



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

**CONSUMER PROTECTION
DISCUSSION DOCUMENT**

**LRDC 29
Windhoek, Namibia
March 2014
ISSN 1026-8405
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LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The current Commission members' are—

Mr S Shanghala, Chairperson

Adv J Walters, Ombudsman

Ms Y Dausab, Appointed in terms of section 3(1)(e) (whose term of office commenced upon the resignation of Mr F. Nghiishililwa)

Under section 3 of the Law Reform and Development Commission Act, 1991, Commissioners are appointed by the President. Previous Commissioners ceased to hold their office when their term of office for three (3) years lapsed on November 8, 2013. They were –

Ms Dianne Hubbard;

Mr Nixon Marcus;

Ms Damoline Muroko; and

Mr Raywood Rukoro

The Secretary to the Commission is Mr J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 1st Floor, Mutual Platz Building, Post Street Mall, Windhoek.

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Foreword

Since the Law Reform and Development Commission's (LRDC's) decision to tackle this matter of Consumer Protection, it has grappled with some fundamental questions: what not to include in its realm, what to include, what solution to follow, what solution to not follow and so forth. Suggestions were made that Namibia should simply follow the South African approach.

Not only out of nationalist thinking, market size and explicit departures in fundamental freedoms definitions have rendered a cut and paste solution untenable. It is for this reason that the LRDC engaged the Ministry of Trade and Industry to seek cooperation first in establishing for the Namibian policy maker, what is out there in the world in terms of consumer protection. Once one knows what is done elsewhere, then one needs to evaluate one's own peculiarities and either adopt or weave uniquely a solution in place for one's own peculiar set of circumstances. Hence the Benchmarking Study undertaken by the officials of the Ministry of Trade and Industry and the LRDC. Much appreciation go to Mrs. Pogisho, Ms. Roswitha Gomachas and Ms. Jessica Gawagab for their efforts to understand for us what other jurisdictions do with their consumer protection frameworks.

Yet after that exercise, one needed to wrap that around what all is available in Namibia's law books with regard to consumer protection, and as is evident from this Discussion Document, it is fragmented, outdated, at times toothless and in need of consolidation based on Namibia's own unique conditions. Much thanks to Mrs. Diane Hazel who worked on the **Discussion Document** from where others had left it to its completion. Ms. Rachel Mundilo and Ms. Tangi Shikongo cannot be forgotten for their work in tying up the loose ends which brought the **Discussion Document** together.

In the coming months, one expects that the **Discussion Document** will spurn discussion and input to the LRDC for it to gather a sense of the mood and attitude of Namibian consumers on how they ought to be served. Notwithstanding efforts in the banking, financial and telecommunications sectors, it is important that all input is made as to how even these sectors should be regulated – as is, or otherwise. It does not harm to think out loud.

Sadly, it has been the experience that the so-called consumer lobby groups are unwilling to attend consultation meetings, yet they will place an article in the local papers, to the satisfaction it seems of the local press, and generate some hype around themselves and less towards the resolution of the consumer quagmire. With this **Discussion Document**, no less than copious pages of input are expected from these lobby groups. Surely, their expertise should contribute to the national debate where it matters, and we look forward for their input.

Almost everything today is a consumable and may very well cross across two or more sectors in respect of one consumable. It is therefore important that we keep up with the changes of the day as far as our laws are concerned. Food today cannot be defined in terms of a law from the 1960's.



Sakeus Edward Twelityaamena Shanghala
Chairperson: Law Reform and Development Commission

1. Introduction

1.1. Background on Markets and Consumers

1.1.1. The change in market conditions in the last half-century—on both a nation state and international level—has had a profound impact on consumers.

1.1.2. On a national level, African states, including Namibia, have pursued policies of economic liberalization and private sector development.¹ Although a number of economic benefits have accrued from these policies, states have not always considered consumer rights and interests when implementing these policy changes.²

1.1.2.1. For example, the privatisation of public enterprises and the introduction of competition into new service areas have compelled consumers to make choices that require new information, which is often unavailable. The lack of information hinders the ability of consumers to make informed choices.

1.1.2.2. In addition, technological change has had a profound impact on consumers, defying the traditional rules of social and political responsibility. The pace of innovation has challenged regulators to maintain pace with market monitoring and controls.³

1.1.3. On an international level—and in the Southern Africa Development Community (“SADC”) in particular—there has been increased liberalisation of exchanges and opening of trade borders.⁴ This increase in global trade has presented consumers with an expanding variety of products from unfamiliar producers, further contributing to the difficulty of making informed choices.⁵

¹ See Model Law for Consumer Protection in Africa, Harare, Zimbabwe, May 1996 p.1.

² Model Law for Consumer Protection in Africa, Harare, Zimbabwe, May 1996 p. 1.

³ See Model Law for Consumer Protection in Africa, Harare, Zimbabwe, May 1996 p. 3.

⁴ Consumers International, *A Guide to Developing Consumer Protection Law*. (London: Consumer International 1st Issue, April 2011), p. 10.

⁵ United Nations Commission for Sustainable Development, *Background Paper for the United Nations Inter-Regional Expert Group Meeting on Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer*, (Sao Paulo, Brazil, 28-30 January 1998).

1.1.4. Consumers may be particularly vulnerable to these changes in market conditions because of Information asymmetries and imbalances in economic power among market players.⁶

1.1.4.1. Information asymmetries occur when one party to a transaction has more, and often better, information about the subject of the transaction than the other party. In the consumer context, one party to a transaction will often know more about the quality of the product or service than the other.⁷

1.1.4.2. New and immature markets are particularly susceptible to imbalances of information and poor consumer awareness.⁸

1.1.5. In some instances, the market may correct these information asymmetries and power imbalances on its own without the need for regulatory intervention.⁹ For instance, if the better-informed party discloses relevant information or the consumer is willing to gather and process information, information asymmetries may be eliminated, or at least lessened.

1.1.6. Unfortunately, markets do not always self correct and consequently fail to provide adequate protection to consumers. Moreover, the nature of consumer transactions further exacerbates those instances when the market fails.¹⁰

1.1.6.1. In most consumer transactions, consumers do not have incentives to read information that accompanies a good or service because the cost of each individual transaction is relatively small.

1.1.6.2. Even if consumers read available information, the capacity of consumers to read and process information is limited. As a result, an

⁶ See Jacques Delisle & Elizabeth Trujillo, 'Consumer Protection in Transnational Context', 58 *American Journal of Comparative Law* 135, 153 (2010); Consumers International, *A guide to developing consumer protection law*, April 2011 p. 9.

⁷ Giesela Ruhl, *Consumer Protection in Choice of Law*, 44 *CORNELL INT'L L.J.* 569, 573 (2011).

⁸ Consumers International, *Loc. Cit.* p. 10.

⁹ Giesela Ruhl, 'Consumer Protection in Choice of Law', *Cornell International Law Journal* Vol. 44 (2011), 569, 575-78.

¹⁰ *ibid.*

increase in the volume of information does not necessarily lead to greater knowledge and better decision-making. This concept is commonly referred to as “information overload”.¹¹

1.1.6.3. Moreover, individuals frequently act in ways that are incompatible with assumptions of rational choice theory. The rational choice model assumes that individuals act to maximise their own welfare by collecting information, comparing the costs and benefits of different courses of action before making decisions, and having robust and stable preferences. Yet, consumers do not always act in ways to maximise their welfare.

1.1.7. If the market fails to self-correct, consumer protection laws and regulations may cure some of these market failures.¹² Consumer policies have the potential to limit fraudulent, misleading, and unfair commercial conduct.¹³ In addition, policies directed at unfair commercial conduct may establish a more balanced relationship between businesses and consumers and help build consumer confidence.

1.1.8. Consumer protection policies cover a range of substantive issues and areas.

1.1.8.1. *Health and safety*: Policies aimed at protecting the health and safety of consumers include measures on the adoption of standards, product safety, product liability, recall of products, and access to public services.¹⁴

1.1.8.2. *Consumers’ economic interests*: Policies aimed at protecting the economic interests of consumers often focus on contract terms,

¹¹ Giesela Ruhl, ‘Consumer Protection in Choice of Law’, *Cornell International Law Journal* Vol. 44 (2011), 569, 580.

¹² Delisle & Trujillo, *Loc. Cit.* AM. J. COMP. L. 135, 152, 160 (2010); Consumers International, *A Guide to Developing Consumer Protection Law*, April 2011 p. 10.

¹³ Organisation for Economic Co-operation and Development, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in Electronic Commerce* (1999).

¹⁴ “Product safety” refers to the safety of non-food products, such as toys, household appliances, cars, and cosmetics. See European Commission, Health & Consumer Protection Directorate-General, Factsheet, Product Safety, http://ec.europa.eu/consumers/publications/prosafety_en.pdf.

warranties,¹⁵ and misleading or deceptive marketing. These policies may also encompass the return of goods, the inspection of goods, the suitability of goods, after-sales service and parts, accountability of suppliers, the prevention of tying sales to other sales and services, unconscionable conduct,¹⁶ and unfair, unjust, or improper trade practices.

- 1.1.8.3. *Disclosure of information:* Policies that address information disclosure in the consumer context seek to ensure that consumers receive information and that the information provided is in plain and understandable language. Information disclosure policies also address product labelling, trade descriptions, and transaction records.¹⁷
- 1.1.8.4. *Consumer education:* Consumer education policies include the general promotion of consumer confidence and empowerment through various educational initiatives. These initiatives also seek to develop a culture of consumer responsibility and create an awareness of the environmental impacts of consumer choices.
- 1.1.8.5. *Privacy:* Privacy policies seek to maintain the confidentiality of consumer information and protect consumers from unwanted marketing or solicitation.¹⁸

¹⁵ Warranties provide the consumer a form of guarantee that the goods are safe and in good quality. They may take various forms. See Law Society of South Africa, Consumer Protection Guide for Lawyers, 2011, Ch. 10, available at

[http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf).

¹⁶ “Unconscionable conduct” includes physical force, coercion, undue influence, pressure, harassment, or other unfair tactics by suppliers and their agents in transactions related to the supply of goods. See Law Society of South Africa, Consumer Protection Guide for Lawyers, 2011, Para. 8.2, available at

[http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf).

¹⁷ A “trade description” is a description or statement indicating the quantity, measure, weight, name of the producer, ingredients, place of origin, mode of manufacture, or intellectual property associated with any goods. A product label includes trade description information. A transaction record is a written sales record issued to the consumer to whom any goods or services are supplied. See Law Society of South Africa, Consumer Protection Guide for Lawyers, 2011, pp. 46-48, 52-53, available at [http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf).

¹⁸ Privacy policies may take several forms. These policies may protect the personal and financial information of consumers from disclosure or they may protect consumers from unwanted direct marketing or solicitation. See Law Society of South Africa, Consumer Protection Guide for Lawyers, 2011, p. 32, available at [http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf).

- 1.1.8.6. *Availability of effective consumer redress:* Although various consumer policies may give consumers a number of rights and protections, these policies have little significance without effective opportunities for consumers to enforce and protect their rights.

1.2. Consumer Protection in Namibia

1.2.1. Namibia does not currently have one generally applicable consumer protection law. Instead, Namibia has a number of laws that have elements of consumer protection scattered throughout them.

1.2.2. Consumer groups in Namibia have been active in expressing their concerns regarding the abuses and harms Namibian consumers face and have openly advocated for the passage of a generally applicable consumer protection law. Examples of some of the issues that consumers face include:

- 1.2.2.1. Unclear and unfair terms in sales contracts;
- 1.2.2.2. Banking institutions charging undisclosed fees and interest;
- 1.2.2.3. Protection of consumer data with the introduction of new technology;
- 1.2.2.4. Non-discrimination in accessing basic services, such as transportation;
- 1.2.2.5. Misleading advertisements;
- 1.2.2.6. High interest charged on debt;
- 1.2.2.7. Products sold past expiration dates;
- 1.2.2.8. Expiration of pre-paid services, such as airtime vouchers;
- 1.2.2.9. Passage of information to credit bureaus and the blacklisting of consumers;
- 1.2.2.9. Failure of stores to display unit prices;
- 1.2.2.10. Micro-lenders and predatory lending;
- 1.2.2.11. Differences in prices advertised versus what is charged; and

1.2.2.12. Product returns and refunds.

1.2.3. Several industry sectors in Namibia have been more proactive in providing consumers with greater protection and an adequate means of redress. In particular, the banking, financial, and communications industries in recent years have adopted legislation and implemented regulations and other measures that offer elements of consumer protection.

2. Law Reform and Development Commission and Consumer Protection

2.1. Consumer Protection Project

2.1.1. The Law Reform and Development Commission (“LRDC”) began studying consumer protection in 2007. In 2011, the LRDC, in conjunction with the Ministry of Trade & Industry, initiated a formal project to investigate the status of consumer protection in Namibia.

2.2. Issue Paper

2.2.1. LRDC issued an issue paper on consumer protection in early 2011. The issue paper discussed how best to define “consumer”, identified types of consumer violations that occur in Namibia, and explored consumer rights under the United Nations Guidelines for Consumer Protection.

2.2.2. The issue paper also presented questions to be considered as the project moved forward, specifically whether there is a need for a consumer protection legal framework in Namibia, and, if so, whether such a framework should be of general application or sector specific.

2.2.3. LRDC circulated the issue paper among relevant stakeholders for comments. Comments on the paper are included in Annexure A.

2.3. Workshop

2.3.1. From April 5-7, 2012, the LRDC held a workshop on consumer protection in Okahandja.

2.3.2. The workshop focused on the issue paper and the status of consumer protection in other countries. Various stakeholders also gave presentations, including the Bank of Namibia, the Namibia Financial Institutions Supervisory Authority (“NAMFISA”), the Communications Regulatory Authority of Namibia (“CRAN”), the Namibia Competition Commission (NaCC), the Namibian Standards Institution (NSI), the Namibia Chamber of Commerce and Industry (NCCI), and the Namibia Consumer Trust (NCT).

2.3.3. The workshop concluded with a discussion of future steps and recommendations on specific consumer issues. The workshop report is enclosed in Annexure B.

3. Overview of the Discussion Report

3.1. Methodology

3.1.1. After the Okahandja workshop, the LRDC began surveying the Namibian legal landscape to identify elements of consumer protection that currently exist under Namibian law. LRDC analysed legislation, regulations, common law, and international law, and identified provisions that are relevant to consumer protection.

3.1.2. To better understand these laws that affect consumers, the LRDC consulted with relevant stakeholders and conducted interviews with industry and government players, including the Bank of Namibia, CRAN, NAMFISA, the Financial Literacy Initiative, the Ministry of Trade and Industry, the Competition Commission, consumer advocates, and banking institutions.

3.1.3. The LRDC, in conjunction with the Ministry of Trade and Industry, also conducted a benchmarking study of consumer protection frameworks in other jurisdictions, which included site visits to Australia, South Africa, and Botswana as well as Consumers International in London.

3.2. Organisation of Report

3.2.1. First, this discussion document identifies existing Namibian and international laws that have provisions pertaining to consumers and consumer rights. The

report discusses the relevant consumer provisions in the Namibian Constitution, common law, trade and industry statutes, health and agriculture statutes, and medicines and medical professions statutes.¹⁹

- 3.2.1.1. The discussion document analyses these provisions, focusing on the protections offered to consumers under the law and whether the law provides an effective means of consumer redress.
 - 3.2.1.2. In discussing the relevant provisions pertaining to consumers, the discussion document separates those provisions that provide direct protection to consumers from those that offer more indirect consumer protection. This discussion document has categorised provisions offering indirect consumer protection as those provisions that grant power to a government regulator or entity to regulate or penalise a person or firm for practices that harm a consumer. These provisions, however, do not necessarily grant the consumer a direct opportunity to seek redress. On the other hand, provisions offering direct consumer protection include those provisions that consumers may directly seek to enforce without relying on the government to act first, provided of course that they can meet standing requirements.
- 3.2.2. Second, the discussion document highlights the industry sectors that have been active on consumer issues, which include the banking, financial, and communication sectors. The discussion document identifies the relevant laws and regulations in each of those sectors, discusses any additional measures involving consumer protection that have been undertaken, and identifies current opportunities for consumer redress. To the extent possible, the discussion document also analyses the effectiveness of these institutions and their laws in protecting consumers.

¹⁹ Although there are statutes regulating professional associations that may have provisions that could benefit consumers—such as the Legal Practitioners Act, 1995 (Act No. 15 of 1995)—this discussion document does not discuss those statutes because they appear to be more focused on regulating and maintaining the integrity of the profession. This discussion document does discuss the statutes pertaining to the medical professions because these statutes form part of the overall analysis of consumer protection in the medical industry.

- 3.2.3. Third, the discussion document identifies relevant provisions applicable to consumer protection in international and regional agreements to which Namibia is a party.
- 3.2.4. Fourth, the discussion document examines other jurisdictions' consumer protection frameworks, focusing on the relevant statutes and governing institutions. In addition, the discussion document discusses the problems that these jurisdictions have faced in implementing their consumer protection frameworks and any criticisms levied against the regulatory institutions.
- 3.2.5. Finally, the discussion document identifies issues for further consideration, including areas to consider prioritising to the extent Namibia decides to adopt a consumer policy or consumer protection legislation. The discussion document also notes and discusses relevant international guidelines that may be useful in developing a consumer protection framework.

4. Consumer Protection under the Namibian Constitution

4.1.1. The Namibian Constitution does not directly address consumer protection, but elements of consumer protection may be extracted from the Constitution's granting of fundamental rights and freedoms.²⁰

4.1.2. Article 5 of the Namibian Constitution states that the fundamental rights and freedoms identified in Chapter 3 of the Constitution shall be respected and upheld by the government and by all natural and legal persons.

4.1.3. The fundamental rights and freedoms under Chapter 3 that are relevant to consumer protection include the "protection of life" under Article 6, "respect for human dignity" under Article 8, "equality and freedom from discrimination" under Article 10, right to "privacy" under Article 13, right to "property" under Article 16, and "freedom of association" under Article 21(1)(e).

4.1.4. In addition, Article 25(2) of the Namibian Constitution states that a person who claims a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened is entitled to approach a court to enforce or protect that right in court or through an Ombudsman. Article 5 grants the courts jurisdiction to enforce these rights.

4.1.4.1. So in theory, consumers could obtain redress through the courts for unfair commercial conduct under the Namibian Constitution by arguing that that one of their fundamental rights or freedoms has been violated. It is unclear; however, if there is precedent for doing so and Namibia's strict standing requirements may complicate consumers' ability to reach the courts.

4.1.4.2. Moreover, arguments for how a violation of a fundamental right occurred would be complicated, requiring sophisticated legal counsel ingenuity and resources.

4.1.4.3. As a result, it may not be feasible—or at the least, extremely difficult—for consumers to seek to enforce their rights in courts by asserting a

²⁰ See Jami Solli, Consumers International, *Developing rights-based consumer protection advocacy strategies: Based on the legal frameworks in place in Botswana, Namibia and Zambia*, 14 April 2013.

violation of a fundamental right or freedom under the Namibian Constitution.

4.1.5. Although enforcing rights through the courts may be difficult for consumers, the availability of the Ombudsman may serve as an alternative path forward. Article 91(d) grants the Ombudsman the power “to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under the Constitution” have occurred.

4.1.5.1. Due to standing issues (*locus standi in juridico*) and resource constraints, consumers may be more successful in addressing unfair commercial conduct under a theory of violation of a fundamental right or freedom through an Ombudsman than a court.

