>417</sup>

Far reaching amendments were made to FAIS in 2008 increasing the FSB's scope and powers over license-holders and improving on the fit and proper requirements.<sup>418</sup> The FSB was empowered to draft and effect codes of conduct, and limits were imposed on incentives that advisors could earn. Widespread amendments to financial services legislation were made again in 2013 to ensure FSB as the lead regulator where there is concurrent jurisdiction with other regulators.<sup>419</sup> The intention was to also give the Reserve Bank powers to maintain stability in the event of a financial crisis.<sup>420</sup>

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<sup>414</sup> SARB Media Release: VBS Mutual Bank Investigators Report to the Prudential Authority (10 October 2018), available at <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8830/VBS%20Mutual%20Bank%20investigators%20report%20to%20the%20Prudential%20Authority%2010.10.2018.pdf>, accessed on 5 November 2018.

<sup>415</sup> FSB *Annual Report* (2009) available at <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202009.pdf>, accessed on 12 July 2018 15.

<sup>416</sup> See Paragraph 3.3.

<sup>417</sup> Section 3(a) FSB Act.

<sup>418</sup> Long title, Financial Services General Laws Amendment Act, 22 of 2008.

<sup>419</sup> National Treasury *Financial Services Laws General Amendment Bill, 2012: Motivation for Proposed Amendments* (note 355 above) 1 -2.

<sup>420</sup> *Ibid.*

The FSB has been fulfilling its supervisory and enforcement function through the Enforcement Committee established in terms of section 10A of the FSB Act.<sup>421</sup> This committee is a department within the FSB that apprehends FSPs that contravene financial services legislation, and which has the power to issue penalties.<sup>422</sup> The FSB's enforcement powers are granted in terms of the various pieces of legislation it supervises, but also specifically in terms of the Inspection of Financial Institutions Act<sup>423</sup> and the Financial Institutions: Protection of Funds Act.<sup>424</sup> The FSB has powers to inspect businesses, their practices and premises.<sup>425</sup> The Financial Institutions Act empowers the FSB to take action against delinquent institutions and it may, after giving a fair hearing, impose an administrative fine.<sup>426</sup>

#### 3.3.4 Dispute resolution

The Ombud for Financial Services Providers (a "statutory ombud") was established in terms of FAIS, to consider and dispose of complaints specific to the financial services in a fair, informal, cost-effective and efficient manner.<sup>427</sup> The Pension Fund Adjudicator is another statutory ombud, fulfilling similar functions but in terms of the Pension Funds Act. The activities of the statutory ombuds are also regulated by the FSOS Act. The Act also provides for a Financial Services Ombud Schemes Council to recognize ombud schemes meeting the requirements of the Act.<sup>428</sup> The FSOS Council has recognized the long-term insurance ombud, short-term insurance ombud, the banking ombud and credit ombud.<sup>429</sup>

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<sup>421</sup> See S Luiz 'Market abuse and the enforcement committee' 2011 *SA Merc LJ* 158: In terms of Section 97 of the SSA, the FSB was required to establish (as a committee of record of the FSB) an Enforcement Committee. "Encouraged by the success of the EC as an enforcement mechanism in the context of market-abuse cases, the jurisdiction of the EC was extended in 2008 to cover all the legislation supervised by the FSB. This was accomplished by the Financial Services Laws General Amendment Act 22 of 2008 that came into effect on 1 November 2008.

<sup>422</sup> <https://www.fsb.co.za/enforcementcommittee/pages/aboutus.aspx>, accessed on 12 June 2018.

<sup>423</sup> Act 80 of 1998.

<sup>424</sup> Act 28 of 2001.

<sup>425</sup> E Van Eeden *Consumer Protection Law* 603. Inspection of Financial Institutions Act 80 of 1998, Section 4 of FAIS and section 22 of the FSB Act.

<sup>426</sup> Section 6, Financial Institutions Act.

<sup>427</sup> Section 20, FAIS; The FAIS Ombud's authority was unsuccessfully challenged in *Risk v Ombud for Financial Services Providers* 2012 JDR 1691 (GNP).

<sup>428</sup> Section 2, 8 and 11, FSOS Act.

<sup>429</sup> Notice of Recognition of Schemes, BN 120 in *GG* 29336 of 27 October 2006.

The FAIS Ombud's role is highlighted in this mini-dissertation due to its role in recent events where consumers are victims of fraudulent schemes that collapse, such as the Sharemax saga. Sharemax imploded after being investigated by the Reserve Bank in 2011 for illegal deposit-taking and then referred to the SAPS for criminal prosecution.<sup>430</sup> The FAIS Ombud issued determinations against Sharemax, its directors, and the brokers, that they repay investors who lost their investments.<sup>431</sup> As a result of the Appeal Board overturning the decision, the Ombud could only hold advisers and not the owners or promoters of the schemes liable.<sup>432</sup> Nonetheless, the FAIS Ombud continues to issue determinations, within this limitation.<sup>433</sup> The Ombud recently reported receiving at least 10 000 individual complaints, of which more than half were regarded as justifiable by the Ombud.<sup>434</sup> Of these complaints, only 68 have been resolved by determinations. The Ombud has concluded settlements of just under R60 million.<sup>435</sup>

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<sup>430</sup> The Reserve Bank first ordered that investors be refunded, and later retracted this; L Wessels 'SARB orders Sharemax to Refund Backers' (17 September 2018), available at <https://www.fin24.com/Companies/Sarb-orders-Sharemax-to-refund-backers-20100917>, accessed on 27 August 2018; SARB Media Statement: 'Withdrawal of Directive in Respect of Property Syndication Companies Promoted by Sharemax (Pty) Limited', (8 February 2018), available at <https://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblast=21b5222e-7125-4e55-bb65-56fd333371e&sarbitem=4953>, accessed on 27 August 2018; T Woker 'Property Syndications v Property scam: who decides? A critical examination of the regulation of property syndications in South Africa' 236, 239 – 240.

<sup>431</sup> *Siegrist (FAIS 00039/11-12/GP1) and Bekker (FAIS 06661/10-11/WC1)*, available at <https://www.faisombud.co.za/determinations/>.

<sup>432</sup> *About the enforcement committee*, available at <https://www.fsb.co.za/enforcementcommittee/pages/aboutus.aspx>, accessed on 12 June 2018. Prior to amendments in terms of the FSR Act, the FSB Act also provided for an appeal board. The Appeal Board adjudicated on appeals on decisions of the Regulators or ombuds. Its decisions could be reviewed by the High Court. See Sections 26A & 26B FSB Act, as amended by Financial Services Laws General Amendment Act, No 22 of 2008. In *Ombud for Financial Services Providers v Harms NO 2017 JDR 0315 (GP)*, the Ombud unsuccessfully tried to have the appeal decision reviewed and set aside, alternatively for declaration on the powers that were relied up on making the initial determination.

<sup>433</sup> R Cockayne 'FAIS Continues with Property Syndication Probe' (23 March 2016), available at <https://www.iol.co.za/business-report/economy/fais-continues-with-property-syndication-probe-2000723>, accessed on 27 August 2018.

<sup>434</sup> FAIS Ombud *Annual Report (2016/17)*, available at <https://www.faisombud.co.za/wp-content/uploads/2017/10/Annual-Report-2016-2017.pdf>, accessed on 30 August 2018 17.

<sup>435</sup> *Ibid* 18.

### 3.4 Concluding remarks regarding financial protection legislation

The Sharemax and African Bank sagas affected a number of the regulators, the Reserve Bank<sup>436</sup>, the FSB<sup>437</sup>, the NCC<sup>438</sup>, CIPC<sup>439</sup>, but none of these regulators actively pursued redress on behalf of consumers.<sup>440</sup> The ruling of the appeal board in the Sharemax matter highlights that the FAIS Ombud's role was limited to resolving consumer complaints, and not policing financial institutions, as this was the role of the FSB.<sup>441</sup> The FSB's position has been that such matters fall within the jurisdiction of the Reserve Bank because they involved taking deposit-from the public. The buck was also passed on to the FAIS Ombud, who was issuing numerous determinations at the time, as well as the NCC because it is being responsible for the enforcement of the CPA.<sup>442</sup>

In 2012, the FSB was questioned by Parliament because it seemed that it only intervened once schemes had already imploded.<sup>443</sup> The FSB was also questioned about gaps in the legislation, specifically FAIS and the CPA that disabled it from acting to the protection of consumers.<sup>444</sup>

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<sup>436</sup> Whilst reporting to have investigated up to 41 illegal deposit-taking schemes in 2016, the Reserve Bank declared that these schemes were correctly under the jurisdiction of the NCC; 'Reserve Bank goes after illegal money schemes' (7 September 2016), available at <https://www.sanews.gov.za/south-africa/reserve-bank-goes-after-illegal-money-schemes>, accessed on 27 August 2018.

<sup>437</sup> The FSB has also investigated a number of alleged schemes, and then referred the matters on to the NCC or the Reserve Bank and to the Commercial Crimes Unit in the SAPS; Reply to Parliamentary Question No. 2704 in National Assembly, (11 October 2013), available at [http://www.treasury.gov.za/publications/other/MinAnsw/2013/Reply%20to%20PQ%202704%20\[NW3205E\].PDF](http://www.treasury.gov.za/publications/other/MinAnsw/2013/Reply%20to%20PQ%202704%20[NW3205E].PDF), accessed on 27 August 2018.

<sup>438</sup> Three years later, on insistence of the Reserve Bank and the FSB, the NCC conducted an investigation into a number of Ponzi schemes. Its outcome was that the NCC referred these matters to the SAPS; A Arde 'Pyramid Schemes Thriving in SA' (16 February 2018), available at <https://www.iol.co.za/personal-finance/pyramid-scams-thriving-in-sa-1980769>, accessed on 27 August 2018; M Mortlock 'Police Investigate Several Suspected Pyramid Schemes', available at <https://ewn.co.za/2016/01/30/Police-investigate-several-suspected-pyramid-schemes>, accessed on 27 August 2018.

<sup>439</sup> It is alleged that the victims of Sharemax are offered to covert that investments/losses into shares into shares in the rescue company Nova, which has similar directors as those of Sharemax; R Cockayne 'Fais Continues with Property Syndication Probe' (23 March 2016), available at <https://www.iol.co.za/business-report/economy/fais-continues-with-property-syndication-probe-2000723>, accessed on 27 August 2018; See [www.faisombud.org.za](http://www.faisombud.org.za) for other determinations.

<sup>440</sup> T Woker 'Property Syndications v Property scam: who decides? A critical examination of the regulation of property syndications in South Africa' 236, 240.

<sup>441</sup> Para 16.

<sup>442</sup> B Cameron 'FSB Passes Buck on the Ponzi scam' (25 November 2012), available at <https://www.iol.co.za/personal-finance/financial-planning/fsb-passes-the-buck-on-ponzi-scams-1429808>, accessed on 27 August 2018; Finance Standing Committee *Eradicating Ponzi schemes: briefing; Financial Management of Parliament Act Committee Report* 19 November 2012, available at <https://pmg.org.za/committee-meeting/15263/>, accessed on 27 August 2018.

<sup>443</sup> Finance Standing Committee *Eradicating Ponzi schemes* (note 442 above).

<sup>444</sup> The Committee made specific reference to section 38, 41 and 43 of the CPA, which outlawed referral selling, fraudulent investment and pyramid schemes and other offers.

In particular, it appeared that there was a lack of enforcement of the existing legislation.<sup>445</sup> The problems highlighted above, as well as the 2008 financial crisis led government to believe that it was necessary to have further and better regulation in the financial services section.<sup>446</sup> Hence the introduction of the Twin Peaks Model of regulation which government hopes will resolve these issues.<sup>447</sup> This will now be discussed in the next chapter, Chapter 4.

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<sup>445</sup> Finance Standing Committee *Eradicating Ponzi schemes* (442 above).

<sup>446</sup> K Gikunda 'The Way to a Safer Financial Services: A comparison between South Africa and Kenya' (LLM Thesis, University of Pretoria, 2015) 15.

<sup>447</sup> National Treasury, *A Safer Financial Sector to Serve South Africa Better* (note 30 above); 4; Finance Standing Committee *Eradicating Ponzi schemes* (note 442 above).

## CHAPTER FOUR

### THE NEW FINANCIAL SECTOR REGULATION

The catalyst that led government to change the mode of regulating the financial services sector, was the financial crisis in 2008. Although South Africa had managed to weather the crisis, it still suffered more than other G20 countries, especially in respect of job losses.<sup>448</sup> The financial crisis was essentially the collapse of many financial markets around the world due to poor and reckless lending practices.<sup>449</sup> It started and spread from developed countries such as the United States of America where consumerism and production were on a massive scale.<sup>450</sup> Reckless lending was at the heart of the problem.<sup>451</sup> Many financial institutions and other business closed down, resulting in job losses and a general recession.<sup>452</sup>

To avoid another crisis, the South African government decided to change the legislation to focus on these four objectives:<sup>453</sup>

1. stability;
2. consumer protection and market conduct;
3. financial inclusion; and
4. combating financial crime.

This Chapter considers the reasons why government pursued these four objectives and the legislation that will give effect to these objectives.<sup>454</sup>

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<sup>448</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 4.

<sup>449</sup> A Erasmus 'The proposed twin peaks system of regulating the financial sector in comparative analysis' (LLM Dissertation: Banking Law University of Johannesburg 2016) 4.

<sup>450</sup> *Ibid* 4 – 6.

<sup>451</sup> J De Jager 'The South African Reserve Bank Blowing Winds of Change (Part 2)' 492 – 493.

<sup>452</sup> *Ibid*.

<sup>453</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 4, 7.

<sup>454</sup> GN 169 in GG 41549 of 29 March 2018; GN 639 in GG 41735 of 27 June 2018.

## 4.1. The need for the Twin Peaks Model

### 4.1.1 *Stability*

The financial crisis led to the belief that less regulation or self-regulation was not ideal in the financial sector.<sup>455</sup> The crisis drove many governments across the globe to recognise that stability was an essential element in the financial market. The South African government also hoped that a stable financial system would foster economic growth.<sup>456</sup>

Stability can be achieved when there is certainty and certainty can be achieved by having a well-founded legal framework and transparency.<sup>457</sup> This meant that financial institutions had to be further and better regulated and monitored, so that regulators could manage risks to avoid another financial crisis.<sup>458</sup> Stability can also be achieved when there is general confidence that in tough economic times, financial institutions will be able to continue to provide financial products and services, whilst complying with the law.<sup>459</sup> Government believed that changing the regulatory structure would allow regulators to facilitate this confidence, in a coordinated and harmonious manner.<sup>460</sup>

### 4.1.2 *Consumer protection and market conduct*

Better regulation was needed to protect consumers against continuous, poor practices in the financial sector.<sup>461</sup> It was established that despite existing legislation, the financial sector was still characterized by high and mysterious fees, and the poor treatment of customers.<sup>462</sup> An independent inquiry conducted by the Competition Commission into the banking sector in 2008, revealed that bank charges were unreasonably high and that vulnerable groups still had

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<sup>455</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 13.

<sup>456</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 23.

<sup>457</sup> L Swart & V Lawack-Davids 'Understanding the South African Financial Markets: An Overview of the Regulators' 619.

<sup>458</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 13, 24; E Van Eeden & J Barnard *Consumer Protection Law in South Africa* 18.

<sup>459</sup> Section 4 FSR Act; Godwin A & Schmulow D, 'The financial sector regulation bill in South Africa, second draft: Lessons from Australia' 2015 *SALJ* 757.

<sup>460</sup> Godwin A & Schmulow D 'The financial sector regulation bill in South Africa, second draft: Lessons from Australia' 764 – 767.

<sup>461</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 8.

<sup>462</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 6.

limited access to banking and other financial services.<sup>463</sup> Most consumers did not understand the features and cost of banking products.<sup>464</sup> It was clear that consumers could not compare costs amongst banks and they were also not saving enough.<sup>465</sup>

Similar challenges were found in the insurance industry. There were poor claim handling practices, the operation of illegal funeral insurance providers and conflicts arising from the application of exemption clauses - these were just some of the issues.<sup>466</sup> The giving of financial advice was also problematic, with advisers often acting in conflict of interests.<sup>467</sup> The conflict often arose because of their relationship to the supplier of the financial product and how they were paid commission, which was not disclosed to consumers.<sup>468</sup> The investigation revealed that suppliers of financial products were not being held accountable when their chosen method of distribution for their products failed.<sup>469</sup>

Savings and investment products were also identified as being inaccessible to consumers.<sup>470</sup> The size and complexity of portfolio documents containing details of these financial products necessitated the use of advisers, who were not easily accessible and in some cases gave bad advice.<sup>471</sup> Government found that investment products were being promoted to consumers but later turned out to be pyramid schemes and other get-rich-quick schemes. These fraudulent schemes were not being properly regulated because it was difficult to identify which regulator was responsible for regulating the product.<sup>472</sup> The fundamental objective of improving

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<sup>463</sup> *Report of the Enquiry Panel to the Competition Commission* (2008) available at <https://www.southafrica.to/Banks/news/2008/competition-commission-banking-enquiry.pdf>, accessed on 19 June 2018 18 – 20; The Banking Enquiry was established by the Competition Commission in August 2006 in terms of Section 21 of the Competition Act No.89 of 1998; National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 43.

<sup>464</sup> *Report of the Enquiry Panel to the Competition Commission* (note 463 above).

<sup>465</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above); 43; *Report of the Enquiry Panel to the Competition Commission* (note 463 above) 18 – 19.

<sup>466</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above); 11.

<sup>467</sup> FSB, *Retail Distribution Review* (2014) available at <https://www.masthead.co.za/wp-content/uploads/2015/05/FSB-Retail-Distribution-Review-2014.pdf>, accessed on 2 December 2017 10.

<sup>468</sup> *Ibid* 22 – 24.

<sup>469</sup> *Ibid* 26.

<sup>470</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above); 12; T Woker 'If it sounds too good to be true it probably is: Pyramid schemes and other related frauds' 237 – 249.

<sup>471</sup> T Woker 'Property Syndications v Property scam: who decides? A critical examination of the regulation of property syndications in South Africa' 236, 240.

<sup>472</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above); 12; T Woker 'If it sounds too good to be true it probably is: Pyramid schemes and other related frauds' 237 – 249.

regulation was to have a single market conduct regulator to monitor and act against certain conduct in the financial sector as a whole for better consumer protection.<sup>473</sup>

#### 4.1.3. *Expanding access and financial inclusion*

Government's aspiration to extend access to the financial services was so that consumers can manage their money, save for the future, obtain credit and insure against unforeseen events.<sup>474</sup> Access has remained a challenge for vulnerable groups of consumers, who find financial products, including bank accounts, complex and expensive.<sup>475</sup> Thus, government has had a vision of transforming the financial services more accessible to the previously disadvantaged. The initial attempt was through the Financial Services Charter adopted in 2004, as an agreement between government and the financial sector, that the sector would be transformed to meet Broad-Based Black Economic Empowerment objectives, in terms of users and products but also in relation to ownership and control of financial institutions.<sup>476</sup>

Now, it is a specific goal in the National Development Plan ("NDP") to ensure that 90 per cent of the population are accessing financial services by 2030, including capitalizing on technological advancements.<sup>477</sup> One of the means through which government has facilitated the inclusion of the previously disadvantaged was through the promotion of the Mzansi account, a transactional account that was offered by Postbank, as well as the major banks, at minimal cost. The popularity of this product has since waned.<sup>478</sup> Another attempt was to issue recipients of social security grants with debit cards for electronic transactions, through the South Africa Social Security Agency ("SASSA").<sup>479</sup> However, this mechanism did not

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<sup>473</sup> A Schmulow 'Financial Regulatory Governance in SA: The move towards Twin Peaks' (017 25 *African Journal of International and Comparative Law* 396 – 7.