4.2. Finally, even if consumers are unable to protect themselves directly under the Namibian Constitution, the Namibian Constitution appears to obligate Namibia to adopt a consumer protection framework. Article 95 dictates that the State must “actively promote and maintain the welfare of the people by adopting, *inter alia*, policies” aimed at various issues, some of which could be relevant for consumer protection.

4.2.1. Those issues identified under Article 95 that are potentially relevant to consumer protection include: ensuring that every citizen has a right to fair and reasonable access to public facilities and services; enacting legislation to ensure the incapacitated, indigent, and disadvantaged are accorded social benefits and amenities; raising and maintaining an acceptable level of nutrition and standard of living and improving public health generally; and utilising living natural resources on a sustainable basis for the benefit for all Namibians.

4.2.2. Further, the use of the phrase “*inter alia*” in Article 95 indicates that this list is not meant to be exclusive or exhaustive. As a result, there may be other issues pertaining to the welfare of the people that the State has an obligation to promote.

4.2.3. Article 95's specific examples of issues that the State is obligated to promote—as well as the openness of the article to non-specified issues—strongly suggest that Namibia has an obligation to adopt a consumer protection framework.

5. Consumer Protection under Common Law

5.1. Validity of Common Law in Namibia

5.1.1. Article 66 of the Namibian Constitution specifies that customary and common law in force on the date of Independence remains valid, as long as those laws do not conflict with the Namibian Constitution or any other statutory law. As such, it is necessary to examine common law principles that may be relevant to consumer protection.

5.1.2. This discussion document identifies general principles of common law relevant to consumer protection. The scope of this discussion document, however, does not include a detailed analysis of every nuance of common law that is relevant to consumer protection or citation to court decisions that may have adopted a slightly different approach. Instead, this discussion document seeks to present general, overarching principles of consumer protection derived from common law.

5.1.3. The common law principles relevant to consumer protection generally fall within the law of contracts and sale of goods.

5.2. Contracts

5.2.1. Common Law Contract Principles that May Present Problems for Consumers

5.2.1.1. Several contract rules that have evolved under common law may actually be problematic from a consumer protection standpoint. These include the “freedom of contract” principle, the *caveat subscriptor* rule, and sales *voetstoots*.

5.2.1.2. “Freedom of Contract”: The right to contract is generally considered a fundamental right under common law, generally referred to as the “freedom of contract” or the “sanctity of contract”. “Freedom of contract” means that courts typically will not modify contract terms that may be unfair to or harm one party, except in limited circumstances.²¹

²¹ DAVID MCQUOID-MASON, CONSUMER LAW IN SOUTH AFRICA 24-25, 115 (Juta & Co. 1997).

- 5.2.1.2.1. This principle proves problematic for consumers because it assumes that suppliers and consumers are on equal footing and that consumers are in a position to adequately protect and enforce their rights.
- 5.2.1.2.2. If consumers try to pursue a contract claim under common law in court, they may encounter significant hurdles. Judges may be unwilling to modify unfair or problematic contract terms, citing the “sanctity of contract” principle that ensures limited interference from the government.
- 5.2.1.3. *Caveat Subscriptor* Rule: This rule embodies the principle that a person who signs a contractual document does so at his or her own peril. In other words, if a person signs a document, the person cannot later argue that he or she did not read the document or that the document does not reflect his or her true intention.²²
- 5.2.1.3.1. Despite this rule, consumers may have some recourse if they can show that the other party misled them in some way.²³
- 5.2.1.3.2. Alternatively, if one party was negligent in signing, the non-negligent party will not be bound by terms that by virtue of the operative mistake do not correctly reflect the common intention of the parties.²⁴ Consumers would thus have to argue and prove that the seller was negligent.

²² Peter Aronstam, *Consumer Protection, Freedom of Contract and the Law* (Cape Town: Juta & Co., 1979), p. 36 citing *Burger v Central South African Railways* 1903 TS 571; David McQuoid-Mason, *Consumer Law in South Africa*. (Cape Town: Juta & Co. 1997), 26 citing *George v Fairmead* 1958 (2) SA 465 (A).

²³ McQuoid-Mason, Op. Cit, pp. 26-27. DAVID MCQUOID-MASON,

²⁴ Aronstam, Op. Cit. pp. 36-40. citing *Meyer v Merchants' Trust Ltd* 1942 AD 244 and *Taylor v Cape Importers* 1938 CPD 362.

5.2.1.3.3. In addition, the document signed must have been a contract, and it must reflect the true or actual transaction between the parties.²⁵

5.2.1.4. Sales *Voetstoots*: A sales *voetstoots* occurs when a seller contracts out of his or her obligations and liability, selling a product “as it stands” or “with all faults”.²⁶

5.2.1.4.1. If a product is sold *voetstoots*, the purchaser accepts responsibility for any defects in the goods or property. The purchaser is not entitled to cancel the contract or claim damages if the goods are unfit for the purpose for which they were purchased.²⁷

5.2.1.4.2. A *voetstoots* agreement, however, does not relieve a seller from liability in the case of fraud.²⁸

5.2.2. Imposition of Contract Terms in Contract Formation

5.2.2.1. Despite some of the common law contract principles that may pose problems for consumers, common law rules pertaining to the imposition of contract terms offer a number of protections to consumers. These rules seek to protect the weaker party—usually the consumer—from the party with more bargaining power.

5.2.2.1.1. As a general rule, a party may only impose a contract term on another if the party imposing the term does all that is reasonably necessary to give notice of the term and the other party accepts.²⁹

²⁵ *ibid.* citing *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 (CA) and *Shepherd v Farrell’s Estate Agency* 1921 TPD 62.

²⁶ G. R. J. Hackwill, *Mackeurtan’s Sale of Goods in South Africa*. (Cape Town: Juta & Co., 5th ed.1984), p. 141. citing *Uhlmann v Grindley-Ferris* 1947 (2) SA 459 (C) and *Schneider v Chapman* 1917 TPD 497.

²⁷ *McQuoid-Mason*, Op. Cit. pp. 39, 51.

²⁸ Hackwill, Loc. Cit.; *McQuoid-Mason*, Op. Cit. p. 51.

²⁹ *Aronstam*, Op. Cit., 32. citing *Davis v Lockstone* 1921 AD 153 and *Weiner v Calderbank* 1929 TPD 654 at 661. If personal notification is possible, then it must be given.

- 5.2.2.1.2. Further, any imposed terms must be in contractual form. If the term is in a written document, that document must be such that a reasonable person would expect it to contain contractual terms.³⁰
- 5.2.2.1.3. The imposition of a term by one party on another should be contemporaneous with the conclusion of the contract. A party is not bound by a term brought to the attention or imposed after the contract has been made, unless that party consents to it.³¹
- 5.2.2.1.4. When imposing a contract term, the party on whom the term is imposed must have read and understood the term. If the party is illiterate or unable to understand, and the other party knows of this illiteracy or ignorance, it is the duty of the party imposing the term to ensure that the contract terms are understood.

5.2.3. Rules of Contract Construction

- 5.2.3.1. When courts construe a contract term, there are several established common law rules of construction that may operate in the favour of consumers.
- 5.2.3.1.1. If a contractual term imposes an undue hardship upon a party or deprives him or her of a common law right, courts will generally construe the term narrowly so as to minimise the burden on that party.³²
- 5.2.3.1.2. Any ambiguous terms in a contract will be resolved against the drafter and in favour of the other party. This principle—the *contra proferentem* rule—reflects the view that a person is responsible for ambiguities in his or her own expression.³³ So to

³⁰ *ibid.*, 26, citing *Central South Africa Railways v McLaren* 1903 TS 727 and *Chapelton v Barry Urban District Council* 1940 1 All ER 356 (CA).

³¹ Aronstam, Op. Cit. 28. citing *Annie Peard v John T Rennie & Sons* (1895) 16 NLR 175.

³² Aronstam, Op. Cit. 34. citing *Jackson v The Union Marine Insurance Company Ltd* (1874) LR 10 CP 125.

³³ *ibid.*, citing *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD).

the extent there are ambiguities in a seller-drafted contract, the terms will be construed in favour of the consumer.

5.2.4. Remedies for Fraud, Duress, and Undue Influence

5.2.4.1. If a seller or manufacturer uses fraud, duress, force, or undue influence in the negotiation or entering of a contract, common law has established specific recourse for the consumer dependent on the conduct at issue.

5.2.4.2. *Misrepresentation/Fraud*: A party induced to enter a contract by misrepresentation of an existing fact may repudiate the contract if the following can be proved: (1) the misrepresentation was material; (2) the misrepresentation was intended to induce him to enter the contract; and (3) the misrepresentation did so induce him.

5.2.4.2.1. During negotiations, a material statement by a seller to a purchaser bearing on the quality of the good, and going beyond mere praise and commendation, may give rise to *actio quanti minoris*—a reduction in the purchase price.³⁴

5.2.4.2.2. If the misrepresentation is fraudulent, the party is entitled to damages.³⁵

5.2.4.3. *Force*: Absolute force used in entering a contract renders the contract void *ab initio*.³⁶

5.2.4.4. *Duress*: Duress—the use of threats inducing fear—renders the contract voidable at the threatened party's option.³⁷

³⁴ R. H. Christie, *The Law of Contract in South Africa*. (South Africa: Butterworths (Pty). Ltd., 1983), p. 298.

³⁵ *ibid.*, 267. Citing *Viljoen v Hillier* 1904 TS 312 215.

³⁶ Christie, *Op. Cit.* p. 299.

³⁷ *ibid.*, pp. 299, 301. Such threats will be assessed from a reasonable person standard.

5.2.4.5. *Undue Influence*: Undue influence imposed in entering a contract entitles the influenced party to set aside the contract.³⁸

5.2.5. Remedies for Breach of Contract

5.2.5.1. Consumers also have several remedies available in the event of contract breach. If a seller or manufacturer breaches a contract, the purchaser may be entitled to the following types of redress:³⁹

5.2.5.1.1. *Specific Performance*: The purchaser may seek a court order that the breaching party—the seller in this scenario—carry out a contractual obligation, such as performing a specified act or paying money owed.

5.2.5.1.2. *Interdict*: When a seller threatens to breach a contract, the purchaser may seek an order from the court prohibiting the seller from doing whatever is specified in the order.

5.2.5.1.3. *Declaration of Rights*: A purchaser may seek a declaratory order.

5.2.5.1.4. *Cancellation*: A purchaser may be entitled to cancel a contract in certain circumstances for contract breach, such as when the seller fails to perform a contractual obligation within the appropriate time (*mora*), the breach goes to the root of the contract, or in the event of repudiation. Cancellation may also be appropriate when specific performance is not possible.

5.2.5.1.5. *Damages*: Special principles of contract law apply for when damages may be assessed for breach of contract, but usually damages are limited to contracts for sales, leases, and employment. The purpose of damages for contract breaches is to put the non-breaching party—the purchaser for our

³⁸ Christie, Op. Cit. pp. 308-310. Citing *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 (W) 541. Party seeking to set aside the contract must demonstrate that would not have entered the contract but for the undue influence.

³⁹ *ibid.*, pp. 253, 505, 514 (Butterworths1983).

purposes—in the position he or she would have been in if the contract had been properly performed.

5.2.5.2. Of course, these remedies also apply in the reverse scenario of the purchaser breaching the contract. But, nevertheless, these remedies offer consumers some recourse if a seller or manufacturer does not fulfil his or her contractual obligations.

5.3. Sale of Goods

5.3.1. Latent Defects

5.3.1.1. A latent defect is a product defect that would not be apparent upon inspection by an ordinary prudent person. Purchasers are expected, however, to make a reasonable examination or enquiry of a product before purchase.⁴⁰

5.3.1.2. As discussed, a seller may contract out of liability for latent defects under a sale *voetstoots*, provided that he or she does not act fraudulently.

5.3.1.3. If a seller does not contract out of liability, the seller has the duty to assume responsibility for latent defects in goods sold, and the purchaser may have several options for recourse.⁴¹

5.3.1.3.1. *Actio redhibitoria*: If the defect is serious, the purchaser may be able to set aside the contract (rescission). The defect, however, must have been so serious that a consumer would not have purchased the goods had he or she known of it.⁴²

5.3.1.3.2. *Actio Quanti Minoris*: If the defect is not so serious that the purchaser would still have purchased the goods but paid less, the purchaser may sue for a reduction in purchase price. The

⁴⁰ . Hackwill, Op Cit. 94-95. citing a number of cases, including *Deutschmann v Graham* 1912 EDC 214 at 219, *Blaine v Moller* 10 NLR 96, and *Douglas & Nolan v Ohlsson's Breweries* 1903 TH 424.

⁴¹ McQuoid-Mason, Op. Cit. 39.

⁴² McQuoid-Mason, Op. Cit. 52.

reduction in price is usually the difference between the purchase price and the value of the article in its damaged state.⁴³

5.3.2. Product Liability

5.3.2.1. *General Liability*: A manufacturer or seller may be liable to a consumer or user for harm caused by a defect in design or manufacture.

5.3.2.1.1. If the seller knows of a defect and remains silent, knowing that a purchaser would not buy the good or insist on a lower price if he or she knew of the defect, the purchaser may recover damages.⁴⁴

5.3.2.1.2. If a seller acts negligently with regards to a defective product, the purchaser may recover damages if he or she can prove the negligence.⁴⁵

5.3.2.1.3. A seller's liability may also extend to third party consumers injured from defective products if those third party consumers can prove fault, in the form of intention or negligence.⁴⁶

5.3.2.2. *Strict Liability*: Strict liability—liability without proving fault—may arise against manufacturers or sellers in limited circumstances under common law.

5.3.2.2.1. If a consumer purchases a good directly from a manufacturer and suffers damages because of a latent or hidden defect, he or she will be able to recover damages under *actio ex empto*—without proving fault.⁴⁷

5.3.2.2.2. For an ordinary seller who is not a manufacturer or who has not professed skill or expert knowledge, a purchaser cannot rely on

⁴³ *ibid.*, 53, citing *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T) and *Bloemfontein Market Garage v Pieterse* 1991 (2) SA 208 (O).

⁴⁴ *ibid.*, 78, citing *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 869.

⁴⁵ *McQuoid-Mason, Op. Cit.* 90-91, citing *Button v Bickfield Smith & Co* 1910 WLD 52 at 54.

⁴⁶ *ibid.*, 92.

⁴⁷ *McQuoid-Mason, Op. Cit.* 89, citing *Odendaal v Bethlehem Romery Bpk* 1954 (3) SA 370 (O) at 376-77. Strict liability may also be imposed on sellers who profess special skills or expert knowledge.

strict liability but instead may only recover damages if he or she can show that the seller breached an implied warranty against latent defects intentionally or negligently.⁴⁸

5.3.3. Warranties

5.3.3.1. A warranty is a statement made before or at the time of contracting that becomes part of the contract.⁴⁹

5.3.3.2. *Express Warranties*: An express warranty is a specific term or warranty in the contract. It is commonly referred to as a “guarantee”. Express warranties are frequently used to limit the rights of consumers.⁵⁰

5.3.3.2.1. If a seller breaches an express warranty, the consumer may sue for breach and have the right to cancel the contract and recover consequential damages.⁵¹

5.3.3.3. *Implied Warranties*: If the parties to a contract fail to specify anything as to the quality or condition of goods in the contract, the law implies that the goods are reasonably usable—i.e. the goods are merchantable.⁵² This warranty may be referred to as the implied warranty of merchantability.

5.3.3.3.1. In addition to the general implied warranty of merchantability, if a consumer purchases goods for a particular purpose and makes that purpose known to the seller, it is implied that the goods will be fit for that purpose.⁵³

⁴⁸ McQuoid-Mason, Op. Cit. 90.

⁴⁹ *ibid.*, 21.

⁵⁰ McQuoid-Mason, Op. Cit. 21-22.

⁵¹ McQuoid-Mason, Op. Cit. 80. citing *Marais v Commercial General Agency Ltd* 1922 TPD 440.

⁵² Hackwill, Op. Cit. 50. citing *Fergusson v Wood Bros* 4 SC 111 and *Koen v Maske & Co* (1909) 24 SC 699. This rule applies in the context of unascertained goods.

⁵³*ibid.*, 51. citing *Kroomer v Hess & Co* 1919 AD 204.

5.3.3.3.2. For breaches of implied warranties, the consumer may obtain a reduction in purchase price or cancel the contract without proving fault, subject to any agreements *voetstoots*.⁵⁴

5.3.4. Seller's Duties

5.3.4.1. In a transaction for the purchase of goods, the common law imposes certain duties on the seller that protect consumers. If the seller violates any of these duties, the law has established specific types of redress that are available in each situation.

5.3.4.1.1. Once the parties conclude the sales contract, the seller must deliver possession of the goods to the purchaser, and the seller must deliver the specific thing that was sold.⁵⁵ If the seller does not deliver or delivers goods other than those sold, the purchaser may cancel the contract, sue for specific performance, or claim damages.⁵⁶

5.3.4.1.2. The seller has a duty to care for the goods until delivery if the seller does not hand over the goods at the time of sale. The purchaser may obtain damages if the goods are damaged, diminished, lost, or destroyed as a result of the seller's fault.⁵⁷

5.3.4.1.3. The seller has a duty to deliver possession to enable the purchaser to enjoy immediate use of the goods or property, free of undisclosed restrictions or encumbrances.⁵⁸ Specifically, the seller's duty is to guarantee that no one with better title to the property will reclaim the property or evict the purchaser from the

⁵⁴ McQuoid-Mason, Op. Cit. 82.

⁵⁵ *ibid.*, 45, citing *Gibson v Payn* (1899) 16 SC 286, *Ayob & Co v Clouts* 1825 WLD 199.

⁵⁶ McQuoid-Mason, Op. Cit. 47, citing *Landau v City Auction Mart* 1940 AD 284.

⁵⁷ *ibid.*, 48.

⁵⁸ Hackwill, Op. Cit. 66-67. citing a number of cases, including *Schultz Bros v Roodepoort Venture Synd* 1905 TH 365 and *Van deer Vlugt v Salvation Army Property Co* 1932 CPD 56.

property. If the seller had a flaw in his or her title at time of sale, the purchaser may claim rescission.⁵⁹

- 5.3.4.1.4. If a seller makes a sale to a purchaser by sample, the goods delivered must match the sample standards. If there are substantial differences in the goods delivered from the samples, the contract may be voidable. The purchaser may be entitled to a reduction in purchase price if the differences are not significant.⁶⁰
- 5.3.4.1.5. The seller cannot deliver goods in instalments, unless the contract provides for such delivery. If such a situation does arise, the purchaser may refuse to pay the purchase price until he or she receives the entire order.⁶¹
- 5.3.4.1.6. If the seller acts negligently and as a result the good sold is materially different from that which the purchaser received, the purchaser is entitled to cancel the contract and refuse to take delivery. The purchaser also may claim damages.⁶²
- 5.3.4.2. The common law has a number of rules and principles pertaining to delivery, improper delivery, and non-delivery as well as particular types of sales. This discussion document only identifies the general duties of a seller and does not detail these other rules and specific types of sales.
- 5.3.4.3. In addition to seller obligations, the common law also imposes obligations on the purchaser and specifies remedies that are available to the seller if the purchaser does not meet his or her obligations. Though potentially counter intuitive, consumers' interests are better protected where the law clearly defines purchaser obligations and

⁵⁹ McQuoid-Mason, Op. Cit. 49. citing Van Staden v Pretorius 1965 (1) SA 852 (T).

⁶⁰ibid., 46., citing Greenshields v Chisholm (1884) 3 SC 220.

⁶¹ McQuoid-Mason, Op. Cit. 47.

⁶²ibid.,49. citing Frumer v Maitland 1954 (3) SA 840 (A).

means of seller recourse, ensuring that sellers cannot go above and beyond what is lawful.

- 5.4. **Summary:** The rules and principles under the common law for contracts and sale of goods offer consumers a wide range of protections. Unfortunately, the majority of consumers in Namibia likely do not know that they have these rights or that sellers owe them certain duties, alternatively if they do know about these rights, they are unable to assert them.

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6. Trade & Industry Statutes

6.1. Overview

6.1.1. This section identifies and discusses elements of consumer protection in the following trade and industry statutes: the Industrial Property Act, 2012 (Act No. 1 of 2012), Standards Act, 2005 (Act No. 18 of 2005), Competition Act, 2003 (Act No. 2 of 2003), Trade Metrology Act, 1973 (Act No. 77 of 1973), Trade Practices Act, 1976 (Act No. 76 of 1976), and Price Control Act, 1964 (Act No. 25 of 1964).

6.2. Industrial Property Act, 2012⁶³

6.2.1. The Industrial Property Act, 2012 regulates the granting, protection, and administration of patents, utility model certificates, industrial designs, trademarks, collective marks, certification marks, and trade names. It also establishes the Industrial Property Office and the Industrial Property Tribunal, however this Act has not entered into force yet.

6.2.2. The Industrial Property Act, 2012 has several direct provisions relating to consumer protection, including the assignments of rights that are likely to deceive, the use of misleading trade names, acts of competition contrary to honest trade practices, representations on the origins of products, and falsely representing patent rights or registered designs.⁶⁴

6.2.2.1. Consumers have some redress opportunities relating to these provisions. For misrepresentations of the origin of a product, a violator may be liable for a fine to a maximum of N\$10,000 and/or imprisonment of up to 24 months. For falsely representing patent rights or registered designs, a violator may be subject to a fine to a maximum of N\$5,000 and/or imprisonment up to 12 months.

⁶³ Industrial Property Act, 2012 (Act No. 1 of 2012)

⁶⁴ Sections 131, 174, 191(2), 193(2), 194 and 195 of the Industrial Property Act, 2012 (Act No. 1 of 2012).

6.2.2.2 The statute also indirectly protects consumers by granting the regulator certain powers regarding deceptive trade marks.⁶⁵

6.2.3. *Analysis:* Although the statute addresses misleading and deceptive statements relating to industrial property, the statute does not designate offenses or impose penalties for a number of the provisions.⁶⁶

6.2.3.1. Without a general offense and penalty provision, consumers have limited means to actually enforce these provisions.

6.2.3.2. In addition, the statute would better protect consumers if it included provisions related to information disclosure, especially as many Namibian consumers may not understand what industrial property means and what is encompassed.

6.3. **Standards Act, 2005 (Act No. 18 of 2005)**⁶⁷

6.3.1. The Standards Act, 2005 provides for the promotion, regulation, and maintenance of standardisation relating to the quality of commodities. It also establishes the Namibian Standards Institution and Namibian Standards Council.

6.3.1.1. Standards encompass rules, guidelines, specified uses, and characteristics of products, production processes, and management systems. For example, standards may address terminology, symbols, packaging, marking, or labelling as they apply to a particular product, process, or production method.⁶⁸

6.3.1.2. The Namibian Standards Institution (“NSI”) has the responsibility for the development, adoption, and application of standards in Namibia as

⁶⁵ Sections 190(1) and 197 of the Industrial Property Act, 2012,

⁶⁶ Sections 174, 191, 193, and 194 of the Industrial Property Act, 2012.

⁶⁷ Under Section 35 of the Standards Act, 2005 (Act No. 18 of 2005), which repeals the Standards Act, 1962 (Act No. 33 of 1962), regulations and notices under the previous Standards Act, 1962 continue to apply.

⁶⁸ <http://www.nsi.com.na/standards.php>.

well as for testing products, particularly food. The Namibian Standards Council (“NSC”), inaugurated in February 2011, governs the NSI.⁶⁹

- 6.3.1.3. The Standards Act, 2005 has not entered into operation yet, although the NSC and NSI are in operation.
- 6.3.2. At a high level, the NSI’s work—mandated by the Standards Act and regulations under it—protects consumers’ health and safety by ensuring a requisite level of product quality. The NSI tests foods, inspects factories and fishing vessels, and samples products. It also has a dedicated Metrology Division.
- 6.3.3. In addition to the work of the NSI, the Standards Act, 2005 itself has several direct and indirect provisions relating to consumer protection.
- 6.3.3.1. The statute prohibits falsely claiming compliance with a Namibian standard, making misleading statements regarding approval, and disclosing confidential information.⁷⁰ Claiming compliance with a Namibian standard or providing misleading information regarding standards may incur a fine to a maximum of N\$100,000 and/or imprisonment up to two years.
- 6.3.3.2. The indirect provisions under the statute relating to consumer protection grant authority to the NSI for the creation and enforcement of standards.⁷¹
- 6.3.4. *Analysis:* Although the work of the NSI contributes to the safety and quality of consumer products, the Standards Act, 2005 itself has limited provisions that directly protect consumers. Instead, the statute primarily addresses the establishment and functions of the NSI and the NSC.
- 6.3.4.1. The penalties for violations of the statute are higher than penalties under other Namibian statutes, ensuring greater deterrence and compliance.

⁶⁹ <http://www.nsi.com.na/aboutus.php>.

⁷⁰ Sections 26 and 28 of the Standards Act, 2005.

⁷¹ Sections 4(a); 5(2)(a), (f), (g), (i), (o) and 34(1)(a) of the Standards Act, 2005.

6.3.4.2. Consumers will most likely be affected by violations of this statute when a business falsely claims compliance with a standard or that it has been approved. As with trade metrology, however, consumers are unlikely to enforce any violations pertaining to compliance or approval because they must know what the applicable standards are. It is unlikely that the average consumer will have sufficient information about product standards to pursue a claim.

6.3.4.3. More importantly, the statute does not explicitly stipulate that standards, after being established, must be complied with by businesses. The NSI's website clearly states that compliance are not mandatory.⁷² Given that compliance is not mandatory, the statute does not guarantee quality and safety of products.

6.4. Competition Act, 2003 (Act No. 2 of 2003)⁷³

6.4.1. The Competition Act, 2003 provides for the safeguarding and promotion of competition in Namibia and establishes the Competition Commission (NaCC).

6.4.2. The Competition Act, 2003 does not have any direct consumer protection provisions, or even a general provision on unfair trade practices. The statute does, however, seek to provide consumers with competitive prices and product choices through enforcement of the statute's provisions.⁷⁴

6.4.3. As a general matter, competition policy offers some protection to consumers despite the lack of direct provisions in the Competition Act, 2003 itself. The protection that competition policy offers, however, is limited, especially in the context of consumer transactions.

6.4.3.1. Competition policy protects consumers by ensuring that markets remain competitive and that consumers have options. Consumers

⁷² <http://www.nsi.com.na/standards.php>.

⁷³ Competition Act, 2003 (Act No. 2 of 2003), as amended by the State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006). The Competition Act, 2003 replaces the Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955).

⁷⁴ Section 2 of the Competition Act, 2003 (Act No. 2 of 2003).

generally benefit from competitive markets through lower prices and better quality products and services.

6.4.3.2. Competition policy does not generally regulate the day-to-day transactions that consumers enter into with businesses. Consumer protection policy, on the other hand, seeks to guard the ability of consumers to make informed choices and to protect consumers from unfair commercial conduct that may not run afoul of competition law.

6.4.3.3. Further, in some instances, competition policy may actually harm consumers.⁷⁵

6.4.3.3.1. For instance, competition policy seeks to ensure that consumers have low prices through the proper functioning of the market. yet the goal of low prices applies across all products and industry sectors, even for such goods that are “bad” for consumers, such as tobacco, alcohol, and gambling. Similarly, competition policy will seek to maintain low prices for “status” goods—those premium goods that confer exclusivity and status but provide no actual consumer benefit.

6.4.3.3.2. The promotion of innovation under competition policy also may prove harmful to consumers. New innovations and technology offers may lead consumers to replace their old products that still have useful lives with the latest fad products, causing consumers to expend unnecessary money.

6.4.3.4. One economic school of thought that has heavily influenced the development of competition law—the Chicago School—does not view consumer welfare as the primary goal of competition policy. Instead, the Chicago School believes the goal of competition policy is to promote economic efficiency, both allocative and productive. Given that the Chicago School’s view of competition policy is to increase both

⁷⁵ Barak Y. Orbach, ‘The Antitrust Consumer Welfare Paradox’, *Journal for Competition Law and Economics* Vol: 7 (1). 133; International Competition Network, *Competition Enforcement and Consumer Welfare: Setting the Agenda Preamble* (Dec. 2011).

allocative and productive efficiency, its concern is the total wealth of society, which encompasses all market players, not just consumers.⁷⁶

Thus, if the goal of competition law is to maximize the welfare of society as a whole, consumers may be exploited by behaviour that contributes to all around economic efficiency.

6.4.4. In conclusion, the goals of competition policy may in some instances actually conflict with those of consumer protection. For the Competition Act, 2005 to sufficiently protect consumers and their interests, the statute would need to incorporate specific provisions addressing trade practices, privacy, information disclosure, and redress. The Competition Act, 2005 in its current form does not provide any meaningful consumer protection measures beyond a theoretical overall goal of ensuring low prices and product choice.

6.5. Trade Metrology Act, 1973 (Act No. 77 of 1973)⁷⁷

6.5.1. Metrology is the science of measurement. The Trade Metrology Act, 1973 consolidates various laws relating to trade metrology, measuring units, and measuring instruments.

6.5.2. The regulation of measurements helps ensure the transparency of consumer transactions, providing greater assurance to consumers that measurements are correct.

6.5.3. The Trade Metrology Act, 1973 has a number of direct consumer protection provisions. These provisions address the manufacture and sale of false, defective and inaccurate measurement instruments; statements that are false, incorrect, untrue, or misleading; the manner of entering in contracts; the

⁷⁶ John B. Kirkwood & Robert H. Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' Notre Dame Law Review Vol. 84 (2008). 191

⁷⁷ Trade Metrology Act, 1973 (Act No. 77 of 1973), as amended by Trade Metrology Amendment Act, 1995 (Act No. 14 of 1995) and Metrology Amendment Act, 2005 (Act No. 17 of 2005) (unclear if in force). Applicable to South West Africa by Section 45 of the Act, and transfer of administration through Transfer Proclamation (AAG 5/1978), dated 30th January 1978.

publication or circulation of catalogues concerning measuring units; and the manner of selling types of goods.⁷⁸

- 6.5.3.1. Section 43 of the statute is a general offense and penalty provision, offering consumers a form of redress. Failure to comply with the statute may result in a fine to a maximum of N\$2,000 or imprisonment up to six months.
- 6.5.4. *Analysis:* The provisions under the Trade Metrology Act, 1973 relevant to consumers focus on the economic interests of consumers, particularly in the context of improper trade practices and misleading statements.
- 6.5.4.1. Although the protection of consumers' economic interests is an important form of consumer protection, the statute does not address other substantive areas of consumer protection and is thus limited in scope. Moreover, the consumer protection provisions offered under this statute only apply in the very narrow sector of trade metrology and would have little import elsewhere.
- 6.5.4.2. The statute has a general offense provision, but the maximum fine of N\$2,000 is too low to serve any real deterrent value. And while there is the possibility of imprisonment, it seems unlikely that a judge would actually impose imprisonment for violations of this statute.
- 6.5.4.3. Finally, without the dissemination of information to consumers on metrology and measuring instruments, it will be difficult for consumers to know when a violation of the statute has occurred. Thus, the potential for enforcement, at least through the consumer channel, is low. It is our view that this is the least known statute by consumers in Namibia.

6.6. Trade Practices Act, 1976⁷⁹

⁷⁸ Sections 29, 37, 38(3), 39, 40 of the Trade Metrology Act, 1973 (Act No. 77 of 1973).

6.6.1. The Trade Practices Act, 1976 regulates advertisements, use of trade coupons, and other trade practices.

6.6.2. The provisions of the Trade Practices Act, 1976 directly relevant to consumer protection include prohibitions on the disclosure of confidential information, false or misleading advertisements or statements, connecting trade coupons to sales, and false or misleading indications of price.⁸⁰

6.6.2.1. The statute also indirectly prohibits trade practices that injure the relations between businesses and consumers and authorises the Secretary⁸¹ to impose conditions on trade prices that may have hurt these relations in certain circumstances.⁸²

6.6.2.2. Contraventions of the statute subject violators to a fine to a maximum of N\$2,000 and/or imprisonment up to two years.⁸³

6.6.3. *Analysis:* Although the statute offers measures relating to the protection of privacy, misleading and deceptive advertisements, and limitations on certain trade practices, it does not offer comprehensive consumer protection as one might expect from a trade act.

6.6.3.1. Further, the opportunity for consumer redress under the statute is significantly limited by the one-year statute of limitations. Consumers may not even be aware of a violation of the statute—let alone file a claim—within a year's time. And for one of the more important consumer protection elements under the statute—trade coupons supplied in contravention of the Act—Section 21 does not permit a right of action for a claim for some inexplicable reason.

⁷⁹ Trade Practices Act, 1976 (Act No. 76 of 1976), as amended in April 1978. Applicable to South West Africa by Section 23 of the Act, and transfer of administration through Executive Powers (Commerce) Transfer Proclamation (AG 28/1978), dated 28 April 1978. Applicable in Namibia by virtue of Article 140 of the Namibian Constitution.

⁸⁰ Sections 8, 9, 10, 13 of the Trade Practices Act, 1976 (Act No. 76 of 1976).

⁸¹ Section 1 of the Trade Practices Act, 1976 defines secretary as the Secretary of Commerce, now the Permanent Secretary of the Ministry of Trade.

⁸² Sections 15 and 17 of the Trade Practices Act, 1976 (Act No. 76 of 1976).

⁸³ Section 19 of the Trade Practices Act, 1976 (Act No. 76 of 1976),

6.6.3.2. The possible fines for violations of the statute are unreasonably low and outdated, ensuring that the statute will have little, if any, actual deterrent value.

6.6.4. It should also be noted that South Africa repealed this statute and replaced it with the Consumer Protection Act, 2008 (Act No. 68 of 2008).

6.7. Price Control Act, 1964⁸⁴

6.7.1. The Price Control Act, 1964 allows for state control of the price of goods and services.

6.7.2. The Price Control Act, 1964 only has indirect provisions relating to consumer protection, granting the Controller⁸⁵ power to issue certain regulations and impose fines for excess prices. The statute does not prohibit any specific conduct. Instead, the statute's provisions dictate what actions the Controller may take regarding prices by publishing a notice in the Gazette.

6.7.2.1. If the Controller issues a notice and an individual or business fails to comply, the violator is subject to a fine to a maximum of N\$2,000 and/or imprisonment up to two years.⁸⁶

6.7.3. *Analysis:* The statute offers little protection for consumers. Although issued regulations may offer additional protection, the redress opportunity under these regulations may be limited. For example, for a consumer to seek redress, the consumer must rely on the Controller first issuing a regulation.

⁸⁴ Price Control Act, 1964 (Act No. 25 of 1964), as amended in April 1978. Applicable to South West Africa by section 21 of the Act and transfer of administration through Executive Powers (Commerce) Transfer Proclamation (AG 28/1977), dated 28 April 1978.

⁸⁵ Section 1 of the Price Control Act, 1964 defines Controller as any official appointed as such by the Minister of Trade and Industry. If such portfolio no longer exists, it is because it has become redundant or because the function of a controller has been incorporated into another portfolio.

⁸⁶ Section 18 of the Price Control Act, 1964 (Act No. 25 of 1964).

- 6.7.3.1. Further, there are a significant number of government notices that have been issued under the statute. Consumers would need to locate the relevant regulation before seeking any relief—a task that could prove quite difficult.
- 6.7.4. As with other remaining South African laws that are still valid, the fines are too low to provide any real level of deterrence, and the imposition of a prison sentence for violations of this statute seems unlikely.

7. Health and Agriculture Statutes

7.1. Overview of Statutes

7.1.1. This section identifies and discusses elements of consumer protection in the following statutes related to health and agriculture: Prevention of Undesirable Residue in Meat Act, 1991 (Act No. 21 of 1991); Control of the Importation and Exportation of Dairy Products and Dairy Product Substitutes Act, 1989 (Act No. 5 of 1986); Meat Industry Act, 1981 (Act No. 12 of 1981); Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance 18 of 1979); and Public Health Act, 1919 (Act No. 36 of 1919).

7.1.2. The Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 appears to be the only generally applicable food safety law. As discussed below, this statute is outdated and does not come close to providing the protection that a generally applicable food safety statute should to consumers. Although Namibia also has the Control of the Importation and Exportation of Dairy Products Substitutes Act, 1986 (Act No. 5 of 1986) and two meat statutes, these statutes have a narrow focus and do not fill in the gaps left by the Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979. Further, the three substances addressed in the Ordinance—foodstuffs, cosmetics, and disinfectants—should each have their own statute and not be addressed together given the differing concerns that accompany each.

7.1.3. In addition, Namibia does not have an effective statute in force relating to safety as far as sanitation and public services are concerned. As discussed in more detail below, the only relevant statute—the Public Health Act, 1919 (Act No. 36 of 1919)—is extremely outdated and provides little as far as actual consumer protection.

7.2. Prevention of Undesirable Residue in Meat Act, 1991⁸⁷

7.2.1. The Prevention of Undesirable Residue in Meat Act, 1991 controls the administration of certain products to animals that may cause residue in meat

⁸⁷ Prevention of Undesirable Residue in Meat Act, 1991 (Act No. 21 of 1991), as amended by Prevention of Undesirable Residue in Meat Act, 1994 (Act No. 11 of 1994).

and meat products. It also regulates the marketing of meat and meat products.

7.2.2. The statute directly prohibits the administration of certain substances to animals and the slaughtering of those animals, subjecting violators to a fine to a maximum of N\$2,000 and/or imprisonment up to six months on the first conviction.⁸⁸ The Minister also may make regulations regarding the manufacture and marketing of meat and meat products.⁸⁹

7.2.3. *Analysis:* This statute contributes generally to the safety and quality of meat products for Namibian consumers. It only applies to the meat industry, however, and thus is very narrow in scope.

7.2.3.1. Moreover, the fines under the statute are too low and are likely not to have any real deterrent value. Imprisonment would likely not be imposed.

7.2.3.2. As with the Meat Industry Act, 1981 discussed below, there is little chance of consumer enforcement because consumers realistically do not have the means to test meat and meat products to ensure compliance. But there is the possibility that consumers could bring a claim if they found something foreign in their meat.

7.3. Control of the Importation and Exportation of Dairy Products and Dairy Product Substitutes Act, 1986⁹⁰

7.3.1. The Control of the Importation and Exportation of Dairy Products and Dairy Products Substitutes Act, 1986 does exactly what the title implies—it controls the import and export of dairy products and dairy substitutes.