<sup>474</sup> K Gikunda 'The Way to a Safer Financial Services: A comparison between South Africa and Kenya' (LLM Thesis, University of Pretoria, 2015) 14; National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 59.

<sup>475</sup> National Treasury, *A Safer Financial Sector to Serve South Africa Better* (note 30 above); 6.

<sup>476</sup> Effective 1 January 2004, and later the Financial Sector Code as a Code of Good Practice in terms of the B-BBEE Act 53 of 2003 was published in GN 997 in GG 35915 of 26 November 2012.

<sup>477</sup> National Planning Commission, *National Development Plan 2030* available at [https://www.gov.za/sites/default/files/NDP-2030-Our-future-make-it-work\\_r.pdf](https://www.gov.za/sites/default/files/NDP-2030-Our-future-make-it-work_r.pdf), accessed on 05 November 2018 150; *When the NDP was adopted in 2015, levels of access were at 63%.*

<sup>478</sup> National Treasury *Achieving Financial Inclusion in South Africa: A payments perspective* available at <http://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf>, accessed on 05 November 2018 60 – 61.

<sup>479</sup> *Ibid.*

succeed in encouraging savings and transactional banking. Instead, the mechanism has been abused as the card is used as proof of income and security for loans, necessitating government to change the system and issue new cards.<sup>480</sup>

#### 4.1.4 Combating financial crime.

Financial crimes such as money laundering, theft of trust funds, get-rich-quick schemes and other fraudulent activities have been on the rise.<sup>481</sup> According to a recent independent survey, South Africa and Kenya have amongst the highest incidents of financial crime.<sup>482</sup> In order for the South African market to exhibit integrity, the legislative framework had to empower and enable the relevant regulators to deal with these crimes.<sup>483</sup> The solution appears to lie in the implementation of the Twin Peaks Model, and financial institutions are encouraged to adapt and comply with the changing regulatory framework in order to mitigate their vulnerability to financial crime.<sup>484</sup>

## 4.2 The Twin Peaks Model

The Twin Peaks Model was developed in response to the situation in the United Kingdom (“UK”) where there were numerous regulators regulating different activities in the financial sector.<sup>485</sup> There was a growing overlap of these activities.<sup>486</sup> For example, banks were also providing insurance, investment products and stocks. This blurring of products and financial institutions combined with the concentration of the market, also limited competition.<sup>487</sup>

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<sup>480</sup> B Maregele & N Ngubane ‘Net1 accused of duping social grant beneficiaries’ (30 August 2018) available at <https://www.fin24.com/Companies/ICT/net1-accused-of-duping-social-grant-beneficiaries-20180830>, accessed on 05 November 2018.

<sup>481</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 73.

<sup>482</sup> PWC ‘Global Economic Crime and Fraud Survey 2018’ (February 2018) available at <https://www.pwc.co.za/en/assets/pdf/gecs-2018.pdf>, accessed on 5 November 2018.

<sup>483</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 74 – 75.

<sup>484</sup> PWC ‘Global Economic Crime and Fraud Survey 2018’ (note 482 above) 34.

<sup>485</sup> A Schmulow, ‘Financial Regulatory Governance in SA: The move towards Twin Peaks’ *2017 African Journal of International and Comparative Law* 395.

<sup>486</sup> *Ibid.*

<sup>487</sup> A Godwin, T Howse & I Ramsay ‘Twin Peaks: South Africa's financial sector regulatory framework’ 669.

Initially, the UK elected to use the unified regulator model, where the Central Bank of England handed over its prudential authority to the Financial Services Authority (“FSA”).<sup>488</sup> The single regulator at the helm above other regulators, was responsible for licensing and supervising financial services providers, monitoring the market and, ensuring stability. The FSA could also set standards and enforce these, to protect consumers as well as provide access to redress through the Financial Services Ombud (“FAIS Ombud”).<sup>489</sup> One of the advantages of the unified regulator model were that the regulator had a holistic view of the market and regulatory silos or gaps were eliminated.<sup>490</sup> The disadvantage was uncertainty, whether an all-in-one regulator could give consumer protection sufficient prominence, whilst focusing on the stability of the market.<sup>491</sup>

After the financial crisis however, even the UK has migrated onto the Twin Peaks Model.<sup>492</sup> South Africa has adopted the Twin Peaks Model similar to that adopted in Australia, with minor variations.<sup>493</sup> Under this model, there are two regulators at the helm, one being responsible for the prudential supervision of institutions, and the other to regulate market conduct.<sup>494</sup> The South African financial market has consisted of a number of regulators: the Reserve Bank, the FSB, the Central Securities Depository, the Johannesburg Stock Exchange.<sup>495</sup> There is also the NCR, in respect of the credit market, the Johannesburg Stock Exchange for securities, the Companies and Intellectual Property Commission (“CIPC”), the Competition Commission and the Financial Intelligence Centre (“FIC”).<sup>496</sup> By limiting the number of regulators, government hopes to limit the confusion and conflicts that resulted from the overlapping roles.<sup>497</sup>

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<sup>488</sup> K Mwenda *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 82 -83.

<sup>489</sup> *Ibid* 82 -83.

<sup>490</sup> *Ibid* 43.

<sup>491</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 29. According to this policy document, “there is, however, likely to be conflict between prudential regulation (which requires “thinking like a banker”) and market conduct regulation (which requires “thinking like a customer”). Effective market conduct regulation may occasionally result in lower profits; a prudential regulator may be disinclined to take regulatory action which can adversely affect profitability and solvency.”

<sup>492</sup> J De Jager ‘The South African Reserve Bank Blowing Winds of Change (Part 2)’ 492 – 499, fn 79.

<sup>493</sup> A Godwin & D Schmulow ‘The financial sector regulation bill in South Africa, second draft: Lessons from Australia’ 758 – 759. In Australia, the prudential regulator is independent of the Central Bank. Also, the coordination between the regulators is a matter of self-regulation.

<sup>494</sup> *Ibid* 758

<sup>495</sup> L Swart & V Lawack-Davids ‘Understanding the South African Financial Markets: An overview of the Regulators’ 623.

<sup>496</sup> *Ibid*.

<sup>497</sup> National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above); 24, 30.

Government also anticipated a smoother transition for the financial sector because the main regulators had, in any event, been the Reserve Bank for banks and the FSB in respect of other financial institutions.<sup>498</sup>

Another reason is that it was ideal that the integrity and stability of the market be managed by a single regulator, the Prudential Authority.<sup>499</sup> This would surely avoid regulatory arbitrage, as all the different financial institutions will submit to one regulator in respect of their prudential requirements.<sup>500</sup> Similarly, the previously neglected issues of market conduct will have a dedicated regulator focusing their attention on consumer protection, to the benefit of the financial system and the country. The Financial Sector Regulation Act<sup>501</sup> (“FSR Act”), the Insurance Act<sup>502</sup> and the imminent COFI Bill provide an enabling framework for the Twin Peaks Model to operate. The Prudential Authority was established within the Reserve Bank, an approach similar to that of the UK where the prudential authority is a subsidiary of the central bank.<sup>503</sup> The Prudential Authority will ensure the stability of the market. The FSB is now re-established, as the Financial Sector Conduct Authority (“FSCA”)<sup>504</sup>. The FSCA will focus on market conduct. The success of this model is dependent on adequate collaboration between the two regulators in order to avoid the duplication of work and to eliminate conflicts and gaps.<sup>505</sup> To this end, a Council of Financial Regulators has been established to “facilitate coordination, cooperation, collaboration, consultation and consistency” between regulators.<sup>506</sup>

### 4.3 The Treating Customers Fairly Campaign

The FSCA is empowered to create and enforce market standards which financial services

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<sup>498</sup> *Ibid* 29.

<sup>499</sup> A Godwin & D Schmulow ‘The financial sector regulation bill in South Africa, second draft: Lessons from Australia’ 759.

<sup>500</sup> A Schmulow ‘Financial Regulatory Governance in SA: The move towards Twin Peaks 2017 *African Journal of International and Comparative Law* 415.

<sup>501</sup> Effective 1 April 2018.

<sup>502</sup> Effective 1 July 2018.

<sup>503</sup> Established in terms of section 32, FSR Act; A Godwin, T Howse & I Ramsay ‘Twin Peaks: South Africa’s financial sector regulatory framework’ 673.

<sup>504</sup> Established in terms of section 56, FSR Act.

<sup>505</sup> A Godwin & D Schmulow ‘The financial sector regulation bill in South Africa, second draft: Lessons from Australia’ 761 – 763; National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 29.

<sup>506</sup> Section 79(2), 81 FSR Act.

providers must comply with in order to meet the six objective of the Treating Customers Fairly (“TCF”) Campaign.<sup>507</sup> With this campaign, the FSCA seeks to ensure that financial customers are treated fairly, throughout the lifecycle of a financial product, including after-sales services.<sup>508</sup> Suppliers must demonstrate that they meet the TCF outcomes in the design and distribution of their financial products.<sup>509</sup> The six TCF Outcomes are as follows:<sup>510</sup>

1. customers can be confident they are dealing with firms where TCF is central to the corporate culture;
2. products and services, marketed and sold in the retail market are designed to meet the needs of identified customer groups;
3. customers are provided with clear information and kept appropriately informed before, during and after the point of sale;
4. where advice is given, it is suitable and takes into account the customer’s circumstances;
5. products perform as firms have led customers to expect, and service is of an acceptable standard and as they have been led to expect;
6. customers do not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint.

Financial institutions must produce business plans that evidence a commitment towards treating customers fairly, in order to be licensed, once the COFI Bill is passed.<sup>511</sup> TCF will have to be embedded in the institutions corporate culture, evidenced by its policies, with the Board of Directors or other governing structure being held accountable.<sup>512</sup> Should an institution fail to meet a TCF outcome, it is likely that they will also be contravening a provision of the COFI Bill or Standards issued by the Regulator, and the enforcement will be in terms of the Bill once passed. Some of the importance provisions are discussed of the Bill in 4.6 below.

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<sup>507</sup> D Millard ‘The Impact of the Twin Peaks Model on the insurance industry’ 2016 *PELJ* 5 – 6.