7.3.2. There are no direct consumer protection provisions under the statute but instead a general provision that authorises the Cabinet to prohibit the importation or exportation of any dairy product or dairy product substitute.⁹¹

⁸⁸ Section 4, 5 of the Prevention of Undesirable Residue in Meat Act, 1991 (Act No. 21 of 1991) ,

⁸⁹ Section 16 of the Prevention of Undesirable Residue in Meat Act, 1991 (Act No. 21 of 1991),

⁹⁰ Control of the Importation and Exportation of Dairy Products and Dairy Product Substitutes Act, 1986 (Act No. 5 of 1986)

7.3.3. *Analysis:* As with other food-related statutes, this statute should ensure a minimum level of safety and quality for consumers. Instead, the consumer is left to rely on the Cabinet taking action. The intent of this statute, moreover, does not seem to be safety or quality but protectionism of the Namibian dairy industry.

7.4. Meat Industry Act, 1981⁹²

7.4.1. The Meat Industry Act, 1981 establishes a Namibian meat board and provides for control over the grading, sale, importation, exportation, and imposition of levies for livestock, meat, and meat products.

7.4.2. Any provisions relevant to consumer protection are indirect in nature, granting the Minister the power to prohibit certain sales or to issue regulations on prices or processing of products.⁹³

7.4.3. *Analysis:* Although this statute does ensure a level of safety and quality in consumers' meat and meat products, the statute does not explicitly prohibit conduct that would be relevant to consumers.

7.4.3.1. If a manufacturer violates the prohibitions or regulations that the Minister issues, there may be the possibility for a consumer to file a claim. Again, it would be difficult for a consumer to know what prohibitions and regulations the Minister has separately issued and when a manufacturer has violated those regulations.

7.4.3.2. Because consumer enforcement of this statute is unlikely, any consumer protection provided under the statute would be through measures the government takes.

7.5. Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979⁹⁴

⁹¹ Section 2 of the Control of the Importation and Exportation of Dairy Products and Dairy Product Substitutes Act, 1986 (Act No. 5 of 1986).

⁹² Meat Industry Act, 1981 (Act No.12 of 1981), as amended by Act 3/1987, Meat Industry Amendment Act, 1992 (Act No. 21 of 1992), and the Stated-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006).

⁹³ Sections 18, 19, 20, 24 of the Meat Industry Act, 1981 (Act No. 12 of 1981).

7.5.1. The Foodstuffs, Cosmetics and Disinfectants Ordinance controls the sale, manufacture and import of foodstuffs,⁹⁵ cosmetics, and disinfectants.

7.5.2. The statute has several provisions that directly protect consumers. For example, the statute prohibits the following: the sale, manufacture, or importation for sale of any foodstuff, cosmetic, or disinfectant that is contaminated or has been treated with a substance that is prohibited or injurious to human health; the sale of a foodstuff that is a mixture of different foodstuffs if it does not bear a label indicating the mixture; the use of certain prohibited processes or methods in connection with the manufacture of foodstuffs, cosmetics, or disinfectants; the publication of false or misleading advertisements; and the furnishing of a false or misleading warning.⁹⁶

7.5.2.1. To supplement these provisions, the Executive Committee⁹⁷ may make regulations prescribing the nature, composition, standards, use or methods, names under which sold, and prohibition of sales of certain foodstuffs, cosmetics, and disinfectants. The Secretary⁹⁸ may also designate health inspectors to inspect or analyse samples.⁹⁹

7.5.2.2. For the first contravention of and conviction under the Ordinance, violators may incur a fine to a maximum of N\$500 and/or imprisonment up to six months. For subsequent convictions, the fine will increase to a maximum of N\$2,000 and/or imprisonment up to two years.¹⁰⁰

7.5.3. *Analysis:*

⁹⁴ Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance No. 18 of 1979), extended to all of South West Africa by the Health Act, 1988 (Act No. 21 of 1988).

⁹⁵ Section 1 of the Ordinance defines "Foodstuff" as "any article or substance (except a medicine) ordinarily eaten or drunk by man, or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance".

⁹⁶ Sections 2, 3, 4, 5, 7(2) of the Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance No.18 of 1979).

⁹⁷ Present day the Cabinet of the Republic of Namibia.

⁹⁸ Referring to the Permanent Secretary of the Ministry of Health and Social Services.

⁹⁹ Sections 10, 12, 15 of the Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance No.18 of 1979).

¹⁰⁰ Section 18 of the Foodstuffs, Cosmetics and Disinfectants Ordinance 1979 (Ordinance No. 18 of 1979).

- 7.5.3.1. This statute is outdated and just skims the surface on the regulation of food, cosmetics, and disinfectants. As an initial matter, consumer safety is a serious concern with each of these substances, so the regulation of them should not all be grouped together but separated out—through separate statutes or sections within the same statute—to adequately address the unique attributes and concerns with each type of substance.
- 7.5.3.2. The Ordinance is so old that some foodstuff being sold and consumed in Namibia were not envisaged at the time the Ordinance came into force. Efforts made towards defining ‘sugar’ and ‘sweeteners’ today reveals legislative gaps.
- 7.5.3.3. In addition, as with many of the statutes that are still in force from the South African dispensation, the monetary penalties are far too low to serve any real deterrent effect. In addition, it would be difficult for an ordinary consumer to actually enforce the Ordinance because of the procedures for prosecuting violations of the Ordinance laid out under Section 22. This section requires that prosecutions provide samples or a report of an inspector or analyst, leaving enforcement almost entirely up to the government.¹⁰¹
- 7.5.3.4. Finally, the statute of limitations under the Ordinance where samples may be involved is sixty to ninety days.¹⁰² As just explained, samples play a significant role in the enforcement of the Ordinance so identifying and prosecuting alleged violators may be low given these time constraints.
- 7.5.3.5. The Standards Act, 2005 may offer some protection in the realm of food, cosmetics, or disinfectant safety if a relevant standard has been issued. The issuance of standards, however, does not negate the need for an updated, generally applicable food statute.

¹⁰¹ Section 18 of the Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance No. 18 of 1979).

¹⁰² Section 20 of the Foodstuffs, Cosmetics and Disinfectants Ordinance, 1979 (Ordinance No. 18 of 1979).

7.6. Public Health Act, 1919¹⁰³

7.6.1. The Public Health Act, 1919 regulates sanitation, food, and public water supplies. This statute vests considerable power with local authorities to regulate pollution and waste handling as well as preventing conditions that may be harmful to the health of people living within their locality.

7.6.2. *Analysis:* The Public Health Act, 1919 is considered outdated and contains discriminatory provisions based on race. In addition to the racial discrimination concerns, it is also concerning from a consumer protection standpoint to leave regulations and enforcement of vital public services to local authorities alone.

7.6.2.1. South Africa replaced this statute with the Health Act 63 of 1977, but this statute was not made expressly applicable to South West Africa and would not have applied automatically. The Supreme Court of South West Africa in *Binga v Cabinet for South West Africa and Others*¹⁰⁴ held that in the new Section 38(1) of the Constitution of South West Africa Act, 1968 (Act No. 39 of 1968) the South African Parliament conferred on the State President full or plenary legislative powers in respect of South West Africa, which were as wide as those possessed by the South African Parliament itself, subject to the limitations imposed by the provisions of section 38(6) and (7).

7.6.2.2. Namibian consumers would similarly benefit from a new, generally applicable public health statute.

¹⁰³ Public Health Act, 1919 (Act No. 36 of 1919). Applicable to South West Africa and amended by South African Public Health Proclamation, 1920 (Proclamation No. 36 of 1920) and transfer of administration through Executive Powers (Health) Transfer Proclamation (AG 14/1977), dated 1 December 1977, still applicable in Namibia by virtue of Article 140 of the Namibian Constitution.

¹⁰⁴ 1988 (3) SA 155 (A) at p 183G-184A.

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8. Medicine and Medical Professions Statutes

8.1. Overview of Medicine Statutes

8.1.1. This section identifies and discusses elements of consumer protection in the following statutes related to medicine and medical professions: Medical and Dental Act, 2004 (Act No. 10 of 2004); Nursing Act, 2004 (Act No. 8 of 2004); Allied Health Professions Act, 2004 (Act No. 7 of 2004); Pharmacy Act, 2004 (Act No. 9 of 2004); and Medicine and Related Substances Control Act, 2003 (Act No. 13 of 2003).

8.2. Medical and Dental Act, 2004,¹⁰⁵ Nursing Act, 2004¹⁰⁶ and Allied Health Professions Act, 2004¹⁰⁷

8.2.1. These three statutes have almost identical provisions relating to consumer protection, so it is more expedient to discuss the statutes' relevant provisions together.

8.2.2. Overview of Statutes

8.2.2.1. The Medical and Dental Act, 2004 establishes a council for medical and dental professions and regulates the registration and practice of practitioners.

8.2.2.2. The Nursing Act, 2004 establishes a nursing council and regulates the registration and practice of nursing professionals.

8.2.2.3. The Allied Health Professionals Act, 2004 establishes an allied health professionals council and regulates the registration and practice of allied health professionals

8.2.2.4. A number of regulations have been promulgated under each of the three statutes that would be relevant to consumer protection. In

¹⁰⁵ Medical and Dental Act, 2004 (Act No. 10 of 2004), repealing Medical and Dental Professions Act, 1993 (Act No. 21 of 1993) and the Allied Health Services Professions Act, 1993 (Act No. 20 of 1993).

¹⁰⁶ Nursing Act, 2004 (Act No. 8 of 2004), repealing the Nursing Professions Act, 1993 (Act No. 30 of 1993).

¹⁰⁷ Allied Health Professions Act, 2004 (Act No. 7 of 2004), repealing the Allied Health Professions Act, 1993 (Act No. 20 of 1993).

addition, all regulations made under previous statutes that were repealed by these statutes remain in force, so long as they are not inconsistent with the relevant statute.

8.2.3. The statutes have two provisions that directly protect consumers.

8.2.3.1. Each statute establishes a process for determining fees that will be charged for care and requires practitioners to inform patients of the fees that will be assessed before rendering services. If the patient disputes a charge, he or she may apply within three months of the receipt to the relevant professional council for a determination of the fee that should have been charged. Practitioners are not allowed to institute legal proceedings against a patient for payment until the council has made its determination.¹⁰⁸

8.2.3.2. The statutes also specify that it is an offence to hold oneself out in a manner or use a title that would lead persons to infer that the practitioner is registered or holds a qualification that he or she does not.¹⁰⁹ If a person violates this provision, he or she may incur a fine to a maximum of N\$20,000 and/or imprisonment up to five years.¹¹⁰

8.2.4. *Analysis:* These statutes protect consumers' economic interests by requiring the up-front dissemination of information about fees, by offering a means of redress, and by preventing deceptive conduct on the part of practitioners in how they present their qualifications. Nevertheless, although the statutes offer some protection to consumers, the statutes have several significant shortcomings in the consumer protection context.

8.2.4.1. First, the statutes primarily focus on the oversight and registration of practitioners. The provisions that do offer consumer protection likely

¹⁰⁸ Section 50 of the Medical and Dental Act, 2004 (Act No. 10 of 2004); section 51 of the Nursing Act, 2004 (Act No. 8 of 2004) and section 48 of the Allied Health Professions Act, 2004 (Act No. 7 of 2004).

¹⁰⁹ Sections 34-36 of the Medical and Dental Act, 2004 (Act No. 10 of 2004); sections 35-36 of the Nursing Act, 2004 (Act No. 8 of 2004) and section 34(4) of the Allied Health Professions Act, 2004 (Act No. 7 of 2004).

¹¹⁰ Section 61(b) of the Medical and Dental Act, 2004 (Act No. 10 of 2004); section 61 of the Nursing Act, 2004 (Act No. 8 of 2004) and section 57 (b) of the Allied Health Professions Act, 2004 (Act No. 7 of 2004).

derive from the general object of the statutes—to regulate the health professions—and not from the goal of protecting consumers.

8.2.4.2. Second, the statutes do not address a number of substantive consumer protection issues that are particularly relevant in the healthcare sector, namely patient safety, quality of care, patient privacy, and greater provision of information to patients on services and care.

8.3. **Pharmacy Act, 2004**¹¹¹

8.3.1. The Pharmacy Act, 2004 establishes a council for the pharmacy profession and regulates the registration and practice of pharmacists.

8.3.2. The statute is similar in some ways to the other medical practitioner statutes discussed above, though the consumer protection provisions are slightly different.

8.3.3. The statute's provisions directly addressing consumer protection prohibit conducting business as a pharmacist under a misleading name, holding oneself out to be a pharmacist if not registered or entitled to practice, and assessing excessive charges for articles supplied.¹¹² Each provision has its own separate offense and liability provision, with sanctions ranging from a reprimand to a fine of N\$20,000 to imprisonment up to five years.¹¹³

8.3.4. *Analysis:* As with the other medical practitioner statutes, the Pharmacy Act, 2004 focuses more on the regulation of pharmacists than on protecting the patients/consumers of pharmacists. The provisions relating to consumer protection focus on ensuring that pharmacists do not mislead the public in how they present their practice credentials.

8.3.4.1. This statute lacks several essential protections, including provisions ensuring consumer privacy, obligating pharmacists to disclose

¹¹¹ Pharmacy Act, 2004 (Act No. 9 of 2004), repealing the Pharmacy Act, 1993 (Act No. 23 of 1993).

¹¹² Sections 40, 43, 44, 57 of the Pharmacy Act, 2004 (Act No. 9 of 2004),

¹¹³ Sections 50, 68(a)-(b) of the Pharmacy Act, 2004 (Act No. 9 of 2004).

information to patients, and specifying improper trade practices in the sale of pharmaceutical products.

- 8.3.4.2. In addition, when pharmacists charge patients excessive fees, there is no direct redress for consumers. Instead, the Council may hold the pharmacist liable under professional conduct penalties, which include reprimands, suspension, removal from registration, and fines.

8.4. Medicines and Related Substances Control Act, 2003¹¹⁴

- 8.4.1. The Medicines and Related Substances Control Act, 2003 establishes the Namibia Medicines Regulatory Council and provides for the registration and control of medicines and related substances.

- 8.4.2. The statute has several direct consumer protection provisions, including labelling requirements, prohibitions of false or misleading advertisements, prohibitions of false or misleading statements during a sale, and the substitution of generic medicines.¹¹⁵

- 8.4.2.1. The penalties are higher for contravention of this statute as compared to others, subjecting alleged violators to a fine to a maximum of N\$40,000 and/or imprisonment up to ten years.¹¹⁶

- 8.4.2.2. In addition, the statute also grants the Council other powers related to medicines and scheduled substances that could potentially result in further protection to consumers. A number of regulations have been promulgated under the statute, and under the previous statute, that still remain in force.

- 8.4.3. *Analysis:* The Medicines and Related Substances Control Act, 2003 covers several important areas of consumer protection. By protecting the economic interests of consumers—primarily through the prohibitions of false and

¹¹⁴ Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003), as amended by Medicines and Related Substances Control Amendment Act, 2007 (Act No. 8 of 2007). The Medicines and Related Substances Control Act replaced the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965).

¹¹⁵ Sections 24, 26, 30, 38(g)-(h) of the Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003).

¹¹⁶ Section 39 of the Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003).

misleading statements in labelling or advertising—the statute ensures a baseline level of safety and quality in medicines.

- 8.4.3.1. The statute also allows for generic medicine substitution, ensuring consumers will pay lower prices for medicines.
- 8.4.3.2. Its high penalties for non-compliance also more effectively deter would-be violators than many other statutes.
- 8.4.3.3. The statute still has room for improvement in the consumer protection context. Provisions addressing disclosure of information and product safety, including medicine recalls, would make the statute even stronger.
- 8.4.3.4. Nevertheless, the Medicine and Related Substances Control Act, 2003 is currently one of the better existing Namibian statutes protecting consumers.

9. Industry Sectors with Consumer Protection

9.1. Overview of Consumer Protection in the Financial & Banking Industries

- 9.1.1. The banking and financial sectors have been active in implementing some consumer protection measures and trying to foster an environment of financial inclusion and literacy.
- 9.1.2. In 2007, a FinScope Consumer Survey showed that over 51% of the Namibian population was financially excluded. Namibia increased its efforts aimed at financial inclusion, and the 2011 FinScope Consumer Survey revealed that the financial exclusion rate had decreased to 31%. The decrease in exclusion reflected progress, but there is still significant room for improvement.
 - 9.1.2.1. The NamPost Smartcard is likely a significant factor leading to greater financial inclusion. The Smartcard is an affordable savings account available to any Namibian. NamPost has around 134 branches around

the country, serving a greater percent of the population than many of the banking institutions.

- 9.1.2.2. The Basic Bank Account also likely has contributed to greater financial inclusion. In 2012, the Bank of Namibia required all banking institutions to launch and implement a basic bank account. The bank account is intended for individuals earning N\$2,000 per month or less, and banking institutions cannot require individuals to offer proof of income to open the account. There is no monthly or account management fee, and banking institutions may not charge fees for the first N\$2,000 in cash deposits.
- 9.1.2.3. Although the Basic Bank Account was not implemented prior to the 2011 Survey, at least one Namibian banking institution offered a similar type of bank account prior to 2011.
- 9.1.3. In 2011, Namibia implemented the Financial Sector Strategy—a 10-year strategy that addresses the weaknesses in the Namibian financial system.
- 9.1.3.1. The Strategy identifies low financial literacy and lack of consumer protection as key weaknesses in the Namibian financial system.
- 9.1.3.2. The Strategy also presents various outcomes that it seeks to achieve, including implementing a consumer protection legal framework, improving the financial literacy rate, and improving access to financial services and products. The Survey is important for consumer protection, as it has led to a number of consumer protection initiatives by banking and financial institutions.
- 9.1.4. The Financial Literacy Initiative is one of the key outcomes of the Financial Sector Strategy. The Ministry of Finance launched the Financial Literacy Initiative (“FLI”) in 2012 as a national platform to enhance financial education for individuals and micro, small, and medium enterprises.¹¹⁷

¹¹⁷ Interview with Financial Literacy Initiative, 21 October 2013.

- 9.1.4.1. FLI is a small institution, with currently only three employees and one consultant on staff.
- 9.1.4.2. Each year, FLI identifies a target population that it will focus on in that year. In its first year, FLI's target population was the low-income public—those earning less than N\$3,000 per month. For 2013, FLI focused on micro/small/medium enterprises, and its secondary focus was the public and youth.
- 9.1.4.3. Although FLI currently does not have the resources to undertake comprehensive consumer education and other protection initiatives, it has been actively disseminating various consumer related information to the public and has been largely successful in this endeavour given its resource constraints.
- 9.1.4.4. To reach consumers, FLI largely relies on media outlets.
 - 9.1.4.4.1. FLI hosts a weekly radio show on NBC National that focuses on both enterprise and consumer education. It also has also broadcast a series of television episodes and conducted road shows in the regions. Its goal is to reach every region at least once in a year.
 - 9.1.4.4.2. FLI disseminates various posters, advertisements, and booklets to the public. FLI makes its materials available on its website, and it has published its booklets in seven languages.
- 9.1.4.5. FLI attempted to implement a teacher-training program to encourage teachers to start extracurricular savings clubs at their schools. Unfortunately the program was not as successful as FLI hoped, so FLI is in the process of reevaluating the program to determine the best way forward.

- 9.1.4.6. FLI is also working on developing an educational model that the Namibia Association of Business Coalition may incorporate into its workplace program.¹¹⁸

9.2. Banking Industry

9.2.1. Overview

- 9.2.1.1. The banking industry has taken a number of steps towards improving consumer protection. Although the relevant banking statutes themselves only provide minimal consumer protection, there are various other bank-related initiatives that have been implemented that offer a greater range of protections to consumers.
- 9.2.1.2. This section first presents the relevant statutes, determinations, and initiatives. The report then analyses the consumer protection framework in the banking sector as a whole.

9.2.2. Bank of Namibia Act, 1997¹¹⁹

- 9.2.2.1. The Bank of Namibia Act, 1997 appoints the central bank to control the money supply, currency, and institutions of finance. This Act should be read with Article 128 of the Namibian Constitution.
- 9.2.2.2. The statute has minimal consumer protection provisions. Section 12 of the Bank of Namibia Act, 1997 generally protects information from disclosure, which presumably encompasses the information of consumers. Although the statute obligates banking institutions to disclose certain information to the public,¹²⁰ such as its annual interest rate and terms of credit, the statute does not provide for liability or penalties for contravening this provision.

¹¹⁸ Interview with Financial Literacy Initiative, 21 October 2013.

¹¹⁹ Bank of Namibia Act, 1997 (Act No. 15 of 1997), as amended by Bank of Namibia Amendment Act, 2004 (Act No. 11 of 2004). The Bank of Namibia Act, 1997 (Act No.15 of 1997) replaced the Bank of Namibia Act, 1990 (Act No. 8 of 1990).

¹²⁰ Section 37 of the Bank of Namibia Act, 1997 (Act No. 15 of 1997).

9.2.3. Banking Institutions Act, 1998¹²¹

9.2.3.1. The Banking Institutions Act, 1998 provides for the control, supervision, and regulation of banking institutions as well as for the protection of the interests of persons making deposits with banking institutions.

9.2.3.2. The Banking Institutions Act, 1998 has both direct and indirect consumer protection provisions.

9.2.3.2.1. The statute protects the confidentiality of consumer information, providing that banking institutions may not disclose information on consumers and that the Bank of Namibia itself cannot disclose the particulars of customers in publishing information.¹²² In addition, the statute prohibits pyramid schemes and requires banking institutions to have insurance or special reserve accounts to compensate customers for negligence, dishonesty, or fraud on the part of the bank.¹²³

9.2.3.2.2. The statute also grants the Bank of Namibia certain powers that could protect consumers, such as ordering institutions to repay money to consumers in certain situations, publishing information regarding those authorised to conduct banking business, and taking various actions if the Bank believes that a banking institution is conducting its business in a manner detrimental to customers and the general public.¹²⁴

9.2.3.2.3. If banking institutions violate any of the provisions pertaining to them, they may be subject to a fine to a maximum of N\$1,000,000 and/or imprisonment up to ten years.¹²⁵

¹²¹ Banking Institutions Act, 1998 (Act No. 2 of 1998) which replaces the Banks Act, 1965 (Act No. 23 of 1965).

¹²² Sections 11, 64(7), and 65 of the Banking Institutions Act, 1998 (Act No. 2 of 1998).

¹²³ sections 63, 55A of the Banking Institutions Act, 1998 (Act No. 2 of 1998).

¹²⁴ Sections 7 (1), 18, 56, 15 (1) (e) Banking Institutions Act, 1998 (Act No. 2 of 1998).

¹²⁵ Sections 72 and 73 of the Banking Institutions Act, 1998 (Act No. 2 of 1998).

9.2.3.3. Under the statute, the Minister may make regulations relating to unfair terms in transactions or contracts between banking institutions and their customers.¹²⁶ The Bank of Namibia is in the process of drafting such regulations but has not issued them yet.¹²⁷

9.2.4. Determinations on the Disclosure of Bank Charges, Fees, and Commission (“BID-13”)¹²⁸

9.2.4.1. Section 71(3) of the Banking Institutions Act, 1998 authorises the Bank of Namibia to make determinations under the statute by notice in the Gazette. The Bank of Namibia issued the Determinations on the Disclosure of Bank Charges, Fees, and Commission (“BID-13”) on the 1st March 1999.

9.2.4.2. The BID-13 Determinations focus on information disclosure to consumers and redress for consumer complaints.

9.2.4.2.1. The Determinations require banking institutions to conspicuously display and regularly update their bank charges on display boards and prohibit the charging of fees that are in excess of what is displayed.¹²⁹ The banking institutions also must annually submit a copy of their disclosure documents.¹³⁰

9.2.4.2.2. In addition to disclosure, the Determinations require banking institutions to establish procedures and policies for handling customer complaints and to inform customers of those procedures.¹³¹

¹²⁶ Section 71 of the Banking Institutions Act, 1998 (Act No. 2 of 1998).

¹²⁷ Interview with Bank of Namibia, 25 October 2013.

¹²⁸ Determinations on the Disclosure of Bank Charges, Fees and Commission (BID-13), General Notice 89/1999 (GG 2105), Namibia.

¹²⁹ Determinations on the Disclosure of Bank Charges, Fees, and Commission (BID-13), section 2.1, 2.2.

¹³⁰ Determinations on the Disclosure of Bank Charges, Fees, and Commission (BID-13), section 3.

¹³¹ Determinations on the Disclosure of Bank Charges, Fees, and Commission (BID-13), section 4.

9.2.4.3. Failure to comply with Bank determinations may result in a penalty to a maximum of N\$50,000 and/or imprisonment of up to 18 months.¹³²

9.2.5. Bank of Namibia Guidelines for Lodging Customer Complaints¹³³

9.2.5.1. The Bank of Namibia Guidelines on Consumer Complaints were launched on the 28th February 2013.¹³⁴ The Guidelines—another important outcome of the Financial Sector Strategy—establish a complaints handling procedure through the Bank of Namibia (“BoN”) for clients of commercial banks.

9.2.5.1.1. Under the guidelines, a complaining customer must exhaust the complaints resolution process of his or her commercial bank before raising the complaint to the BoN. The Guidelines establish time constraints for when complaints must be submitted and responses filed.

9.2.5.1.2. If a customer or banking institution is not satisfied with the BoN’s decision, it may seek redress before a court.

9.2.5.2. There is at least some public awareness of the availability of the complaints procedure through the Bank of Namibia. When the BoN first published the Guidelines, it issued media releases advertising the availability of the Guidelines but has not done any recent media campaigns. The Guidelines are currently only available in English.¹³⁵

9.2.5.3. The BoN estimates that it receives fewer than ten complaints a month on average. Most complaints that the Bank receives are related to poor customer service, though a few relate to disclosure of information or misrepresentation of contract terms.

¹³² Section 71 (5) of the Banking Institutions Act, 1998 (Act No. 2 of 1998).

¹³³ Interview with Bank of Namibia, 25 October 2013.

¹³⁴ Bank of Namibia and Bankers Association of Namibia Joint Media Statement, 28th February 2013, available at <https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/80/806d57b0-dbc1-423a-ba54-3eafba730ffe.pdf>, accessed 24 March 2014.

¹³⁵ Interview with Bank of Namibia, 25 October 2013.

- 9.2.5.4. Banking institutions must submit quarterly reports detailing all complaints that have been lodged and how these have been resolved. The Bank of Namibia then analyses these reports.
- 9.2.5.5. Overall, the BoN considers the complaints procedure to have been effective. The BoN typically resolves the complaints in a shorter time frame than required under the Guidelines.¹³⁶
- 9.2.5.6. On a final note, there is currently a Financial Ombudsman Bill that has been forwarded to the Minister of Finance. If this bill is passed, the complaints procedure through the BoN will end, and the Ombudsman will be responsible for all complaints in the financial and banking sectors.

9.2.6. Code of Banking Practice

- 9.2.6.1. The Bank of Namibia and the Bankers Association of Namibia launched the Code of Banking Practice together with the Guidelines for Lodging Customer Complaints discussed above on the 28th February 2013. The Code is a voluntary code for the banking industry that establishes standards of good banking practices for financial institutions to follow when dealing with customers.
- 9.2.6.2. The Code's objectives include increasing transparency and the speedy and effective handling and resolution of complaints. Banking institutions undertake to promote better-informed decisions about banking products and services, provide information to consumers in plain and understandable language, and advise consumers of their rights.
- 9.2.6.3. The Code has a number of standards directly addressing consumer protection, including ensuring terms and conditions are fair; using legal and technical language only when necessary; making information available on services, products, charges, interests, and fees; maintaining the confidentiality of consumers' personal and account

¹³⁶ Interview with Bank of Namibia, 25 October 2013.

information; and ensuring that all advertising and promotion material is clear, fair, reasonable, and not misleading.¹³⁷

- 9.2.6.4. The standards also provide that banking institutions must have an internal dispute resolution process and establish a timeframe for acknowledging and investigating complaints.¹³⁸

9.2.7. Analysis of Banking Industry & Consumer Protection

- 9.2.7.1. The various statutes, determinations, and initiatives in the banking industry address several key elements of consumer protection. For example, the BID-13 Determinations ensure information disclosure by banking institutions so that consumers know the fees they must pay up front. The Determinations also require banking institutions to have a complaint handling process, which the Code of Banking Practice specifies in more detail. The Bank of Namibia Guidelines provide consumers a means of appealing complaints that they believe are not adequately handled by their banking institutions. The BoN Guidelines also ensure a level of oversight of banking institutions by the central bank.

- 9.2.7.2. In addition, the BoN is working on draft regulations relating to unfair contract terms in contracts, authorised under Section 71 of the Banking Institutions Amendment Act, 2010.

- 9.2.7.3. Despite the various protections that the banking industry offers consumers, there are still a number of issues in the banking industry that could be addressed, either through amendments to the statutes, passage of further determinations, or other initiatives.

- 9.2.7.3.1. Both the Bank of Namibia and the banking institutions could undertake more efforts to provide consumers information and to ensure that the information provided is in plain and understandable language. Many consumers still complain about

¹³⁷ Code of Banking Practice, pages 6-9.

¹³⁸ Code of Banking Practice, page 22.

banking institutions and their practices relating to fees and other charges. Although English is the official language of Namibia, it would be advisable for the Bank of Namibia and the banking institutions to offer information to consumers in other widely spoken languages. Banking institutions boast that they have staff who can speak multiple languages in their branches, yet their documents are only available in English.

9.2.7.3.2. The Banking Institutions Act, 1998 could go even further in addressing improper trade practices. Currently, the statute only identifies pyramid schemes, but there are many other acts that banking institutions may engage in that are likely considered improper or unfair to consumers.

9.2.7.3.3. As mentioned, the Code of Banking Practice is voluntary. Although it appears that banking institutions are earnestly trying to comply with the Code,¹³⁹ the Code would provide better protection to consumers if it were made mandatory or incorporated into legislation.

9.3. Non-Banking Financial Industry

9.3.1. Overview of the Non-Banking Financial Sector

9.3.1.1. The Namibia Financial Institutions Supervisory Authority (“NAMFISA”) regulates and supervises a number of financial institutions, including pension and retirement funds, insurance, medical aid schemes, friendly societies, unit trust management schemes, stock exchange, asset managers, micro-lenders, and hire purchase outlets.

9.3.1.2. This section identifies and analyses the relevant statutes that fall under NAMFISA’s authority that have elements of consumer protection. At the end, this discussion document discusses other initiatives in the financial sector relevant to consumer protection.

¹³⁹ The four major banks in Namibia were contacted for interviews. All of the banks except one—First National Bank Limited—were willing to discuss consumer protection and the initiatives they have taken.

9.3.2. Namibia Financial Institutions Supervisory Authority Act, 2001¹⁴⁰

9.3.2.1. The Namibia Financial Institutions Supervisory Authority Act, 2001 establishes an authority—NAMFISA—to supervise the business of financial institutions and financial services.

9.3.2.2. The statute has little pertaining to consumer protection. Although Section 30 of the Act limits the disclosure of information acquired in the performance of duties at NAMFISA—which presumably encompasses consumer information—the provision only restrains NAMFISA and does not apply to the greater financial industry. Moreover, violations of this section only subject alleged violators to a fine to a maximum of N\$4,000 and/or imprisonment up to two years.¹⁴¹

9.3.3. Payment System Management Act, 2003¹⁴²

9.3.3.1. The Payment Systems Management Act, 2003 provides for the management, administration, operation, regulation, oversight, and supervision of payment, clearing, and settlement systems.

9.3.3.2. This statute similarly offers little in terms of consumer protection. Section 11 of the statute protects confidential information, stipulating that persons cannot disclose confidential information acquired in the performance of duties. Contraventions of the statute may incur a fine to a maximum of N\$20,000 and/or imprisonment for up to five years.¹⁴³

9.3.3.3. Although privacy is the only element of consumer protection addressed under the statute, privacy is probably the most important area of consumer protection that a statute such as this should protect. However, despite the inclusion of a privacy provision in the statute, the question arises whether the statute's privacy provision goes far

¹⁴⁰ Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), as amended by The State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006).

¹⁴¹ Section 34 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001).

¹⁴² Payment Systems Management Act, 2003 (Act No. 18 of 2003), as amended by Payment System Management Amendment Act, 2010 (Act No. 6 of 2010).

¹⁴³ Section 17(b) of the Payment Systems Management Act, 2003 (Act No. 18 of 2003).

enough. Section 11 frames non-disclosure around “confidential information” yet the statute does not define what information constitutes “confidential information”. Further, Section 11 applies only to those working at the Bank of Namibia, limiting the scope of the statute and its applicability.

9.3.4. Short-Term Insurance Act, 1998¹⁴⁴ and Long-Term Insurance Act, 1998¹⁴⁵

9.3.4.1. The Short-Term Insurance Act, 1998 and the Long-Term Insurance Act, 1998 regulate the business of short-term and long-term insurance respectively and contain almost identical provisions on consumer protection.

9.3.4.2. Both statutes have provisions directly protecting consumers.

9.3.4.2.1. The statutes prohibit offering to lend money, rendering a service, leasing goods, or granting credit on the condition that a person also take out or make changes to a policy—commonly referred to as the tying of sales.¹⁴⁶

9.3.4.2.2. The statutes also prohibit insurers from making a statement that they know to be misleading, false, or deceptive or wilfully concealing any material facts to induce a person to enter an insurance policy or influence the exercise of rights.¹⁴⁷ Not only are those who contravene this provision liable to a fine and/or imprisonment, but the consumer also has the right to cancel the policy, get his or her money back, and be compensated for any loss.

¹⁴⁴ Short-term Insurance Act, 1998 (Act No. 4 of 1998), as amended by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001). The Short-term Insurance Act replaced the portions dealing with short-term insurance in the Insurance Act, 1943 (Act No. 27 of 1943).

¹⁴⁵ Long-term Insurance Act, 1998 (Act No. 5 of 1998), as amended by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001). The Long-term Insurance Act replaced the portions dealing with long-term insurance in the Insurance Act, 1943 (Act No. 27 of 1943).

¹⁴⁶ Section 60 of the Short-Term Insurance Act, 1998 (Act No. 4 of 1998) and Section 60 of the Long-Term Insurance, 1998 (Act No. 5 of 1998).

¹⁴⁷ Section 66 of the Short-Term Insurance Act, 1998 (Act No. 4 of 1998), and Section 67 of the Long-Term Insurance Act, 1998 (Act No. 5 of 1998).

- 9.3.4.3. The statutes also grant the Registrar certain powers that provide indirect protection to consumers. For example, the Registrar must ensure that the insurance applications are not misleading and may cancel the registration of insurers, insurance agents, or brokers who make a material misrepresentation to members of the public in connection with entering into a policy.¹⁴⁸
- 9.3.4.4. Although the statutes offer some protection of consumers' economic interests—specifically those relating to tying of sales and misleading or deceptive statements—several of these protections are indirect in form and only enforceable by the Registrar. The statutes have little otherwise regarding improper trade practices. Moreover, the statutes do not address consumer privacy, information disclosure, or contract terms in insurance policies.

9.3.5. Medical Aid Funds Act, 1995¹⁴⁹

- 9.3.5.1. The Medical Aid Funds Act, 1995 provides for the control and promotion of medical aid funds and establishes the Namibian Association of Medical Aid Funds.
- 9.3.5.2. The statute only has a few provisions relating to consumer protection.
- 9.3.5.2.1. The statute prohibits the use of names in association with medical aid funds that may mislead the public.¹⁵⁰
- 9.3.5.2.2. The statute also grants the Registrar the authority to notify funds that its business practices are irregular and undesirable, to declare those practices to be such in the Gazette, and to cancel

¹⁴⁸ Sections 16(2)(d), 17(11)(c) and 57(1)(b)(i) of the Short-Term Insurance Act, 1998 (Act No. 4 of 1998) and sections 16(2)(d), 17(11)(c) and 59(1)(b)(i) of the Long-Term Insurance Act, 1998 (Act No. 5 of 1998).

¹⁴⁹ Medical Aid Funds Act, 1995 (Act No. 23 of 1995), as amended by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001). The Medical Aid Funds Act replaces the Medical Schemes Act, 1967 (Act No. 72 of 1967).

¹⁵⁰ Sections 24(2)(f) and 25(5) of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995).

or suspend the registration of a fund for engaging in those practices.¹⁵¹

9.3.5.2.3. Those who contravene the statute are liable to a fine to a maximum of N\$10,000 and/or imprisonment up to 30 months.¹⁵²

9.3.5.3. Although the statute addresses irregular and undesirable business practices, the statute does not define or provide context for what sorts of practices may be considered irregular or undesirable. Further, any irregular or undesirable business practices fall within the Registrar's purview so consumers do not have a direct means of redress without the Registrar acting first. The statute also lacks consumer protection provisions that are important in the context of medical aid schemes, including provisions on privacy, information disclosure, and contract terms.

9.3.6. Stock Exchanges Control Act, 1985¹⁵³

9.3.6.1. The Stock Exchanges Control Act, 1985 consolidates the laws relating to the regulation and control of stock exchanges, stockbrokers, and certain lenders.

9.3.6.2. Although the Stock Exchanges Control Act, 1985 only has a few direct and indirect provisions relating to consumer protection, these provisions cover a broader range of consumer protection issues than do those of other statutes. The statute addresses the issuance of receipts when securities are deposited, misleading advertisements, misleading statements to induce another to buy or sell securities, and

¹⁵¹ Section 4(9) and 39(1)(a)(ii) of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995).

¹⁵² Section 45 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995).

¹⁵³ Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), as amended by Stock Exchanges Control Amendment Act, 1992 (Act No. 26 of 1992), Stock Exchanges Control Amendment Act, 2000 (Act No. 29 of 2000), and the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No.3 of 2001). Section 52 of the Act made it applicable to South West Africa, it continues to apply to Namibia by virtue of Article 140 of the Namibian Constitution.

the power to repudiate transactions if a stockbroker fails to deliver within a certain time frame.¹⁵⁴

9.3.6.2.1. Contraventions of these provisions incur a fine ranging from N\$400-N\$4,000 and/or imprisonment of one to four years.

9.3.6.2.2. The statute also has a general provision stating that the rules of the stock exchange will ensure that the manner in which members trade and the disclosure of information is consistent with efficiency, honesty, and fair practice and that stock brokers must notify clients of certain transactions and charge reasonable fees.¹⁵⁵

9.3.6.3. As noted, the statute offers a greater range of consumer protection than many other statutes, but it still focuses primarily on the protection of consumers' economic interests and lacks provisions relating to information disclosure, privacy, and contract terms.

9.3.6.4. Further, the fines under the statute are too low to ensure deterrence, especially considering the resources of the players in the financial market. Although there have been several amendments to the statute, the statute likely does not adequately address current market conditions and consumer needs in light of the enormous changes in the Namibian financial markets since 1985.

9.3.7. Unit Trusts Control Act, 1981¹⁵⁶

9.3.7.1. The Unit Trusts Control Act, 1981 consolidates the laws regarding the regulation of trust schemes relating to securities.