<sup>508</sup> FSB *Treating Customers Fairly: The Roadmap* (Mar 2011) available at <https://www.fsb.co.za/feedback/documents/treating%20customers%20fairly%20-%20the%20roadmap%202011.pdf> accessed on 20 April 2017.

<sup>509</sup> FSB *Retail Distribution Review* (note 467 above) 11.

<sup>510</sup> Sections 29 & 30, COFI Bill.

<sup>511</sup> Section 14, COFI Bill.

<sup>512</sup> Section 31, COFI Bill.

## 4.4 The Financial Sector Regulation Act

### 4.4.1 Aims of the legislation

The FSR Act came into operation on 1 April 2018, laying the foundation for the establishment and functioning of the new regulators, as the first phase of implementing the Twin Peaks Model.<sup>513</sup> The passing of the Conduct of Financial Institutions (“COFI”) Bill will complete the second phase and bring about harmony with the repeal or amendment of the various industry-specific legislation.<sup>514</sup> The FSR Act aims to provide a regulatory framework that promotes a stable financial system that balances economic growth against the interests of financial customers.<sup>515</sup> This framework will ensure integrity of financial institutions, whilst promoting inclusion, fair treatment and the confidence of financial customers.<sup>516</sup>

### 4.4.2 Important provisions

#### 4.4.2.1 Prudential Regulation

Much of the Act is dedicated to the establishment and empowerment of regulators and various supporting structures.<sup>517</sup> The Reserve Bank, as prudential regulator is tasked with protecting, enhancing and restoring financial stability.<sup>518</sup> The Prudential Authority is mandated to monitor systemic risks and take action against systemic events.<sup>519</sup> These are events that may have an adverse effect on the financial system or on economic activity; such as events that lead to a loss of confidence that financial institutions will be able to continue providing financial services.<sup>520</sup> The FSCA is established to promote the fair treatment of consumer in the financial services and to educate consumers towards sound financial decisions.<sup>521</sup> The Act also provides for the financing, staff and other resources necessary for the Prudential Authority and the FSCA to function.<sup>522</sup>

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<sup>513</sup> Notice 169 in GG41549 of 29 March 2018; *FSB Status Update: Retail Distribution Review Phase 1*, (November 2015) available at <https://www.fsb.co.za/newslibrary/fsb%20retail%20distribution%20review%20phase%201%20status%20update%202015.pdf>, accessed on 2 December 2017 1.

<sup>514</sup> *FSB Status Update: Retail Distribution Review Phase 1* (note 512 above) 1.

<sup>515</sup> Section 7.

<sup>516</sup> Section 7.

<sup>517</sup> Chapters 3 and 4, FSR Act.

<sup>518</sup> Section 11, FSR Act.

<sup>519</sup> Section 14 & 15, FSR Act.

<sup>520</sup> Section 1, FSR Act.

<sup>521</sup> Section 57, FSR Act.

<sup>522</sup> Section 55, 73 & Chapter 16, FSR Act.

Whilst the Prudential Authority and the FSCA are the two peaks of the Twin Peaks Model, the Act also recognizes the NCR, the FIC and any other regulators administering the various industry-specific laws.<sup>523</sup> Each of the regulators, have powers to make regulatory instruments, including prudential standards, conduct standards and joint standards.<sup>524</sup> The regulators may issue guidance notes and interpretation rulings in respect of the legislation they are enforcing.<sup>525</sup>

The Act seeks to find harmony in the regulation of the financial services by providing for collaboration and consultation among the Prudential Authority, the FSCA, the NCR, FIC and other organs of state relevant to financial stability.<sup>526</sup> They will convene either as the Financial Stability Oversight Committee,<sup>527</sup> the supporting structure to the Committee, the Financial Sector Contingency Forum<sup>528</sup> or the Financial System Council of Regulators.<sup>529</sup> The regulators, sitting as a Council can also establish various sub-committees and working groups supported administratively, to assist them in fulfilling their functions.<sup>530</sup> The Financial Sector Inter-Ministerial Council is established for Cabinet members responsible for administering financial services legislation to discuss matters of mutual interest.<sup>531</sup>

#### *4.4.2.2 Enforcement*

The Act confers powers on regulators to conduct intrusive inspections and investigations.<sup>532</sup> Where a financial institution is conducting its business improperly or risks causing instability to the financial system, the Prudential Authority or FSCA, as applicable, may issue a directive that it take specific action to reduce and/or remedy the risk or breach.<sup>533</sup> Generally, the regulators may enforce compliance by, prohibiting the delinquent institution from providing financial products and services in terms of a debarment order and approaching the High Court

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<sup>523</sup> Section 1, FSR Act.

<sup>524</sup> Chapter 7, FSR Act.

<sup>525</sup> Section 141, 142 FSR Act.

<sup>526</sup> Part 3, Chapter 1, FSR Act.

<sup>527</sup> Section 22, FSR Act.

<sup>528</sup> Section 25, FSR Act.

<sup>529</sup> Section 79, FSR Act.

<sup>530</sup> Section 81, 83 FSR Act.

<sup>531</sup> Section 83, FSR Act.

<sup>532</sup> Chapter 9, FSR Act.

<sup>533</sup> Section 143, FSR Act.

for an appropriate order.<sup>534</sup> If found guilty, offenders will be liable for a fine or imprisonment, and damages may be awarded against them by a competent court.<sup>535</sup> The power to issue administrative penalties has been maintained.<sup>536</sup> Enforcement undertakings, replace consent orders in terms of the outgoing legislation.<sup>537</sup>

In pursuit of accountability, financial institutions will be categorized and licensed according to their activities and their relationship to customers, whether they are suppliers, sellers or advisers on financial products.<sup>538</sup> To further enable consumers to know whom they are transacting with, advisers and intermediaries be classified according to their source of work.<sup>539</sup> This should clarify the advisers relationship to a single, multiple or no suppliers at all.<sup>540</sup>

#### 4.4.2.3 *Dispute resolution*

The FSR Act also brings about changes in the regulation of financial sector ombuds, and these changes have been well received.<sup>541</sup> This means that the FSOS Act will be repealed,<sup>542</sup> and a new system for the approval and recognition of ombud schemes will be introduced.<sup>543</sup> The manner in which ombud schemes are to operate is still under discussion.<sup>544</sup> Currently, the recognition of the voluntary schemes has been maintained, most likely because the system functions well, is cost effective and there is buy in from institutions.<sup>545</sup> However, a super-ombud will be established together with an Ombud Council that will replace the existing Financial Services Ombud Council.<sup>546</sup> The predecessor council lacked capacity including

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<sup>534</sup> Parts 4 & 5 of Chapter 10 and section 167, FSR Act.

<sup>535</sup> Part 3, Chapter 17 and section 278, FSR Act. The reference to a competent court is assumingly to the High Court, at the very least.

<sup>536</sup> Section 167, FSR Act.

<sup>537</sup> Section 151, FSR Act.

<sup>538</sup> Section 111, Chapter 8 FSR Act.

<sup>539</sup> FSB *Retail Distribution Review* (note 467 above) 34.

<sup>540</sup> *Ibid.*

<sup>541</sup> D Millard 'The Impact of the Twin Peaks Model on the insurance industry' 11 -12.

<sup>542</sup> Chapter 14, FSR Act 9 of 2017.

<sup>543</sup> T Woker 'Consumer Protection and alternative dispute resolution' 39 – 40.

<sup>544</sup> The Department of Trade and Industry and National Treasury convened a workshop on 29 November 2017 with all interested parties to discuss the way forward.

<sup>545</sup> T Woker 'Consumer Protection and alternative dispute resolution' 41.

<sup>546</sup> Section 175, FSR Act 9 of 2017.

human resources to enforce the legislation.<sup>547</sup> It is hoped that the new council will not face these problems.

The objective of the Ombud Council is to facilitate the use of the available ADR mechanisms by consumers. One of the means through which this will be achieved is the recognition of industry ombud schemes.<sup>548</sup> The processes towards recognition as an ombud scheme have not changed much, but stringent registration requirements and hefty fees may deter many willing ADR agents.<sup>549</sup> The FSR Act also establishes the Financial Services Tribunal (“FST”), replacing the existing Appeal Board.<sup>550</sup> The FST is actually an internal remedy that must be exhausted in accordance with the Promotion of Access to Justice Act (“PAJA”).<sup>551</sup> The FST reconsiders decisions of the regulators, the Ombud Council, statutory ombuds as well as authorised financial services providers.<sup>552</sup> The FST will reconsider decisions through panels established in terms of the Act.<sup>553</sup> The panels’ decisions are the decisions of the FST.<sup>554</sup> If there are no objections, by filing the order of the FST with a High Court, the order is enforceable as a civil judgment.<sup>555</sup> Otherwise, the decision may be taken on review in terms of PAJA.<sup>556</sup>

#### 4.4.3 *Criticisms of the FSR Act*

Some of the criticisms levelled at government’s interventions, discussed in Chapter 2, are raised against this new legislation as well. The FMF argues that there are no real benefits to more legislation because of the way the market operates - it is incapable of the control that government intends.<sup>557</sup> The failure of the different regulators to stop or at least prevent consumer abuse does not however mean that the legislation itself is problematic. It may simply mean that the legislation should be better enforced.

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<sup>547</sup> National Treasury *A Known and Trusted Ombud System for All* (note 232 above) 14.

<sup>548</sup> Section 177(1), FSR Act.

<sup>549</sup> T Woker ‘Consumer protection and alternative dispute resolution’ 47.

<sup>550</sup> Section 219 FSR Act.

<sup>551</sup> Act 3 of 2000; Section 230(2), FSR Act.

<sup>552</sup> Section 218(1) read with Part 4, Chapter 11.

<sup>553</sup> Section 224, FSR Act.

<sup>554</sup> Subsection (3).

<sup>555</sup> Section 236, FSR Act.

<sup>556</sup> Section 235, FSR Act.

<sup>557</sup> L Louw ‘Financial Advisers Bill’ (note 41 above).