¹⁵⁴ Sections 29, 35, 39(3) and 40 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

¹⁵⁵ Section 12 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

¹⁵⁶ Unit Trusts Control Act, 1981 (Act No. 54 of 1981), as amended by the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001). Section 45 of this Act makes it applicable to South West Africa. This legislation continues to apply to Namibia by virtue of Article 140 of the Namibian Constitution.

- 9.3.7.2. This statute also covers a broader range of consumer protection issues.
- 9.3.7.2.1. The statute has direct consumer protection provisions requiring certain information to be included in price lists, advertisements or brochures; prohibiting the sale of units at prices above the made-up price; dictating information that must be included in trust deeds; voiding provisions in trust deeds that attempt to relieve parties of liability from negligence; and prohibiting the use of names or descriptions relating to unit trusts unless entitled to use those descriptions.¹⁵⁷
- 9.3.7.2.2. In addition, the statute has several indirect provisions that obligate auditors to report undesirable business practices and that allow the Registrar to disapprove of misleading or objectionable terms in price lists, advertisements, or brochures.¹⁵⁸
- 9.3.7.2.3. For certain contraventions of the Act, there is the potential for a fine to a maximum of N\$600 and/or imprisonment up to 18 months. The statute, however, does penalise noncompliance with several of the relevant consumer protection provisions.
- 9.3.7.3. The Unit Trusts Controls Act, 1981 provides probably the greatest breadth of consumer protection of the financial industry acts, addressing information disclosure, misleading statements, and the economic interests of consumers through regulation of contract terms and certain selling practices.
- 9.3.7.4. Nevertheless, the statute's greatest shortcoming is the possibility of consumer redress; redress is available for only some of the provisions. Further, as with many of the other older financial industry statutes, the fines are extremely low and would have little deterrent value. The statute also could have stronger provisions concerning misleading and

¹⁵⁷ Sections 12, 19, 22, 23, 34 and 38 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).

¹⁵⁸ Section 11 and 13 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).

deceptive practices as well as the tying of sales, as the insurance statutes do.

9.3.8. Pension Funds Act, 1956¹⁵⁹

- 9.3.8.1. The Pension Funds Act, 1956 provides for the registration, incorporation, regulation, and dissolution of pension funds.
- 9.3.8.2. As far as consumer protection is concerned, the statute states that a business cannot apply the term “pension fund” to a name unless it is registered as a pension fund under the statute and that the Registrar or Minister may declare practices or methods of conducting business irregular or undesirable.¹⁶⁰ Contraventions of the statute only incur a fine to a maximum of N\$1,000 and/or imprisonment up to one year.¹⁶¹
- 9.3.8.3. In addition to lacking consumer protection provisions relating to information disclosure, privacy, or business practices that affect the economic interests of consumers, the fines under the statute are extremely low. And although the statute allows the Registrar or Minister to declare certain business practices irregular or undesirable, consumers must rely on the Registrar/Minister to first make such a declaration.

¹⁵⁹ Pension Funds Act, 1956 (Act No. 24 of 1956), as amended by the Pension Fund Amendment Act, 1994 (Act No. 4 of 1994), the Short-Term Insurance Act, 1998 (Act No. 4 of 1998), the Long-Term Insurance Act, 1998 (Act No. 5 of 1998), the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), and the Maintenance Act, 2003 (Act No. 9 of 2003). Section 40 of the Act makes it applicable to South West Africa. This legislation continues to apply to Namibia by virtue of Article 140 of the Namibian Constitution.

¹⁶⁰ Sections 32A and 31(1)(d) of the Pension Funds Act, 1956 (Act No. 24 of 1956).

¹⁶¹ Section 37 of the Pension Funds Act, 1956 (Act No. 24 of 1956).

9.3.9. Usury Act, 1968¹⁶²

- 9.3.9.1. The Usury Act, 1968 provides for the limitation and disclosure of finance charges levied for money lending, credit, and leasing transactions.
- 9.3.9.2. The statute has a number of provisions relating to maximum finance charges that may be charged, the limitation of finance charges, disclosure of finance charges, information that must be included in certain debt instruments, limitations on the recovery of sums, and instalment payments. Contraventions of the statute may incur a fine to a maximum of N\$10,000 and/or imprisonment of up to three years.¹⁶³
- 9.3.9.3. The Usury Act, 1968 offers a number of measures relating to consumer protection, particularly in the protection of consumers' economic interests with respect to fees and charges. The primary problem, however, is that the statute has numerous provisions relating to charges, and they are difficult to understand. Although these numerous provisions in theory protect consumers, it seems unlikely that any consumer would look to enforce a violation of the statute given how complicated the provisions are.
- 9.3.9.4. The fines—though higher than some of the other older statutes—are still too low to serve as deterrence, especially for the financial sector.

9.3.10. Participation Bonds Act, 1981¹⁶⁴

- 9.3.10.1. The Participation Bonds Act, 1981 consolidates the laws relating to the rights of holders of participation in certain mortgage bonds.

¹⁶² Usury Act, 1968 (Act No. 73 of 1968), as amended by the Usury Amendment Act, 2000 (Act No. 1 of 2000) and the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001). Section 19(1) of the Act made it applicable to South West Africa. This legislation continues to apply to Namibia by virtue of Article 140 of the Namibian Constitution.

¹⁶³ Section 17 of the Usury Act, 1968 (Act No. 73 of 1968).

¹⁶⁴ Participation Bonds Act, 1981 (Act No. 55 of 1981). Section 16 of the Act made it applicable to South West Africa. This legislation continues to apply to Namibia by virtue of Article 140 of the Namibian Constitution.

9.3.10.2. Section 6 of the statute presents the general rights of a holder of a participation bond. The statute has several direct provisions pertaining to consumer protection, including provisions specifying what information must be included in an offer for a participation bond, requiring notification of participation, and stipulating that money must be refunded if a manager accepts money and participation is not granted within a certain time.¹⁶⁵

9.3.10.2.1. In addition, the Registrar may direct a manager to cease publishing or make adjustments to advertisements or brochures that he or she believes are misleading, offering some indirect protection to consumers.¹⁶⁶

9.3.10.2.2. Failure to comply with the statute may result in a fine to a maximum of N\$1,000 and/or imprisonment up to one year.¹⁶⁷

9.3.10.3. The statute offers some protection of consumers' economic interests and ensures a minimum level of information disclosure. Although the statute addresses misleading advertisements, this provision is inherently limited because the Registrar would first need to make an order, which would then have to be violated, before a consumer can seek redress.

9.3.10.4. Finally, the statute could better protect consumers by addressing conduct related to the transaction itself, such as prohibiting misleading and false statements made during the sales transaction, and not just limiting the prohibition to advertisements.

9.3.11. Consumer Complaints in the Non-Banking Financial Sector

9.3.11.1. This section examines some of the most common complaints regarding the non-banking financial sector and discusses the consumer

¹⁶⁵ Section 3-4 of the Participation Bonds Act, 1981 (Act No. 55 of 1981).

¹⁶⁶ Section 14A of the Participation Bonds Act, 1981 (Act No. 55 of 1981).

¹⁶⁷ Section 15 of the Participation Bonds Act, 1981 (Act No. 55 of 1981).

complaints process that NAMFISA has established to address these complaints.

9.3.11.2. Complaints in Non-Banking Financial Sector¹⁶⁸

9.3.11.2.1. Many of the complaints that NAMFISA receives involve microlenders—or payday lenders. The microlending industry has grown rapidly in Namibia, at about 24% annually. The typical size of a microlender loan is N\$1,200, repayable over thirty days. These loans are given for consumption purposes, not for business development.

9.3.11.2.2. The microlending system inherently lends itself to complaints. Microlenders generally do not do affordability checks before giving loans. As a form of security for the loan, microlenders will take borrowers' bank cards and pin numbers so that they can withdraw money directly from borrowers' accounts every month. In addition, microlenders may inflate the interest they charge above what is allowed by regulation.

9.3.11.2.3. NAMFISA issued regulations in 2004 that outlawed the taking of cards and PIN numbers by microlenders, but it has not taken any enforcement action yet.¹⁶⁹ Despite the regulations, inspectors were still finding evidence that microlenders were taking card and PIN information in violation of the regulations. In December 2011, NAMFISA issued a circular reminding the microlenders of the regulations and that NAMFISA would start to enforce,¹⁷⁰ though NAMFISA does not technically have enforcement powers and must be granted such by the Ministry of Finance.

¹⁶⁸ Interview with NAMFISA, 3 December 2013.

¹⁶⁹ section 11(a) of Government Gazette No. 3266, No. 189, 25 August 2004.

¹⁷⁰ Edgar Brandt, Namfisa Contradicts Micro-Lenders on ATM Cards, New Era, 3 December 2012. The Circular, dated 22 December 2011, notified microlenders that NAMFISA would ensure strict compliance with the provisions of the law.

- 9.3.11.2.4. Microlending creates a perpetual debt trap in which borrowers must continue to return to the microlenders to get more money, often just to pay back the interest. Borrowers frequently are only able to pay the interest on the amount they borrowed and are unable to make any payments towards the capital.
- 9.3.11.2.5. Although many of the complaints NAMFISA receives are about microlenders, the majority of these complaints involve only one microlending institution.
- 9.3.11.2.6. NAMFISA also receives complaints about overcharges and long-term insurance.

9.3.11.3. NAMFISA Complaints Procedure

- 9.3.11.3.1. NAMFISA has not published official guidelines on its complaints process but has developed an internal procedure for handling consumer complaints related to the institutions it regulates. The NAMFISA complaints department currently has seven employees: one manager, one officer, four analysts, and an administrator.
- 9.3.11.3.2. Consumers may lodge complaints with NAMFISA in writing, by email, on its website, via SMS, or by filling out a form in NAMFISA's office. Once NAMFISA receives the complaint, a front desk administrator assesses the complaint to see if it falls within its jurisdiction before assigning it to a complaints officer. The complaints officer creates a file and determines if any more information is needed. An analyst then takes the complaint and must contact the complainant within two days of receiving the file. NAMFISA aims to send out an acknowledgment letter to the complainant within three days and indicate who the analyst is who will be handling the complaint. The analyst will also write a letter to the relevant institution involved and request more

information, typically allowing the institution around fourteen days to respond.

- 9.3.11.3.3. NAMFISA strives to resolve complaints within thirty days of receiving them, though this timeline may not be possible in all cases. NAMFISA has established targets for the resolution of complaints that it receives. On a quarterly basis, NAMFISA aims to resolve 80% of the complaints filed within the quarter. And it targets to resolve 95% of the complaints it receives annually.
- 9.3.11.3.4. On a quarterly basis, the complaints team will do presentations for the various departments within NAMFISA setting out the complaints in details. These presentations assist the departments in monitoring and enforcement of the institutions that fall within their regulatory jurisdiction.
- 9.3.11.3.5. As mentioned, NAMFISA does not have actual enforcement powers. It may only make recommendations to the financial institutions for how to resolve the complaints. If the financial institution does not agree with NAMFISA's recommendations, NAMFISA will refer the complainant to a legal practitioner if the complainant wishes to pursue the issue on his or her own. In general, institutions have little incentive to follow NAMFISA's recommendations if it is not in their favour or interest. Many of these institutions can afford to go to court to litigate and, as such, are less likely to acknowledge fault.
- 9.3.11.3.6. Although NAMFISA has taken significant steps to protect consumers and address complaints, its lack of enforcement powers is a serious impediment to effective consumer protection in the non-banking financial sector.

9.3.12. Other Consumer Initiatives in the Non-Banking Financial Sector¹⁷¹

9.3.12.1. This section highlights some of the consumer education initiatives that NAMFISA has undertaken and discusses relevant draft legislation that will affect consumer protection in the non-banking financial sector.

9.3.12.2. Consumer Education¹⁷²

9.3.12.2.1. The consumer education department at NAMFISA tailors its education initiatives based on an analysis of the complaints it receives. It also sometimes collaborates with the Financial Literacy Initiative.

9.3.12.2.2. Previously, NAMFISA promoted consumer education through TV, radio advertisements, billboards, trolleys, and by doing presentations at schools and factories. However, NAMFISA's strategic focus on educating changes from year to year. NAMFISA currently focuses on educating consumers through radio, brochures, and SMS. Its radio advertisements are in Oshiwambo, and its brochures are published in English, though it has tried to simplify the language it uses in its brochures so that as many consumers as possible may understand the message.

9.3.12.3. Financial Institutions and Markets Bill¹⁷³

9.3.12.3.1. NAMFISA has spearheaded the Financial Institutions and Markets Bill ("FIM Bill"), which has been drafted and is at an advanced stage. The Bill would repeal the Namibia Financial Institutions Supervisory Authority Act, 2001 and would consolidate and harmonise the statutes regulating financial

¹⁷¹ Interview with NAMFISA, 3 December 2013; Interview with Bank of Namibia, 25 October 2013; "Namibia pushes financial law reform," Namibian Sun, 23rd July 2013, available at <http://sun.com.na/business/namfisa-pushes-financial-law-reform.55253>

¹⁷² Interview with NAMFISA, 3 December 2013.

¹⁷³ Interview with NAMFISA, 3 December 2013; Interview with Bank of Namibia, 25 October 2013; "Namibia pushes financial law reform," Namibian Sun, 23rd July 2013, available at <http://sun.com.na/business/namfisa-pushes-financial-law-reform.55253>

institutions and financial markets in Namibia. It also will incorporate regulations issued by the Ministry of Finance and Standards issued by NAMFISA. But perhaps most importantly, the FIM Bill will grant NAMFISA enforcement powers.

9.3.12.3.2. It is possible that the FIM Bill may include other institutions that NAMFISA does not currently regulate.

9.3.12.3.3. The FIM Bill will not cover microlending. The Consumer Credit Bill, which has not yet been passed or enacted by Parliament, will instead address microlending. The first draft of the Consumer Credit Act was sent to the industry for comments several years ago. The industry submitted a number of comments, which stalled the bill. The Bill was heavily based on South Africa's National Credit Act, 2005.¹⁷⁴ South Africa has had a number of problems with debt councillors in particular under its act, which is another reason Namibia's version has not moved forward. In 2014, NAMFISA plans to start afresh with the Credit Act. NAMFISA has concerns, however, that the various bills being promulgated in the financial sector may not be in synch.

9.3.12.3.4. The FIM Bill is with legal drafters now and will be entering the promulgation process soon. It should be emphasised that the FIM Bill is very detailed and may warrant a separate analysis from a consumer protection standpoint.

9.3.12.4. Financial Services Ombudsman Bill

9.3.12.4.1. As mentioned, a Financial Services Ombudsman Bill also has been drafted. Originally, the FIM Bill contained provisions relating to the establishment of the Financial Services Ombudsman, but these provisions now reside in a separate bill.

¹⁷⁴ South African National Credit Act, 2005 (Act No. 34 of 2005).

9.3.12.4.2. The office of the Financial Ombudsman would hear complaints against both banking institutions and financial institutions.

9.4. Other Financial Statutes

9.4.1. Overview

9.4.1.1. These statutes do not fall under the regulatory authority of either the Bank of Namibia or NAMFISA.

9.4.2. Agricultural Bank of Namibia Act, 2003¹⁷⁵

9.4.2.1. The Agricultural Bank of Namibia Act, 2003 establishes the object, functions, and powers of the Agricultural Bank of Namibia.

9.4.2.2. The statute offers little protection to consumers. The statute contains what seems to be the standard confidentiality provision, requiring that information acquired in the exercise of duties must be kept confidential.¹⁷⁶ Contraventions of this provision may incur a fine to a maximum of N\$8,000 and/or imprisonment up to two years.¹⁷⁷

9.4.2.3. In addition to the lack of protection offered to consumers under the statute, the operation of the Agricultural Bank also raises concerns from a consumer standpoint. The Agricultural Bank has no direct banking regulator, and it is not subject to the other laws, regulations, and determinations pertaining to banking institutions.¹⁷⁸

9.4.3. Credit Agreements Act, 1980¹⁷⁹

¹⁷⁵ Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003), as amended by the Agricultural Bank of Namibia Amendment Act, 2004 (Act No. 22 of 2004) and the State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006). This statute replaced the Agricultural Bank Act, 1944 (Act No. 13 of 1944).

¹⁷⁶ Section 13 of the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003).

¹⁷⁷ Section 28 of the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003).

¹⁷⁸ Section 2 of the Agricultural Bank of Namibia Act, 2003 (Act No. 5 of 2003), (“The Agribank is not subject to any law regulating banking institutions in Namibia.”).

¹⁷⁹ Credit Agreements Act, 1980 (Act No. 75 of 1980), as amended by the Credit Agreements Proclamation (AG 17/1981). Section 1 of the Credit Agreements Proclamation, 1981 made the statute applicable to South West Africa, and Section 4 of the Proclamation effected the transfer of administration.

- 9.4.3.1. The Credit Agreements Act, 1980 regulates transactions in which goods or services are purchased or leased on credit.
- 9.4.3.2. The statute has a number of direct provisions protecting consumers who engage in credit transactions, including provisions that:
- 9.4.3.2.1. Regulate the contents and terms of credit agreements, including attempts to exempt from liability, as well as restrictions surrounding the entering of credit agreements;
 - 9.4.3.2.2. Limit collection of periodical amounts;
 - 9.4.3.2.3. Limit the actions a grantor may take against a credit receiver who fails to comply with the obligations under the agreement, including for the return of goods for breach of credit agreements without providing notice;
 - 9.4.3.2.4. Specify the circumstances when a credit receiver may terminate a credit agreement;
 - 9.4.3.2.5. Specify the conditions in which a credit receiver may be entitled to a refund and when a credit grantor must make repayment following a request by a receiver; and
 - 9.4.3.2.6. Prohibit imposing a waiver of any right under the Act.¹⁸⁰
- 9.4.3.3. The statute provides for direct redress, subjecting alleged violators to a fine to a maximum of R\$5,000 and/or imprisonment up to two years.¹⁸¹
- 9.4.3.4. Overall, the statute has a number of provisions protecting the economic interests of consumers, including provisions pertaining to contract terms, validity of waivers, inducements in entering agreements, return of goods, and limits on the actions a credit grantor may take. Despite these protections, the statute in its current form still raises several concerns relating to consumer protection.

¹⁸⁰ Sections 4-7, 9, 11, 13, 14, 15, 22 and 27 of the Credit Agreements Act, 1980 (Act No. 75 of 1980).

¹⁸¹ Credit Agreements Act, 1980 (Act No. 75 of 1980).

- 9.4.3.4.1. First, the statute does not designate an authority to act as enforcer or regulator beyond a few references to the Minister of Economic Affairs and Technology.¹⁸² In theory, consumers may directly enforce these provisions, but many consumers do not know their rights under the statute so are unlikely to be able to contribute to enforcement and deterrence.
- 9.4.3.4.2. Second, the statute is limited in scope because it only regulates credit transactions and does not address the rest of the credit market. Currently, there is no regulator of credit bureaus in Namibia, which is problematic since access to credit may have a significant impact on the economic interests of consumers.
- 9.4.3.4.3. Third, this statute, though seemingly comprehensive, is over thirty years old, and the credit market in Namibia has likely changed significantly since its enactment.
- 9.4.3.4.4. Fourth, the statute is South African. In fact, South Africa has even repealed this statute and passed a new credit act—the National Credit Act 34 of 2005. The South African National Credit Act was designed to protect the consumer in the credit market and to make credit and banking services more accessible. Before the new act, South Africa found that the complex nature of credit agreements rendered many consumers—especially those who are illiterate—vulnerable and exploited by credit providers. Now, under the new statute, South Africa has a Credit Ombudsman and a National Credit Regulator.
- 9.4.3.5. In a study conducted by the Bank of Namibia, the results revealed a need for the regulation of credit bureaus to better protect consumers and the privacy of their information. The central bank is in the process of developing credit bureau regulations under the Bank of Namibia Act,

¹⁸² A portfolio that does not exist in the post-independence dispensation.