Another consistent criticism is that the costs of the regulatory changes will be borne by suppliers and businesses and eventually passed on to consumers.<sup>558</sup> Government conducted an impact study, which the FMF suggested should be done, to determine the costs and benefits of further regulation. The study revealed that there was uncertainty regarding foreseeable costs of compliance.<sup>559</sup> It does however, make it clear that the projected costs of just setting up the institutions required in terms of the Twin Peaks Regime will run into millions.<sup>560</sup> However, the study concludes that these costs should be measured against the work of maintaining the stability of the economy and significant value or portion of the economy that the financial services sector constitutes.<sup>561</sup>

Government has revealed that in terms of the projected budgets of the Reserve Bank and FSCA alone, R1,3 billion is expected to be raised through the implementation of the levies bill in 2019/2010.<sup>562</sup> This will include R173 million raised by the FST, the Ombud Council Pension Fund Adjudicator and FSP Ombud.<sup>563</sup> It excludes the NCR which raised R32 million in 2015/2016 from the registration of credit providers.<sup>564</sup> It also excludes the myriad of support structures to be established, as discussed in 4.4.2 above.

However, the challenges that consumers face in the financial services sector, such as complex terms and a lack of knowledge of where to complain are already regulated matters.<sup>565</sup> Therefore, it is not clear how giving the FSCA additional administrative and enforcement powers will alter the *status quo*.<sup>566</sup> For example, in terms of the FSR Act, the FSCA has the power to set conduct standards on a wide range of subjects including the design, suitability, marketing and distribution of financial products, and generally, the disclosure of information to financial customers.<sup>567</sup> This is a power that the FSB already had. This may be an indication

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<sup>558</sup> National Treasury *Impact Study of the Twin Peaks Reforms* (note 48 above) 9 and 18.

<sup>559</sup> *Ibid* 17.

<sup>560</sup> *Ibid* 12.

<sup>561</sup> *Ibid* 19 -20.

<sup>562</sup> National Treasury *Supplement to the Impact Study of the Twin Peaks Reforms* (note 50 above) 1.

<sup>563</sup> *Ibid* 12.

<sup>564</sup> NCR *Annual Report 2015/16* (Note 138 above) 53.

<sup>565</sup> R Vivian 'Treasury spins a fairy tale to dupe MPs' (10 July 2015) Business Day available at <http://www.pressreader.com/south-africa/business-day/20150710/282011851031601>, accessed on 2 December 2017 1 – 2.

<sup>566</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 34 – 38.

<sup>567</sup> Section 106, FSR Act.

that government has not acknowledged where and how the existing legislation and regulators have failed and if this failure warrants government introducing new legislation, with the resultant costs.<sup>568</sup>

## 4.5 The Insurance Act

### 4.5.1 Aims of the legislation

The Insurance Act<sup>569</sup> came into operation on 1 July 2018. The Act aims to make the industry safer for consumers, ensuring they all have access to reliable insurance products in a stable financial system.<sup>570</sup> It changes the prudential regulation provisions applicable in the insurance industry in general, and provides a new regulatory framework for micro-insurance.<sup>571</sup> The micro-insurance sector has been under-regulated and has performed poorly in giving effect to consumer protection.<sup>572</sup>

Micro-insurance is the most common type of insurance that is accessed by the low-income earners. The dominant insurance product in this market is funeral cover, which is often provided by unlicensed providers, resulting in significant risks to consumers.<sup>573</sup> This sector is also riddled with fraud with little, if any, regulation to protect consumers.<sup>574</sup> The more sophisticated and regulated insurance products considered safer for consumers are inaccessible to the majority of consumers because of their complexity and cost.<sup>575</sup> The Insurance Act is an

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<sup>568</sup> R Vivian 'Treasury spins a fairy tale to dupe MPs' (note 564 above) 1 – 2.

<sup>569</sup> Act 18 of 2017.

<sup>570</sup> Section 3, FSR Act.

<sup>571</sup> Section 3, FSR Act.

<sup>572</sup> National Treasury *The Future of Micro-Insurance in South Africa* available at

<http://www.treasury.gov.za/public%20comments/The%20Future%20of%20Microinsurance%20Regulation%20in%20South%20Africa.pdf>, accessed on 8 August 2017; National Treasury *The South African Microinsurance Regulatory Framework* available at

<http://www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf> accessed on 24 August 2017; A Hutchison 'A customary insurance law' 2017 *SA Merc LJ* 32.

<sup>573</sup> National Treasury *Press Statement: Release of microinsurance policy document* available at [http://www.treasury.gov.za/comm\\_media/press/2011/2011072801.pdf](http://www.treasury.gov.za/comm_media/press/2011/2011072801.pdf) accessed on 24 August 2017; A Hutchison 'A customary insurance law' 31.

<sup>574</sup> A Hutchison 'A customary insurance law' 29.

<sup>575</sup> *Ibid* 32.

attempt at addressing the issues of access and consumer protection, whilst consolidating the numerous regulations that cut across the industry.<sup>576</sup>

#### 4.5.2 *Important provisions*

Insurance may only be sold in the Republic if the provider has been licensed by the Prudential Authority, which is the Reserve Bank.<sup>577</sup> The scope of the Insurance Act is very wide, encompassing all insurers from micro-insurers, existing insurers of short term and long term insurance, to foreign companies and re-insurers.<sup>578</sup> These are all brought under the jurisdiction of the Prudential Authority, which has the power to liquidate unlicensed insurers.<sup>579</sup> The Prudential Authority has the powers to issue and enforce standards on aspects such as the minimum solvency and liquidity ratios and risk management practices that financial institutions must adopt in the quest for stability.<sup>580</sup>

Until the COFI Bill is passed, the sale and distribution of insurance will remain regulated under the LTIA, STIA and FAIS.<sup>581</sup> The transformation of the insurance industry is staggered with consequential amendments gradually being made to the existing legislation and with existing insurers being given a two year grace period within which to submit to the Prudential Authority.<sup>582</sup> The staggered approach includes the recent replacement of the Policyholder Protection Rules.<sup>583</sup> Amendments have also been made to the regulations under the STIA and LTIA,<sup>584</sup> and FAIS<sup>585</sup>. The changes also differentiate the roles of suppliers and advisers, and

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<sup>576</sup> National Treasury *The Future of Micro-Insurance in South Africa* (note 571 above) 13.

<sup>577</sup> Section 5, FSR Act.

<sup>578</sup> Schedule 2, Insurance Act.

<sup>579</sup> Section 67, Insurance Act.

<sup>580</sup> Section 63, Insurance Act; Item 2.1 Memorandum on the Objects of the Bill, Insurance Bill, 2016 63; These powers also exist in terms of section 30 of the FSR Act.

<sup>581</sup> National Treasury *The Future of Micro-Insurance in South Africa* (note 571 above) *Executive Summary x*.

<sup>582</sup> Item 6, Schedule 3 Insurance Act.

<sup>583</sup> GN 1407 in GG 41321 GN 1433 in GG 41329 of 15 December 2017 and effective on 1 January 2018. These now hold product suppliers and their chosen intermediaries more accountable, encourage the functioning of the Insurance Ombud and generally reflect the Treating Customers Fairly Campaign.

<sup>584</sup> GN 1437 and GN 1439 in GG of 15 December 2017. The changes include limiting and at times capping, remuneration that may be earned by role-players in the chain of distribution of policies and specifying the rules for collection of premiums.

<sup>585</sup> One of the changes to the FAIS Regulations will bring about a new regime whereby an “individual may not be appointed as a representative by more than one FSP in respect of the same product classes”. Advisers will be categorized and licensed in two tiers – Product Supplier Agents (“PSA’s”) and Registered Financial Advisers (“RFA’s”). PSA’s are agents of the product suppliers and act under the licence of the product supplier RFA’s or RFA firms with individual representatives, will be licensed to provide advice in their own right, but no PSA

will see micro-insurers specially licensed.<sup>586</sup>

#### 4.5.3 *Criticism of the Insurance Act*

It was expected that the reasons for regulating micro-insurance, would result in less bureaucracy that the smaller insurers would have to deal with.<sup>587</sup> If this was not the objective, then it can be argued that the LTIA, STIA and especially FAIS were adequate as existing measures.<sup>588</sup> It is argued that the intended categorization and regulation of suppliers and advisors results in overlap and conflicts.<sup>589</sup> The obvious resultant conflict is that practically, most financial institutions have both product supplier and advice capacity internally. In this regard, the Act simply provides that “an insurer, other than a micro-insurer or a reinsurer, must be licensed to conduct life or non-life insurance business, and may not be licensed to conduct both.”<sup>590</sup>

According to government, the solution lies in having two regulatory peaks, which will ensure that consumers are not left confused or caught in conflicts of interest.<sup>591</sup> However, it is not clear how the recurring practical problem of unlicensed insurers will be resolved.<sup>592</sup> It appears that practically micro-insurers will have a special licence, subjecting it to lesser prudential requirements.<sup>593</sup> The reasons why government opted to extend the application of regulation to micro-insurers, through another statute instead of specific micro-insurance legislation or improved enforcement, are not evident from the policy documents or the Act itself.

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may be an RFA and vice versa; FSB *Status Update: Retail Distribution Review* (December 2016), available at <https://www.fsb.co.za/NewsLibrary/FSB%20Retail%20Distribution%20Review%20Status%20as%20at%20December%202016.pdf>, accessed on 2 December 2017 6, 16, 43.

<sup>586</sup> ‘Insurance Bill brings micro-insurance one step closer’ 19 December 2017, available at <https://www.iol.co.za/personal-finance/insurance-bill-brings-micro-insurance-one-step-closer-12431410>, accessed on 30 August 2018.

<sup>587</sup> A Hutchison ‘A customary insurance law’ 34 – 35; D Millard ‘The Impact of the Twin Peaks Model on the insurance industry’ 29 – 30.

<sup>588</sup> D Millard ‘The Impact of the Twin Peaks Model on the insurance industry’ 30 -31; General Code of Conduct for authorised financial services providers and their representatives was published under board notice 80 of 2003; The General Code of Conduct for Administrative and Discretionary FSPs (Category II and Category II FSPs) was published under board notice 79 of 2003.

<sup>589</sup> D Millard ‘The Impact of the Twin Peaks Model on the insurance industry’ 31 – 32.

<sup>590</sup> Section 25(1), Insurance Act.

<sup>591</sup> FSB ‘Status Update: Retail Distribution Review’ (note 584 above)16 – 17.

<sup>592</sup> D Millard ‘The Impact of the Twin Peaks Model on the insurance industry’ 18.

<sup>593</sup> Section 22, Insurance Act.

## 4.6 The Conduct of Financial Institutions Bill

### 4.6.1 Aims of the Bill

The Conduct of Financial Institutions Bill (“COFI”) was published for comment in December 2018. According to a socio-economic impact conducted, the Bill is the most appropriate means to resolve the problems that particularly financial consumers face, under the existing legislative regime, which includes FAIS.<sup>594</sup> The main objects of the Bill are to protect financial customers and to promote their fair treatment and protection by financial institutions.<sup>595</sup> The Bill supports innovation and development, but also aims to promote trust, confidence and sustainable competition in the financial sector. The Bill also gives effect to government’s vision for financial inclusion and transformation of the financial sector.

### 4.6.2 Important provisions

The COFI Bill completes the rationalization of the regulation of financial services. The LTIA, STIA, Financial Institutions (Protection of Funds) Act, FAIS and the Collective Investment Schemes Act will be replaced by the Bill, whilst there will be consequential amendments to the Pension Funds Act, the FSR Act and the Insurance Act.<sup>596</sup>

The Bill introduces an activities-based, principles-based, outcomes- based and proportional-risk-based approach.<sup>597</sup> The focus will shift from the type of financial institution, and licenses will be issued according to the different activities. The main activities that will licensed include the following:<sup>598</sup>

- providing a financial product or financial instrument
- distributing financial products
- financial advice
- managing and administering investments
- benefit administration
- certain payment service

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<sup>594</sup> K Singh *Socio-economic Impact Assessment: Phase 1: Conduct of Financial Institutions Bill, 2018* available at [https://www.gov.za/sites/default/files/gcis\\_speech/201812/SEIA%20COFI%20Bill\\_0.pdf](https://www.gov.za/sites/default/files/gcis_speech/201812/SEIA%20COFI%20Bill_0.pdf), accessed on 13 February 2019 11

<sup>595</sup> Section 3, COFI Bill 2018.

<sup>596</sup> Schedule 1, COFI Bill 2018.

<sup>597</sup> National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (December 2018) available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181211CoFI\\_Bill\\_policy\\_paper.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181211CoFI_Bill_policy_paper.pdf), accessed on 13 February 2019 11 – 12.

<sup>598</sup> Schedule 2, COFI Bill 2018.

- financial markets activities
- service related to buying or selling of foreign exchange
- credit rating service
- debt collection service

Whilst The FSR Act sets out the powers of regulators, the COFI Bill sets out the conduct that is expected from financial institutions.<sup>599</sup> The Bill embodies principles, including some of the TCF principles, that participants in the market should adhere to, so as to enable consumers to know what is expected of financial institutions and for the regulators to effectively monitor and supervise the expected outcomes.<sup>600</sup> The Bill outlaws unfair, unreasonable and unconscionable terms and conduct.<sup>601</sup> It also seeks to eliminate conflicts of interest caused by remuneration of individuals.<sup>602</sup> The risk-based and proportionate approach will be regulators pay more attention to financial institutions depending on their size, activities and whether they pose a greater threat to the financial system.<sup>603</sup>

As mentioned above, the FSCA will have the powers to make standards, applicable to the various financial institutions, as will the Prudential Authority.<sup>604</sup> The standards should replace the existing Regulations, Policyholder Protection Rules and Conduct Standards under the various industry legislation. Standards will cover a wide range of subjects such as the promotion, marketing, disclosure, distribution, advice, discretionary investment management, post-sale barriers and obligations. Additionally for the sake of financial stability, the FSCA may stipulate standards for the safeguarding of assets and operational requirements of financial institutions. Lastly, the FSCA is yet to make standards detailing the process for the reporting to it and management of contraventions of the Act.<sup>605</sup> Specific offences include the failure to properly invest a customer's assets, to meet post-sale obligations, and conducting business without a licence.<sup>606</sup> Offenders may be liable for a fine or imprisonment, however the FSCA

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<sup>599</sup> National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (Note 596 above) 12 – 21.

<sup>600</sup> *Ibid* 11 – 12.

<sup>601</sup> Section 32 – 34, COFI Bill.

<sup>602</sup> Part 5, COFI Bill.

<sup>603</sup> National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (note 596 above) 12 – 13; 21.

<sup>604</sup> Part 2, Chapter 12, COFI Bill 2018.

<sup>605</sup> Section 114

<sup>606</sup> Section 13, 23, 78 and 80, COFI Bill.

will be authorized to issue a directive requiring the financial institution to undertake specified measures to remedy the effects including the appropriate redress.<sup>607</sup> Consumers will also have the right approach a court for appropriate relief.<sup>608</sup>

#### 4.7 Concluding remarks

From the above discussion, it is clear that going forward, government wants to improve its regulation of the financial market in order to maintain its stability, whilst giving special attention to the protection of vulnerable financial customers.<sup>609</sup> One of the needs that these changes seek to address, is regulatory arbitrage. Having too many regulators has resulted in regulators not acting, or acting quickly enough to offer consumers protection in terms of their enabling legislation. The focus of this mini-dissertation has been on particular issues that require the combined effort of the regulators. The prevalence of get-rich-quick schemes and the rising figures of consumer over-indebtedness were highlighted. These issues called upon the NCC, the NCR, the Reserve Bank as well as the FSB to act. From the discussion, it is evident that each of the four regulators had jurisdiction to take on fraudulent schemes. However, they have been sidestepping the issue by stressing the limits of their jurisdiction, thus prejudicing consumers.

The FSR Act, Insurance Act and COFI Bill seeks to address the existing regulatory arbitrage. The design, distribution and sale of financial services and products, as well as the licensing of financial institutions will now be comprehensively covered by the COFI Bill. As a result of the change in regime, government acknowledges that there may be an increase in compliance costs for suppliers initially, however the vision is that both consumers and financial institutions will ultimately benefit from the more streamlined and simplified regulation.<sup>610</sup> It is hoped that the Regulator's powers to make standards will be used sparingly, so as not to create a new form of over-regulation.

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<sup>607</sup> Section 102 and 113, COFI Bill.

<sup>608</sup> Section 103 and 104, COFI Bill.

<sup>609</sup> B Bekink and C Botha 'The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence' 75.

<sup>610</sup> K. Singh *Socio-economic Impact Assessment: Phase 1: Conduct of Financial Institutions Bill, 2018* available at [https://www.gov.za/sites/default/files/gcis\\_speech/201812/SEIA%20COFI%20Bill\\_0.pdf](https://www.gov.za/sites/default/files/gcis_speech/201812/SEIA%20COFI%20Bill_0.pdf), accessed on 13 February 2019.

## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summation

This mini-dissertation considered some of the specific reasons why legislation had to be introduced to protect South African consumers. Chapter 2 presented South Africa's unique social context and the resultant unequal bargaining power between consumers and suppliers, as one of the main reasons that informed the need to legislate specific consumer protection measures.<sup>611</sup> Moreover on the context, it was revealed that post democracy, mass production and mass consumerism dominated the South African market, whilst South African consumers were vulnerable because of poverty and low literacy levels.<sup>612</sup> Government found it necessary to intervene to provide these very consumers with better access to the market and the credit market in particular, because the latter was seen as a vehicle for socio-economic freedom. However, many consumers were over-indebted and exploited in the credit market, and this necessitated intervention. Consumers were particularly vulnerable to unfair market processes, and had limited access to avenues to complain and get justice. Whilst the common law and existing legislation had means to protect consumers, these measures were effectively inadequate to protect consumers.<sup>613</sup> There was a need to codify and rationalise the existing measures to make them more relevant and accessible to consumers.

Chapter 3 presented the NCA, the CPA and some of the important consumer protection measures in the financial services that were enacted to address some of the needs. The aims of the legislation were discussed. In summary, the CPA now regulates *inter alia*, the marketing of goods and services, contract terms, as well after-service complaints resolution mechanisms.<sup>614</sup> The CPA's over-arching objective is the protection of consumers and must be enforced and interpreted in a manner that gives effect to this. Government anticipated that specifying the minimum requirements for fairness and penalizing non-compliance would

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<sup>611</sup> T Naude & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 20 para 32.

<sup>612</sup> S Eiselen & T Naude 'Introduction and Overview of the Consumer Protection Act' in *Commentary on the Consumer Protection Act* (2014) paras 11 & 14.

<sup>613</sup> The DTI *Draft Green Paper on the Consumer Policy Framework* (note 3 above) 12; L Hawthorne 'Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?' 442.

<sup>614</sup> L Hawthorne 'Contract Law's choice of architecture' 614.

inspire a change of behaviour in suppliers towards treating customers better.<sup>615</sup> The NCC was established as a consumer advocate to enforce the CPA. The credit market required its own regulation, with the NCR as the watchdog, to manage access to credit as well as address the problem of over-indebtedness.<sup>616</sup>

Unlike the CPA, the NCA requires the interest of both consumers and credit providers to be balanced. Ideally, credit providers should approve credit at fair rates, to consumers who can repay their debts, and there must be a means for struggling consumers to manoeuvre out of the vicious debt cycle. The NCA introduced measures to regulate and streamline the registration, application, review and collection processes by suppliers and to enable the restructuring of debt. The NCA has since been amended a number of times to tighten the NCR's grip over the credit market to police unlicensed and reckless lending.<sup>617</sup> In addition, the law was amended to ensure that credit is extended only to those who can afford to repay their debts, empirically. New measures are on the cards to assist certain debtors falling in the low income bracket, to restructure their debts.