1997. This is an interim measure, however, until the Namibian Parliament passes a new credit act.¹⁸³

9.5. Communications Sector

9.5.1. Overview

9.5.1.1. This section identifies relevant consumer protection provisions under the Communications Act, 2009 (Act No. 75 of 2009) and discusses other initiatives that the Communications Regulatory Authority of Namibia (“CRAN”) has undertaken related to the protection and education of consumers, including the Regulations of Consumer Complaints.

9.5.2. Communications Act, 2009¹⁸⁴

9.5.2.1. The Communications Act, 2009 establishes the Communications Regulatory Authority of Namibia and regulates telecommunications services and networks, broadcasting, postal services, and uses and allocation of radio spectrum.

9.5.2.1.1. The previous communications statute did not deal with consumer issues or adequately address the evolving communications sector, prompting the need for a new communications statute.

9.5.2.1.2. The Communications Act, 2009 came into force in May 2011, but there are still parts that have not yet been enacted, including Chapter V, Part 4 on universal service, Chapter IX on the

¹⁸³ Interview with Bank of Namibia, 25 October 2013.

¹⁸⁴ Communications Act, 2009 (Act No. 75 of 2009), repealing Radio Act, 1952 (Act No. 3 of 1952), Namibian Communications Commission Act, 1992 (Act No. 4 of 1992), and sections of the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992).

establishment and incorporation of the .na domain name association, and Chapter VII on postal service licenses.

- 9.5.2.2. The objects of the statute indicate that consumer protection is one of the statute's priorities, stating that it seeks "to ensure fair competition and consumer protection in the telecommunications sector" and ensure costs are just, reasonable, and affordable.¹⁸⁵
- 9.5.2.3. The statute has a number of provisions directly relating to consumer protection, including provisions that:
- 9.5.2.3.1. Prohibit disclosure of confidential information;
 - 9.5.2.3.2. Prohibit carriers from providing telecommunications services on terms that discriminate against a user based on use;
 - 9.5.2.3.3. Dictate that discount schemes for customers must be transparent and non-discriminatory;
 - 9.5.2.3.4. Require licensees to disclose adequate and current information concerning the standard terms and conditions for telecommunication services to all its users and that the information must be given to CRAN to be made public; and
 - 9.5.2.3.5. Prohibit actions that annoy, abuse, threaten, or harass a person and telecommunications that may be obscene or indecent.¹⁸⁶
- 9.5.2.4. The statute also offers indirect protection to consumers by granting CRAN the authority to ensure the public has access to various kinds of information on its internal proceedings; impose on a licensee the equitable treatment of and provision of information to users; include additional requirements in the numbering plan to protect consumers; prescribe that the broadcasting code may impose certain conditions that may protect consumers; make regulations pertaining to domain

¹⁸⁵ Sections 2(g) and (k) of the Communications Act, 2009 (Act No. 75 of 2009).

¹⁸⁶ Sections 28(7), 52, 54(7), 79 and 117 of the Communications Act, 2009 (Act No. 75 of 2009), Contraventions of Section 117 subject violators to a fine to a maximum of N\$20,000-\$1,000,000 and/or imprisonment up to five to fifteen years, depending on the offense.

name registration that include elements of privacy, consumer protection, and alternate dispute resolution; issue enforcement orders for failure to comply with the Act.¹⁸⁷

- 9.5.2.5. Importantly, the statute offers a direct means of consumer redress through CRAN. Users of telecommunications services may lodge complaints directly with CRAN relating to quality of service. CRAN must then take action and inform the complainant of the action it has taken.¹⁸⁸
- 9.5.2.6. Although consumers have a means of redress through CRAN, they do not appear to have a right to approach the courts for a violation of the statute.
- 9.5.2.7. The statutes authorises CRAN to enter enforcement orders. However, CRAN's enforcement orders are more injunctive in nature, and CRAN does not have the authority to issue administrative penalties.¹⁸⁹ CRAN may impose penalties for regulatory offenses or for offenses under Section 117 of the Act,¹⁹⁰ but there is no general penalty provision for failure to comply with other provisions of the statute, including most of the consumer protection provisions.

9.5.3. Regulations Regarding Consumer Complaints, 2011¹⁹¹

- 9.5.3.1. CRAN issued regulations on its complaints handling procedures. These regulations prescribe the manner and time frame for submitting and handling complaints.
- 9.5.3.1.1. Under the regulations, the complainant must first try for a resolution and response from the respondent before lodging the complaint with CRAN.

¹⁸⁷ Sections 27, 38, 10(g), 81(4), 89, 112 and 116 of the Communications Act, 2009 (Act No. 75 of 2009); also see section 113 (Minister may make regulations for an alternative mechanism for the resolution of disputes in .na domain name space).

¹⁸⁸ Section 131 of the Communications Act, 2009 (Act No. 75 of 2009).

¹⁸⁹ Section 116 of the Communications Act, 2009 (Act No. 75 of 2009).

¹⁹⁰ Sections 114 and 117 of the Communications Act, 2009 (Act No. 75 of 2009).

¹⁹¹ (No. 128 of 2011).

- 9.5.3.1.2. Complainants must submit the complaint in writing, using a CRAN form, which are available online or at the CRAN office.
- 9.5.3.1.3. CRAN has various powers to resolve the complaint, including ordering mediation, initiating an investigation, conducting oral hearings, dismissing the complaint, granting the relief sought, imposing a penalty, and taking other actions as necessary.
- 9.5.3.2. CRAN initiated the complaints procedure in 2011, and it has lawyers on staff who handle the complaints.
- 9.5.3.3. Licensees are required to submit annual reports on the consumer complaints they receive,¹⁹² which CRAN then analyses. The complaints involve a range of issues, including roaming charges, data usage, quality of service, and contractual disputes. CRAN then compiles an annual report analysing the issues in the complaints to submit to the Board. The annual report assists CRAN in identifying the issues to include in its consumer campaigns.¹⁹³
- 9.5.3.4. The regulations also require licensees to submit a copy of their internal complaint handling procedures, which CRAN plans to evaluate in the future.

9.5.4. Analysis of Consumer Protection in the Communications Sector

- 9.5.4.1. The Communications Act, 2009 protects the economic interests of consumers by regulating aspects of consumer transactions in the telecommunications industry, including discount schemes and the tying of sales.
- 9.5.4.2. Though not in force yet, the universal service provisions under the statute will provide greater access to more Namibians because licensees will be required to operate in a greater range of areas.

¹⁹² Regulation 4(4).

¹⁹³ Interview with CRAN, 4 November 2013.

- 9.5.4.3. CRAN is currently in the process of drafting a broadcast code that will protect content dissemination to minors. CRAN also regulates the tariffs that customers may be charged, which it publishes through regulation.¹⁹⁴
- 9.5.4.4. The statute is unique among existing Namibian laws in that it establishes a consumer complaints procedure, which the Regulations then detail.
- 9.5.4.4.1. Most complaints under the complaints procedure are successfully resolved, though CRAN has concerns that the timeframe for resolving complaints under the regulations is too short and does not adequately consider the actual time it takes to resolve complaints, especially with written submissions involved.¹⁹⁵ The public may access complaints filed with CRAN at CRAN's office.¹⁹⁶
- 9.5.4.4.2. In May 2013, CRAN launched a consumer awareness campaign to notify the public of the consumer complaints procedure. The campaign used various media, including newspaper, radio, TV shows, small billboards, and trolleys at Pick n Pay. CRAN also travelled to some of the regions to spread information about the campaign. Although public awareness of the complaints procedure available through CRAN was initially low, the consumer campaign has helped notify the public of this avenue.¹⁹⁷
- 9.5.4.4.3. CRAN has plans for other consumer awareness campaigns, including a future portability campaign to advise consumers of their right to switch between networks with the same number.

¹⁹⁴ Interview with CRAN, 4 November 2013.

¹⁹⁵ *Ibid.*

¹⁹⁶ Interview with CRAN, 4 November 2013.

¹⁹⁷ *Ibid.*

CRAN plans to conduct periodic surveys to assess the effectiveness of its campaigns.¹⁹⁸

9.5.4.5. CRAN has taken significant steps as far as consumer protection is concerned, though there are a few areas that could be improved.

9.5.4.5.1. First, although the complaints procedure through CRAN has proven to be an effective means of consumer redress, consumers should still have the ability to access the courts. At the least, there should be an opportunity for a consumer to appeal to the courts.

9.5.4.5.2. Second, the statute lacks a general offense and penalty provision for those who fail to comply with the statute. CRAN may enter enforcement orders but does not have the authority to assess general administrative penalties, except in limited circumstances.

9.5.4.5.3. Third, although the Communications Act, 2009 promotes information disclosure—an important feature of consumer protection—the statute may potentially compromise consumer privacy because it may go too far in disclosing information. For example, as currently drafted, information must be designated as “confidential” to be treated as such. If a licensee submits information to CRAN that may include consumer information but does not designate it as confidential, that consumer information could become public. The statute should be applauded for increasing transparency, but it is important to balance the promotion of transparency and the protection of personal consumer information.

¹⁹⁸ Interview with CRAN, 4 November 2013.

10. International & Regional Agreements

10.1. Relevance of International Law

- 10.1.1. Article 144 of the Namibian Constitution states that international law and agreements binding on Namibia automatically form part of Namibian law. Accordingly, this discussion document identifies international and regional agreements to which Namibia is a party that are relevant to consumer protection.
- 10.1.2. There are several international and regional agreements that have provisions relating to consumer protection, some more direct and relevant than others. At the least, consumer rights may be derived from several of the general human rights international agreements. Privacy, in particular, is a recurring theme.

10.2. International Agreements

10.2.1. United Nations Universal Declaration of Human Rights

- 10.2.1.1. Namibia was admitted to the United Nations in April 1990, and consequently became a party to this agreement upon admission. The Declaration of Human Rights is also considered to be part of customary international law.
- 10.2.1.2. The Declaration is a general rights treaty with no specific articles addressing consumer protection. Elements of consumer protection, however, fall within these universally recognised rights: the rights to security, privacy, family, home or correspondence, assembly and association, access to public services, social security, adequate standard of living, education, and an effective remedy for violations of rights.¹⁹⁹
- 10.2.1.2.1. Several of the enumerated rights—the rights to security, privacy, access to public services, and an effective remedy for rights

¹⁹⁹ Articles 3, 8, 13, 20-22 and 25-26 of the United Nations Universal Declaration of Human Rights.

violations—are particularly relevant in the consumer protection context.

10.2.1.3 The Declaration obligates nations to take steps to ensure that these rights are recognised and observed. For example, the Preamble holds that nations must strive to take “progressive measures, national and international, to secure their universal and effective recognition and observance”. Article 28 expands on the Preamble stating, “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

10.2.1.4. Because this Declaration forms part of Namibian law, Namibia is obligated to take steps to protect these enumerated human rights. Further, this Declaration also may obligate Namibia to adopt at least some specific measures regarding consumer rights, as consumer rights fall within the Declaration’s broad language.

10.2.2. International Covenant on Civil and Political Rights, 1966

10.2.2.1. Namibia acceded to this covenant in November 1994, and it became effective in February 1995.

10.2.2.2. The Covenant covers general civil and political rights. As with the UN Universal Declaration of Human Rights, elements of consumer protection fall within these rights, though this Covenant has fewer articles that would likely apply to consumer protection.

10.2.2.2.1. Article 17 is one such relevant provision, ensuring freedom from interference with privacy, family, home, or correspondence.

10.2.2.2.2. Article 2(3)(a) obligates states to ensure that any person whose rights or freedoms have been violated have an effective remedy. If nation states do not fulfil their obligations under the Covenant, they may be referred to the Human Rights Committee under Article 41.

10.2.2.3. In the consumer context, this Covenant obligates Namibia to ensure that consumers who have suffered a violation of their right to privacy have an effective remedy. As with other international agreements to which Namibia is a party, consumers could in theory bring a claim under the Covenant since it is part of Namibian law. It would be preferable, however, if Namibia ensured that its statutes protect these rights through specific provisions, which a number currently do.

10.2.3. International Covenant on Economic, Social and Cultural Rights, 1966

10.2.3.1. Namibia acceded to this covenant in November 1994, and it became of effect in February 1995.

10.2.3.2. This covenant is more applicable in the consumer context than the Covenant on Civil and Political Rights discussed above.

10.2.3.2.1. Article 11(1) provides for a right to an adequate standard of living, including adequate food, clothing, and housing. This article could be directly relevant to consumer protection, especially in the context of product safety, adoption of standards, and even the economic interests of consumers in sales transactions.

10.2.3.2.2. Article 12(1) further complements Article 11(1), providing for the right to enjoyment of the highest attainable standard of physical and mental health, including improvement of environmental and industrial hygiene and medical services.

10.2.3.3. Namibia must submit reports on the measures it has taken under Article 16. Although Articles 11 and 12 are broad, many facets of consumer protection—particularly related to health and safety—would fall within the scope of the articles.

10.2.4. Paris Convention for the Protection of Industrial Property

- 10.2.4.1. The Namibian Parliament ratified the Paris Convention in March 2003, and the effective date of the Convention is January 2004. The Convention applies to patents, marks, industrial designs, utility models, and trade names.
- 10.2.4.2. There are a number of articles pertaining to misleading or deceiving the public scattered throughout the Convention, specifically Articles 5(c)(3), 6ter(1)(c), 6quater(2), 6quinquies(B)(iii), and 10.
- 10.2.4.3. Article 10bis(2) on “Unfair Competition”, however, directly speaks to consumer protection. The article prohibits unfair competition, defining it to include “[a]ny act of competition contrary to honest practices in industrial or commercial matters”.
- 10.2.4.3.1. Although the article is framed in terms of unfair competition, it pertains more to consumer protection than competition matters. The article offers specific examples of acts that will be prohibited, including statements or actions that are likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods.
- 10.2.4.3.2. Parties to the Convention must not only provide legal protection against unfair competition but also must offer redress. Article 10bis(1) addresses legal protection stating, “countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition”. Article 10ter(1) then addresses redress, specifying that the countries must “undertake to assure to nationals of other countries of the Union appropriate legal remedies effectively to repress” acts encompassed in Article 10bis.
- 10.2.4.4. Of the international agreements, the Paris Convention has one of the most direct applications to consumer protection. In addition, the scope of the unfair competition provision goes beyond just industrial property, prohibiting “act[s] of competition contrary to honest practices in industrial or *commercial* matters”.

- 10.2.4.5. The broad scope of the Convention pertaining to unfair competition raises the question whether the consumer protection provisions scattered throughout Namibian statutes are sufficient under the Convention to ensure protection against unfair competition and dishonest practices. As the law currently has gaps where dishonest practices thrive, the Convention may obligate Namibia to adopt more measures.

10.3. Regional Agreements

10.3.1. Southern African Development Community Protocol on Trade (1996)²⁰⁰

- 10.3.1.1. Namibia signed the Protocol on Trade in August 1996 and ratified the Protocol in December 1998. SADC protocols are legally binding on Member States.

- 10.3.1.2. The Protocol has two articles that are directly relevant to consumer protection: Article 17 and Article 25.

- 10.3.1.2.1. Article 17 obligates member states to make their standards compatible with international standards without reducing the level of safety or protection of consumers. Under Namibia's Standards Act, 2005 the NSI must "achieve compliance with any internationally or regionally agreed instruments or organisations regarding standardisation". Namibia appears to be at least working towards compliance with Article 17, but should ensure that consumer protection and safety remains at the forefront of any compliance efforts.

- 10.3.1.2.2. Article 25 obligates member states to implement measures that prohibit unfair business practices and promote competition. Although Article 25 is labelled "Competition Policy", the article's inclusion of unfair business practices renders it directly relevant to consumer protection.

²⁰⁰ Amended in 2000, 2007, and 2008.

10.3.1.3. Namibia potentially could be viewed as in violation of this Protocol since it has not taken comprehensive consumer protection measures since Independence. Similar to the Paris Convention, this Protocol is one of the more directly relevant international agreements in the context of consumer protection.

10.3.2. Southern African Development Community Declaration on Regional Cooperation in Competition and Consumer Policies (2009)

10.3.2.1. The SADC Declaration on Regional Cooperation in Competition and Consumer Policies elaborates on SADC's position toward economic competition in the region. The SADC member states signed the Declaration in September 2009 pursuant to obligations under Article 25 of the Protocol on Trade.²⁰¹

10.3.2.2. Under the Declaration, member states agree to converge their policies to preserve equity in trade and fair competition throughout the region. The Declaration is not binding and does not impose any obligations on member states but instead facilitates cooperation among governments on policy.

10.3.2.3. The Declaration also provides for a Competition and Consumer Policy and Law Committee to oversee cooperation on competition policies.

10.3.3. African Union (Banjul) Charter on Human and Peoples' Rights (1981)

10.3.3.1. Namibia acceded to the Charter in June 1992 and deposited it in August 1992.

10.3.3.2. Although a general human rights charter, the Banjul Charter is more relevant in the consumer protection context than other general human rights agreements, articulating several rights that speak directly to consumer interests.

²⁰¹ SADC Declaration on Regional Cooperation in Competition and Consumer Policies (2009) at Preamble.

- 10.3.3.2.1. For example, Article 9 provides that every individual has the right to receive information. Article 19 states that all peoples shall enjoy the same respect and have the same rights, noting that nothing justifies the domination of a people by another. And Article 22 ensures a right to economic, social, and cultural development.
- 10.3.3.2.2. The Charter, interestingly, does not have an article addressing privacy.
- 10.3.3.3. Under Articles 47 and 49, states may report other states that appear to be in violation of the Charter to the Secretary General, the Chairman, and the Commission.
- 10.3.3.4. As with the other international agreements relating to human rights, this Charter imposes obligations on Namibia in the consumer protection context.
- 10.3.4. Africa, Caribbean and Pacific – EU Partnership “COTONOU” Agreement**
- 10.3.4.1. Namibia signed the COTONOU Agreement in June 2000 and ratified it around May/June 2002. The Agreement came into force internationally on April 1, 2003. Article 1 states that the objective of the Agreement is to promote and expedite economic, cultural, and social development of Africa, Caribbean, and Pacific states.
- 10.3.4.2. Although the COTONOU Agreement addresses consumer protection, it does not directly protect consumers by obligating members to adopt specific measures. Instead, the Agreement addresses consumer protection through cooperation among members to the Agreement.
- 10.3.4.2.1. Article 33(4)(a) provides that members must cooperate in enhancing public sector capacity and support institutions in developing regulatory capabilities for consumer policies.
- 10.3.4.2.2. Article 51 obligates members to cooperate generally in the area of consumer policy and consumer health protection. It then lists specific areas for improving institutional and technical capacity.

10.3.4.2.3. Under Article 3, parties commit to take all appropriate measures to ensure the fulfilment of obligations arising from the Agreement and facilitate the attainment of the objectives.

10.3.4.3. Unlike some of the other agreements examined in this discussion document, the COTONOU Agreement focuses on cooperation in policy and not the protection of certain rights. The Agreement speaks to cooperation with the EU, however, Namibia should consider forming partnerships with EU member states or other ACP states to work together on developing a consumer protection policy.