Finally, the financial services sector was identified as requiring greater and better protection because of the nature and complexity of the financial services. This study highlighted that the prevalence of get-rich-quick schemes and the collapse of financial institutions, necessitated that government introduce a substantial amount of new legislation and amend existing legislation to protect consumers of financial services and products.<sup>618</sup> The existing legislation created a number of regulators to enforce the legislation but the main regulators have been the Reserve Bank for banks and the FSB for all other financial institutions. They have been working towards the stability of the financial system and the fair treatment of consumers.

After the financial crisis, government saw a need to overhaul the financial services legislation, replacing it with the Twin Peaks Model of regulation.<sup>619</sup> This model consolidates the prudential regulation of all financial institutions under the authority of the Prudential Authority

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<sup>615</sup> L Hawthorne 'Public governance: Unpacking the Consumer Protection Act 68 of 2008' 345 -369.

<sup>616</sup> M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' 226.

<sup>617</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 12.

<sup>618</sup> There is still some legislation which has not been repealed from pre- 1994.

<sup>619</sup> National Treasury *A safer financial sector to serve South Africa better* (note 30 above) 1 -3.

within the Reserve Bank and the regulation of market conduct under the authority of the FSCA, previously the FSB.<sup>620</sup> This transformation was to address the gaps caused by having too many regulators. As a result, some of the issues that affected consumers and/or placed the financial system at risk were not well attended. The regulatory system also needed to be upgraded to be in line with international standards, which also directed that market conduct be given special attention.<sup>621</sup> Hence, the main drive of the FSCA and previously the FSB, is to ensure that financial institutions treat customers fairly. Chapter 4 provided an overview of these regulators and the enabling legislative framework, the FSR Act, the Insurance Act, and the imminent COFI Bill.

Government's decision to pass legislation geared towards the protection of consumers appears justified when considering some of the reasons behind it, however, it has not escaped challenges and criticism.<sup>622</sup> Some of these issues were discussed in each of the previous chapters. The main critics are supporters of the free market, who advocate for less regulation. They argue that the existing legislation has had adequate consumer protection mechanisms and therefore, did not need to be altered.<sup>623</sup> As is, the South African market is over-regulated.<sup>624</sup> Excessive regulation risks upsetting the balance that the country's financial market needs in order to be stable.<sup>625</sup> Without stability, a financial crisis looms. Supporters of the free market further argue that regulation comes at a cost to suppliers and therefore to consumers.<sup>626</sup> They argue that more regulation merely results in more bureaucracy; this deters investors and therefore hinders growth.<sup>627</sup>

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<sup>620</sup> National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 31 – 32.

<sup>621</sup> ML Du Preez 'The Consumer Protection Bill: A few Preliminary Comments' 62; *FSB Retail Distribution Review 2014* available at <https://www.masthead.co.za/wp-content/uploads/2015/05/FSB-Retail-Distribution-Review-2014.pdf>, accessed on 2 December 2017 13.

<sup>622</sup> See L Louw 'Is South Africa overregulated?' (12 May 2009) available at <http://www.freemarketfoundation.com/article-view/is-south-africa-over-regulated>, accessed on 15 May 2017.

<sup>623</sup> H Chitimira & V Lawack 'Overview of the Role –Players in the investigation, prevention and enforcement of market-abuse provisions in South Africa.' 2013 *Obiter* 200 – 217.

<sup>624</sup> National Treasury *Responses to Comments by the Standing Committee on the FSR Bill* <http://www.treasury.gov.za/twinpeaks/Comments%20matrix%20for%20issues%20raised%20in%20SCOF%20hearings%20on%20July%202016%20version%20of%20FSR%20Bill.pdf>, accessed on 21 June 2018.

<sup>625</sup> Vivian R National Treasury's 'Twin Peaks': Another calamity in the making' Available at <http://www.freemarketfoundation.com/article-view/national-treasury%E2%80%99s-twin-peaks-another-calamity-in-the-making>, accessed on 12 March 2018.

<sup>626</sup> *Ibid.*

<sup>627</sup> E Davie 'Submission on the Future Constitution, Role and Function of Ombudsmen in the Financial Services Sector' (24 May 2002) available at <http://www.freemarketfoundation.com/publications-view/submission-on-the-future-constitution-role-and-function-of-ombudsmen-in-the-financial-services-sector>, accessed on 22 September 2017.

Government appears to take the position that the risk of having no regulation at all is greater than the risk of the market failing because of the lack of regulation.<sup>628</sup> It appears that regulation remains the only way that consumers will be protected.<sup>629</sup> However, new legislation must find and maintain a delicate and harmonious balance between its subjects, as well as with existing law.<sup>630</sup> Hence, this mini-dissertation scrutinised the objectives that the new legislation aims to achieve, and what has changed to warrant the transformation. Hence the question: is all this consumer protection legislation necessary?

## 5.2 Enforcement

Criticisms of the Twin Peaks Model and the legislative changes to implement it, cannot be disregarded. The first point that must be considered, is that the outcome of the implementation of this model will be more than the intended two peaks of regulation.<sup>631</sup> *Inter alia*, the NCR in respect of credit matters, the Competition Commission, FIC and the Council of Medical Schemes will retain powers and control in terms of the respective enabling legislation.<sup>632</sup> Additionally, to address the soaring levels of over-indebtedness, the NCR is forging on with amendments to relieve consumers by providing a new mechanism for their debts to be restructured.<sup>633</sup> The regulation of credit matters could easily have been brought under the authority of the FSCA.<sup>634</sup> Instead, going forward, the FSCA will coordinate with the NCR in respect of matters relating to the NCA; it will not be a superior regulator or take over the role of the NCR.<sup>635</sup> The FSR Act has largely restructured some of the existing institutions and introduced new ones, in the quest for improved collaboration.<sup>636</sup>

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<sup>628</sup> E Van Eeden *Consumer Protection Law in South Africa* 19.

<sup>629</sup> T Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 230 – 231.

<sup>630</sup> SIG Van Tonder 'Hints on drafting Statutes' in Van den Bergh NJC (ed) *Legislative Drafting and Drafting Techniques (1983)* University of Zululand 39 - 40.

<sup>631</sup> FSB *Retail Distribution Review* (note 463 above) 9.

<sup>632</sup> *Ibid*; A Godwin, T Howse & I Ramsay 'Twin Peaks: South Africa's financial sector regulatory framework' 668.

<sup>633</sup> NCR *Annual Report* (2016/17) 43.

<sup>634</sup> P Kruger 'Closing Loopholes under Twin Peaks' (12 November 2015), available at <https://www.moonstone.co.za/closing-loopholes-under-twin-peaks/>, accessed on 11 June 2018; Yet, in 2016, the NCR reported that it had good relations with other regulators, even convening quarterly as the Council of Trade and Industry Institutions ("COTII") - NCR *Annual Report* 2015/16 (Note 138 above) 9.

<sup>635</sup> FSB *Retail Distribution Review* (note 463 above) 9.

<sup>636</sup> A Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' 2017 *Law & Financial Markets Review* 173.

The second point is that the new legislation aims to address recurrent problems, which regulators have been previously empowered to resolve. This is discernible from the poor handling of the African Bank, VBS Bank and Capitec Bank sagas. The collapse of African Bank in 2014 came as government sought to tighten regulation on unsecured lending.<sup>637</sup> The NCR is criticised for failing to lodge a thorough investigation timeously, into the African Bank's practices after the alarm was first raised in 2011.<sup>638</sup> The Reserve Bank only placed African Bank under curatorship in August 2014, as its share prices continued to drop.<sup>639</sup> This emphasized the need for an effective regulatory system for the financial market, but it left open the question of who was due to act timeously to avert the bailout that the Reserve Bank eventually facilitated – the NCR, the FSB or the Reserve Bank.<sup>640</sup> Each of the above-mentioned banks symbolised innovation and access to the intended market for better access to the financial services. However, their activities included reckless lending, conducting an unlicensed insurance business, and posing a threat to the banking and entire financial system - all regulated matters under the authority and radar of the Reserve Bank, the FSB, and NCR.

Regulators also seem slow to protect consumers against recurrent conduct such as fraudulent investment schemes. The NCC has the CPA as empowering legislation speaking directly to these schemes. FAIS was introduced as an outcome of the collapse of the Masterbond Scheme. The FSB and the Reserve Bank are arguably the ideal regulators to act first because the value of loss in the schemes, often exceeds the relief limits of the NCT.<sup>641</sup> The FSB in particular has had powers to place offending institutions under curatorship and issue penalties up to R10 million, and in certain circumstances issue compensation orders, much like damages, subject

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<sup>637</sup> *Minutes of the Finance Standing Committee: African Bank and the Myburgh Report: SARB briefing* (24 May 2016) available at <https://pmg.org.za/committee-meeting/22601/>, accessed on 31 August 2018; The collapse of African and the threat of collapse of African Bank highlight the tension between the need to relax control so that risk taking providers can access low income and previously disadvantaged market which government sought to include financially. Since the business of African Bank related to unsecured loans and the issue of reckless lending was beyond the scope of the Myburgh enquiry, high expectations were that the NCR would have averted the problem. The Reserve Bank passed the buck on the basis that it had since 2011, when African Bank failed to comply with the requirement of FICA, supervised it intensely.

<sup>638</sup> A Ismail 'NCR faces flak over African Bank fiasco' (11 August 2014), available at <https://www.fin24.com/Companies/Financial-Services/NCR-fingered-in-African-Bank-fiasco-20140811>, accessed on 31 August 2018.

<sup>639</sup> *Ibid.*

<sup>640</sup> K Gikunda 'The Way to a Safer Financial Services: A comparison between South Africa and Kenya' (LLM Thesis, University of Pretoria, 2015) 40.

<sup>641</sup> The greater of R1 million or 10% of annual turnover.

to the confirmation by the High Court.<sup>642</sup> However, putting aside compensatory jurisdiction, the failure to act by either of the regulators compromises consumer protection in the financial services sector. Based on just these two points, a conclusion that the deficiency is not in the legislation but lies in the enforcement of the legislation, is inevitable.

### 5.3 Education

Woker points out that “[c]onsumers have to claim their rights and without the necessary education they will not know how to enforce these rights, or even that they have them.”<sup>643</sup> Thus, government has always recognised that, in order for the legislation to have a meaning and effect on consumers, they had to be educated to the point where they were at least financially literate.<sup>644</sup> Put simply, financial literacy is about having the knowledge and skills to manage money.<sup>645</sup> It was recognised that this had to be instilled as early as in schools.<sup>646</sup> There is currently a measure of attention given in South Africa’s regulatory framework to financial literacy, specifically in terms of the NCA.<sup>647</sup> The FSB also has a duty to provide, promote and support consumer education.<sup>648</sup> The National Consumer Financial Education Strategy was adopted in 2013, with the aim that consumer gain financial knowledge, to enable them to plan ahead, manage their money and exercise choices about financial products. This

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<sup>642</sup> Sections 7 & 10, Financial Institutions Act, 28 of 2001; at present, whilst the NCT can impose administrative fines, it does not have the power to order damages, which power remains with the civil courts.

<sup>643</sup> When recommending that consumers be given greater access to credit and the market, the SALC had also recommended that consumer education be compulsory and given priority; T Woker ‘Consumer Protection and alternative dispute resolution’ 48.

<sup>644</sup> P Stoop ‘The South African consumer credit policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness’ 373; National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 62 – 66; NCR *Outcomes of Educational Workshops and Media Campaigns of the NCR* (Jan 2013) available at

<https://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf>, accessed on 16 November 2017.

<sup>645</sup> G Pearson, NP Stoop and M Kelly-Louw ‘Balancing Responsibilities - Financial Literacy’ p2 – 3.

<sup>646</sup> NCR *Outcomes of Educational Workshops and Media Campaigns of the NCR* (note 643 above) 18.

<sup>647</sup> *Ibid.*

<sup>648</sup> *Ibid.*

strategy has been implemented by the FSB.<sup>649</sup> However, financial literacy levels remain low.<sup>650</sup> The NCC has a similar responsibility but has also not performed well on this aspect.<sup>651</sup>

Furthermore, efforts are not necessarily directed at consumer education at the preventative stage, or towards increasing knowledge for better access to other financial products, such as investment products. For example, in the credit market, the 2018 amendments to the NCA will introduce a financial literacy and budgeting skills programme, which applicants for debt intervention and rehabilitation may be ordered to attend.<sup>652</sup> These measures will assist those already in the debt hole. Yet, the evidence shows that more of South Africa's poor and previously disadvantaged are accessing more credit, out of all the available financial services and products.<sup>653</sup> Whilst the positive outcome of consumer education in relation to credit, is credit health, which happens to be one of the keys to socio-economic transformation is South Africa.<sup>654</sup> However, government's efforts should focus on providing money management skills, not just for credit, but for all financial services and products.

In the transition to the Twin Peaks, the need for more financially literate consumers is recognised, however there are no tangible measures to achieve this.<sup>655</sup> Unfortunately, the same education strategy in place since 2013 and enforced by the consumer education department within the FSB, is the plan for the future.<sup>656</sup>

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<sup>649</sup> FSB *The Consumer Education Department of the FSB*, available at [https://www.fsb.co.za/Departments/consumerEducation/Documents/The%20Consumer%20Education%20Department%20of%20the%20FSB%20%20\(2\).pdf](https://www.fsb.co.za/Departments/consumerEducation/Documents/The%20Consumer%20Education%20Department%20of%20the%20FSB%20%20(2).pdf), accessed on 26 June 2018.

<sup>650</sup> FSB *Financial Literacy in South Africa: Results from the 2015 South African Social Attitudes Survey (SASAS) 2016* <https://www.mylifemoney.co.za/Resources/Research%20Documents/FSB%20Financial%20Literacy%20Report%202015.pdf>, accessed on 8 May 2017.

<sup>651</sup> R Lake 'The consumer's right to redress- is National Consumer Commission fulfilling its mandate?' 2011 *De Rebus* 47.

<sup>652</sup> Clause 27 of the National Credit Amendment Bill, 2018.

<sup>653</sup> M Simatele 'Access to Financial Services and Poverty: Perspectives from South African Household Data' (15 October 2015) in *Africa Growth Agenda 20 – 23*.

<sup>654</sup> NCR *Outcomes of Educational Workshops and Media Campaigns of the NCR* (note 643 above) 20.

<sup>655</sup> FSB *Status Update: Retail Distribution Review* (note 584 above) 41; National Treasury *A Safer Financial Sector to Serve South Africa Better* (note 30 above) 39, 47 – 48; National Treasury *A Draft Market Conduct Policy Framework for South Africa* (note 45 above) 63 – 69.

<sup>656</sup> FSB *The Consumer Education Department of the FSB* (note 648 above).

#### 5.4. Concluding Remarks

Consumer protection legislation is necessary to protect South African consumers, especially in the country's unique social context as emphasized in this research. However, consumer protection specifically for the credit market and the financial services needs a balancing of interests. Tightening the noose of regulation on suppliers has so far been counter-productive. Innovation has been inspired, but to the detriment of consumers. To get ahead or reach new markets, suppliers are constantly developing new products and services whilst keeping costs down, in order to realise profits. One way of keeping costs down is to advance with technological developments. Ordinary consumers are not equipped to keep up with all these developments when transacting. Evidently, the legislation is not keeping up either as government, through its policies and legislation, is still trying to facilitate consumers' access to these markets.

Some of the poor conduct in market that consumers need to be protected against, such as fraudulent schemes and pyramid schemes, is recurrent. However, lack of enforcement of the existing legislation is the challenge.<sup>657</sup> Ideally, adequate monitoring by the regulators, which the legislation enables, should bring to the fore trends in unfair treatment and regulators should act without delay. More regulation is not the sole answer. Even a special drive to raise awareness about fraudulent schemes so that consumers are able to identify them, requires less resources and could be more impactful. This is action that can be taken by any of the regulators and generate an impact. Collaborative regulation and enforcement is after all the mandate for each of the regulators; it should not have to be constantly reinforced by legislative amendments. As earlier directed and constantly maintained in the policy documents, consumer education should be the priority.<sup>658</sup>

In summary the following conclusions have been reached:

1. the common law was inadequate to protect South African consumers;
2. consumer protection legislation was therefore necessary;
3. the legislation introduced was comprehensive and contains substantial consumer protection measures;

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<sup>657</sup> Finance Standing Committee *Eradicating Ponzi schemes* (note 442 above).

<sup>658</sup> T Woker 'Consumer Protection and alternative dispute resolution' 48.

4. he legislation is not effectively enforced;
5. introducing more legislation will not resolve the problems if there is no proper enforcement;
6. consumers need to be educated about their rights. When aggrieved, they need clear processes for accessing the correct forums for their specific issues, where their grievances will be resolved expeditiously in accordance with simple rules that consumers can easily understand. Only then, will consumer protection be meaningful to consumers.

### **5.5 Final Recommendations**

Whilst the Twin Peaks Model is supported as a means to rationalise the regulation of the financial services sector and bring it in line with international standards, the government should not simply introduce more legislation, for the protection of consumers. Instead, there should be a marked focus on enforcement, including the adequate allocation of resources to established institutions for them to perform their functions. Secondly, the focus should be on far-reaching consumer education initiatives, including allocating adequate resources and fostering partnerships with consumer advocate bodies. Introducing further and better legislation will be meaningless unless that legislation is effectively enforced, offending suppliers are held accountable for their conduct and consumers are properly educated so that they are able to take action when their rights are infringed.

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235. Gikunda K, 'The Way to a Safer Financial Services: A comparison between South Africa and Kenya' (LLM Thesis, University of Pretoria, 2015)

236. Erasmus A 'The proposed twin peaks system of regulating the financial sector in comparative analysis' (LLM Thesis: Banking Law, University of Johannesburg, 2016)

#### **URLs**

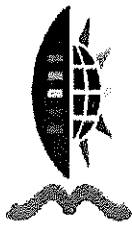
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## ABBREVIATIONS AND ACRNONYMS

Alternative Dispute Resolution	ADR
Business Practices Committee	BPC
Consumer Affairs Committee	CAFCOM
Companies and Intellectual Property Commission	CIPC
Conduct of Financial Institutions Bill	COFI Bill
Consumer Protection Act	CPA
Department of Trade and Industry	DTI
Financial Advisory and Intermediary Services Act	FAIS
Financial Services Ombud	FAIS Ombud
Financial Intelligence Centre	FIC
Financial Services Tribunal	FST
Financial Services Authority	FSA
Financial Services Board	FSB
Financial Sector Conduct Authority	FSCA
Financial System Council of Regulators	FSCR
Financial Services Ombud Schemes Act	FSOS Act
Financial service providers	FSPs
Financial Sector Regulation Act	FSR Act
Free Market Foundation	FMF
Independent Financial Advisers	IFA
Long-term Insurance Act	LTIA
Micro Finance Regulatory Council	MFRC
Minister of Trade and Industry	Minister
The National Credit Act	NCA
National Consumer Commission	NCC
National Credit Regulator	NCR
National Consumer Tribunal	NCT
National Development Plan	NDP
National Prosecuting Authority	NPA
Promotion of Access to Justice Act	PAJA
Reconstruction and Distribution Programme	RDP
South African Law Commission	SALC

South Africa Social Security Agency	SASSA
South African Police Service	SAPS
Short-term Insurance Act	STIA
South African Reserve Bank	Reserve Bank
Treating Customers Fairly	TCF
United Kingdom	UK
VBS Mutual Bank	VBS



14 March 2019

Ms Nomfundo Gugulethu Hlophe (216074658)  
School of Law  
Howard College Campus

Dear Ms Hlophe,

Protocol reference number: HSS/0959/017M

New project title: Consumer Protection Legislation in South Africa – Is it really necessary?

**Approval Notification – Amendment Application**

This letter serves to notify you that your application and request for an amendment received on 28 February 2019 has now been approved as follows:

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

.....  
Dr Rosemary Sibanda (Chair)

/ms

cc Supervisor: Professor T Woker  
cc Academic Leader Research: Dr Freddy Mnyongani  
cc Post Graduate Administrator: Mr Pradeep Ramsewak

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Humanities & Social Sciences Research Ethics Committee

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