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11. Case Studies: Consumer Protection in Other Jurisdictions

11.1. Overview

11.1.1. This section discusses consumer protection frameworks in five other jurisdictions: South Africa, Botswana, Tanzania, Zambia, and Australia.

11.1.2. In studying the frameworks of these other jurisdictions, the LRDC, in conjunction with the Ministry of Trade and Industry (“MTI”), travelled to South Africa, Botswana, and Australia to meet with the relevant consumer protection government institutions and learn more about consumer protection in those countries.

11.1.2.1. The LRDC and the MTI selected South Africa because of its shared legal and jurisprudential history with Namibia and because South Africa recently passed an extremely comprehensive consumer law.

11.1.2.2. The LRDC and the MTI selected Botswana because Botswana places consumer protection enforcement within its Ministry of Trade, and not within a separate commission or agency.

11.1.2.3. The LRDC and MTI selected Australia because it too has a new consumer law and because one commission handles both consumer protection and competition.

11.1.3. This report also examines the consumer protection frameworks in Zambia and Tanzania, though LRDC and MTI did not conduct site visits there.

11.2. South Africa

11.2.1. The South African Consumer Protection Act, 2008 (Act No. 68 of 2008) establishes South Africa’s consumer protection framework. Competition regulation is embodied in another law—the Competition Act, 1998 (Act No. 89 of 1998).

11.2.1.1. The Consumer Protection Act came into force in April 2011, and South Africa issued regulations under the statute in 2012.

- 11.2.1.2. The statute is a law of general application, applying to “every transaction occurring within the Republic”²⁰² and has been described as the “most wide-ranging piece of legislation to have been enacted in South Africa”.²⁰³
- 11.2.1.3. Schedule 4 of South Africa’s Constitution stipulates that consumer protection is a concurrent legislative competency of the national government and the provincial governments. As such, the South African national and provincial governments have an obligation to implement cooperative governance practices in consumer protection.²⁰⁴
- 11.2.2. The Consumer Protection Act, 2008 (Act No. 68 of 2008) establishes the National Consumer Commission to enforce the Act.
- 11.2.2.1. The Commission may initiate complaints on its own, at the direction of the Minister, or from complaints filed by consumers or consumer protection groups.
- 11.2.2.2. In addition, the Commission may accredit consumer protection groups to commence actions to protect the interests of consumers and intervene in matters.²⁰⁵
- 11.2.3. Section 26 of South Africa’s National Credit Act, 2005 (Act No. 34 of 2005) established the National Consumer Tribunal, which hears matters arising both under the National Credit Act and the Consumer Protection Act. The National Consumer Tribunal has the power to grant interim relief, prohibit certain conduct, and confirm consent orders.

²⁰² Section 5 of the Consumer Protection Act, 2008 (Act No. 68 of 2008). The Act does not apply to transactions in which the State supplies goods or services, the consumer is a juristic person with assets above a certain threshold, the transaction has been exempted by the Minister, credit agreements under the National Credit Act, 2005, employment contract services, and giving effect to collective bargaining agreements.

²⁰³ Law Society of South Africa, *Consumer Protection Guide for Lawyers* (2011), available at [http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf), accessed 24 March 2014.

²⁰⁴ African Dialogue, Vol. 1, Issue 1, First Quarter 2010.

²⁰⁵ Section 78 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).

- 11.2.4. The Consumer Protection Act, 2008 prohibits a range of conduct considered to be harmful or problematic to consumers. These conduct prohibitions fall under various “Fundamental Consumer Rights” specified in Chapter 2 of the Act. The fundamental rights encompassed under the statute are as follows:
- 11.2.4.1. *Right of equality in consumer market:* protection of access and fair pricing and against unreasonable discriminatory marketing (Part A);
- 11.2.4.2. *Right to privacy:* regulation of unwanted direct marketing, including prescribed days and times for which the Minister has prohibited direct marketing (Part B);
- 11.2.4.3. *Right to choose:* regulation of tying, fixed term agreements, estimates for repairs, examination of goods, cooling off periods for direct marketing, cancellation of advance reservations, rejection of goods upon delivery, unsolicited goods, refunds in the case of direct marketing, and unsolicited goods and services (Part C);
- 11.2.4.4. *Right to disclosure and information:* regulation of information in plain and understandable language, posting of prices, product labelling and trade descriptions, disclosure of reconditioned goods, and written sales records (Part D);
- 11.2.4.5. *Right to fair and responsible marketing:* regulation of false and misleading representations, bait marketing, negative option marketing, direct marketing, catalogue marketing, trade coupons and promotions, customer loyalty programs, promotional competitions, alternative work schemes, and referral selling (Part E);
- 11.2.4.6. *Right to fair and honest dealing:* regulation of unconscionable conduct, false, misleading or deceptive representations in marketing or supply, fraudulent schemes and offers, substitution of goods, pyramid schemes, auctions, over-selling/booking (Part F);

- 11.2.4.7. *Right to fair, just and reasonable terms and conditions*: regulation of contract terms, notice for certain terms and conditions, written agreements, limitation or exemption from liability for gross negligence (Part G); and
- 11.2.4.8. *Right to fair value, good quality, and safety*: regulation of timely performance, unavoidable delay, goods free of defects, goods suitable for intended purpose, implied warranties of quality, warranties of repaired goods, warnings of certain risks, recalls, strict liability for unsafe goods (Part H).
- 11.2.5. Part I of Chapter 2 specifies suppliers' accountability in certain situations, including lay-bys, prepaid certificates/credits/vouchers, prepaid services, and the holding of consumer property.
- 11.2.6. Chapter 3 of the statute protects consumers' exercise of their rights. For example, if a consumer chooses to exercise a right in terms of the Consumer Protection Act, that consumer cannot be discriminated against or penalised.
- 11.2.7. The Consumer Protection Act, 2008 affords South African consumers several opportunities for redress. Consumers may file complaints with the Commission or refer a matter directly to the Tribunal if the Commission issues a notice of non-referral in response to a consumer complaint.²⁰⁶ In addition, consumers have other recourse options, including approaching any applicable ombudsman with jurisdiction, alternative dispute resolution agents, provincial consumer courts, if available, or a court of general jurisdiction.²⁰⁷
- 11.2.8. The National Credit Act, 2005 (Act No. 34 of 2005) serves as the other major piece of legislation in South Africa's consumer protection framework. This statute regulates the provision of credit. The statute has provisions on unconscionable credit agreements and consumer rights, including the right to apply for credit, protection against

²⁰⁶ Section 71 and 75 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).

²⁰⁷ Section 69 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).

discrimination, information in plain and understandable language, and confidential treatment.

- 11.2.8.1. Consumers have several forms of redress available under the National Credit Act, 2005 including alternative dispute resolution, a financial services ombudsman, the Consumer Tribunal, consumer courts, and ordinary courts.
- 11.2.8.2. The National Credit Regulator, established under the National Credit Act, 2005 enforces the statute and has the power to register credit providers, credit bureaus, and debt councillors, suspend or cancel registrations, and establish and maintain registries.
- 11.2.8.3. Although the National Credit Act, 2005 pertains to the provision of credit, the Consumer Protection Act, 2008 still applies to the sales transaction itself or any related transaction underlying the credit agreement as well as the actual goods or services that are the subject of the credit agreement.²⁰⁸
- 11.2.9. A number of other industry regulatory bodies also protect consumers in some form.²⁰⁹ As such, South African consumers may also seek relief through industry-specific ombudsmen.²¹⁰
- 11.2.10. Analysis of Consumer Protection:
 - 11.2.10.1. Described as “draconian”, “clumsily-drafted”, “dreaded”, “controversial”, “far-reaching”, and “game changing”,²¹¹ the Consumer Protection Act, 2008 in South Africa generated much debate and criticism when it was introduced.

²⁰⁸ Law Society of South Africa, *Consumer Protection Guide for Lawyers* (2011), available at [http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf), accessed 24 March 2014.

²⁰⁹ These include the Independent Communications Authority of South Africa, the National Credit Regulator, the National Energy Regulator, the Financial Services Board, the Advertising Standards Authority of South Africa, the South African Bureau of Standards, and the Competition Commission.

²¹⁰ African Dialogue, Vol 1, Issue 1, First Quarter 2010.

²¹¹ Andrew Allison, “The Consumer Protection Act: When and how does it apply”, Gotta Quirk, <http://www.gottaquirk.com/2011/04/04/the-consumer-protection-act-when-and-how-does-it-apply/>, accessed 24 March 2014; http://www.standardbank.co.za/site/2011/CPA/CPA_long%20version.pdf, accessed 24 March 2014.

- 11.2.10.2. Many viewed the statute as a “Bill of Rights” for South African consumers, making them the most protected consumers in the world. Yet, many also feared that this “bill of rights” might incur significant costs to the economy and discourage free enterprise.²¹²
- 11.2.10.3. Although it is generally recognised that the Consumer Protection Act, 2008 was a step in the right direction for South African consumers, many questioned if the government considered the potential impact on the South African market given the statute’s wide ambit covering a broad scope of commercial activity.²¹³
- 11.2.10.4. Businesses, in particular believed the statute went too far and were concerned about the impact the statute would have on their businesses.²¹⁴
- 11.2.10.5. Some analysts and commentators feared the statute could even result in harming consumers by cracking down too hard on businesses.²¹⁵ For example, the cost of doing business would likely increase because of the added compliance burden, which business might then pass on to consumers in the form of higher prices.²¹⁶

²¹² Andrew Glendinning, “The New Consumer Protection Act: Has the Government Gone Too Far?”, African Scene, <http://www.africanscene.co.za/2011/04/the-new-consumer-protection-act-has-the-government-gone-too-far/>, accessed 24 March 2014.

²¹³ Andrew Glendinning, “The New Consumer Protection Act: Has the Government Gone Too Far?”, African Scene, <http://www.africanscene.co.za/2011/04/the-new-consumer-protection-act-has-the-government-gone-too-far/>, accessed 24 March 2014.

²¹⁴ “A law too far?”, 20 May 2010, News 24, <http://www.fin24.com/Finweek/Insight/A-law-too-far-20100517-2>, access 24 March 2014; “The Consumer Protection Act”, 11 January 2012, Entrepreneur, <http://www.entrepreneurmag.co.za/advice/starting-a-business/start-up-guide/the-consumer-protection-act/>, accessed 24 March 2014.

²¹⁵ Andrew Allison, “The Consumer Protection Act: When and how does it apply”, Gotta Quirk, <http://www.gottaquirk.com/2011/04/04/the-consumer-protection-act-when-and-how-does-it-apply/>, accessed 24 March 2014.

²¹⁶ Andrew Glendinning, “The New Consumer Protection Act: Has the Government Gone Too Far?”, African Scene, <http://www.africanscene.co.za/2011/04/the-new-consumer-protection-act-has-the-government-gone-too-far/>, accessed 24 March 2014.

- 11.2.10.6. Many also criticised the statute for its potential to discourage foreign direct investment, expressing concern that foreign firms would pull out of South Africa and go to neighbouring countries.²¹⁷
- 11.2.10.7. Numerous questions were raised about the meaning and interpretation of a number of provisions in the statute. For example, the statute entitles consumers to information in plain and understandable language, yet many didn't understand what plain and understandable language meant in the context of contractual relations. Ironically, it was noted that "[s]ome of the provisions and definitions in the new act relating to 'plain and understandable language' were complex, unclear, and open to differing interpretations".²¹⁸
- 11.2.10.8. Other areas of concern included the "far-reaching" powers of the National Consumer Commission, no-fault product liability, product recalls, cancellation of bookings, and refunds.²¹⁹
- 11.2.10.9. The Consumer Protection Act, 2008 has been in force for over two years now. It would be useful to review any studies by those who have reviewed the implementation of the statute and its effectiveness thus far.

11.3. Botswana

- 11.3.1. The Consumer Protection Act, 1998 (Act No. 21 of 1998) establishes Botswana's consumer protection framework.
- 11.3.2. The Consumer Protection Office ("CPO") under the Ministry of Trade and Industry, within the Department of Trade and Consumer Affairs, enforces the statute.

²¹⁷ Andrew Glendinning, "The New Consumer Protection Act: Has the Government Gone Too Far?", African Scene, <http://www.africanscene.co.za/2011/04/the-new-consumer-protection-act-has-the-government-gone-too-far/>, accessed 24 March 2014.

²¹⁸ "CPA 'plain language' poser", 15 November 2011, News24, <http://www.fin24.com/Economy/CPA-plain-language-poser-20111115>, accessed 24 March 2014; see "A law too far?", 20 May 2010, News 24, <http://www.fin24.com/Finweek/Insight/A-law-too-far-20100517-2>, accessed 24 March 2014.

²¹⁹ "A law too far?", 20 May 2010, News 24, <http://www.fin24.com/Finweek/Insight/A-law-too-far-20100517-2>, accessed 24 March 2014.

- 11.3.3. The Consumer Protection Act, 1998 is a broad consumer law that prohibits “unfair business practices”. The statute defines “unfair business practice” as any business practice which, directly or indirectly has or is likely to have the effect of unfairly affecting any consumer”.
- 11.3.3.1. Consumers may file a complaint against an alleged unfair business practice with the CPO. But consumers must first lodge the complaint against the business before referring the complaint to the CPO.
- 11.3.3.2. The CPO may institute investigations on its own or at the instruction of the Minister. The CPO also may institute civil proceedings to obtain an order prohibiting a particular practice, a declaratory judgment, or a declaratory order.
- 11.3.4. In 2001, Consumer Protection Regulations were issued describing the CPO complaints process and investigations.²²⁰
- 11.3.4.1. The Regulations stipulate that failure to meet minimum specifications and minimum standards of performance constitutes an unfair business practice.²²¹ The Regulations then list specific deceptive methods, acts or practices that will be considered unfair business practices.²²²
- 11.3.4.2. The Regulations provide more detailed provisions regarding consumer protection than the Consumer Protection Act, 1998. The Regulations, however, are not readily accessible on the Consumer Protection Unit’s website nor through an Internet search. It seems unlikely that consumers even know of their rights and what conduct may violate the regulations.
- 11.3.4.3. The Control of Goods Regulations 1974 also contributes to consumer protection, specifying the labelling of goods.

²²⁰ Consumer Protection Regulations, 12 October 2001. Other regulations were issued in 1999 but are not particularly relevant. Consumer Protection (Year 2000 Compliance) Regulations, 21 December 1999.

²²¹ Regulations 14, 16 of Consumer Protection Regulations, 12 October 2001.

²²² Regulation 17 of Consumer Protection Regulations, 12 October 2001.

- 11.3.5. Botswana does not have a specialised consumer protection tribunal. It does have small claims courts in Gaborone and Francistowne, but these only handle claims of non-receipt of merchandise and civil debt collection.²²³
- 11.3.6. In 2002, the banking institutions in Botswana established the Office of Banking Adjudicator—an independent body that provides an impartial redress mechanism for consumers who are unable to resolve a dispute with the bank.
- 11.3.6.1. The Office of Banking Adjudicator (“OBA”) has established a procedure for submitting complaints, similar to that under the Bank of Namibia. The primary difference is that the Bank of Namibia—a government body—oversees the complaints, whereas the banking industry in Botswana is self-regulated. In other words, the banking institutions against which complaints are filed are the ones that finance the OBA.
- 11.3.6.2. The Bank of Botswana also allows serious complaints to be reported to the Banking Supervision Department at the Bank of Botswana, which has a member of senior management directly responsible for issues relating to consumer affairs.²²⁴
- 11.3.7. Several other statutes in Botswana have provisions protecting consumers.
- 11.3.8. There have been calls for Botswana to review its Consumer Protection Act, 1998 claiming that it does not adequately address changing consumer needs.²²⁵

11.4. Tanzania

²²³ Consumers International, *Developing rights-based consumer protection advocacy strategies: Based on the legal frameworks in place in Botswana, Namibia and Zambia* (14 April 2013).

²²⁴ <http://www.bankofbotswana.bw/index.php/content/2009110614050-consumer-protection>, accessed 24 March 2014.

²²⁵ Onalenna Modikwa, “Botswana: Review Consumer Protection Act – Tema,” 16 November 2009, All Africa, <http://allafrica.com/stories/200911170245.html>, accessed 24 March 2014.

- 11.4.1. The Fair Competition Act, 2003 (Act No. 8 of 2003) establishes the consumer protection framework in Tanzania. The statute is a law of general application that addresses both competition and consumer protection.
- 11.4.2. The Fair Competition Act, 2003 establishes the Fair Competition Commission, which is responsible for administering and enforcing the Act. The statute also establishes a Fair Competition Tribunal to hear appeals, issue warrants, and exercise other functions designated to it under the Fair Competition Act, 2003 and other pieces of Tanzanian legislation.
- 11.4.3. The statute addresses misleading and deceptive conduct (Part III), unfair business practices (Part IV), unconscionable conduct (Part V), implied conditions in consumer contracts (Part VI), manufacturer's obligations (Part VII), product safety and product information (Part VIII), and product recall (Part IX). Though not as detailed as South Africa's Consumer Protection Act, 1998 the Tanzanian statute covers a broad range of conduct.
- 11.4.4. Consumers have two routes for redress under the Fair Competition Act, 2003.
- 11.4.4.1. For loss or damages from implied conditions in consumer contracts or when manufacturers violate their obligations, consumers may seek relief in court but may not seek a compensatory order from the Commission.²²⁶
- 11.4.4.2. For other losses or damages resulting from an offense under the Act, consumers may apply to the Commission for a compensatory order. The Commission may then enter an order requiring the respondent to pay money, supply the goods or services, or declare contract terms void.²²⁷

²²⁶ Fair Competition Act, 2003, section 59(6).

²²⁷ Fair Competition Act, 2003, section 59(1), (4).

- 11.4.5. Tanzania is in the process of revising the Fair Competition Act, 2003.²²⁸ The Tanzania Law Reform Commission has undertaken a review of the legal framework governing consumer protection, and amendments to the statute will include revisions to improve consumer protection.²²⁹
- 11.4.5.1. It appears that Tanzania feels that revisions are necessary because there are currently multiple laws with consumer protection provisions in force, making it difficult to take action against service providers. The revised statute will strive to make it easier for consumers to pursue violations of the law by service providers.²³⁰
- 11.4.5.2. Although news sources have cited the multiplicity of statutes addressing consumer protection as the impetus behind amendment of the Act, it still is a little unclear why Tanzania feels that it needs to revise the consumer protection provisions. When the United Nations Conference on Trade and Development reviewed Tanzania's Fair Competition Act, 2003 it found the consumer protection provisions to be quite expansive.²³¹
- 11.4.5.3. Consumer protection provisions under the Fair Competition Act, 2003 seem fairly comprehensive, there may be an underlying problem relating to general lack of consumer awareness regarding their rights and available means of enforcement. The Fair Competition Act, 2003 also may not clarify which statute governs in the case of multiple statutes with overlapping jurisdiction.

²²⁸ "Lobby wants Tanzania to devise better ways to protect consumers", IPP Media, 12 March 2013, available at <http://www.ippmedia.com/frontend/?l=52233>, accessed 24 March 2014.

²²⁹ Law Reform Commission of Tanzania, <http://www.lrc.go.tz/on-going-reform/review-of-legal-framework-governing-consumer-protection-in-tanzania/>, accessed 24 March 2014.

²³⁰ Kilasa Mtambalike, "The government is reviewing the legal framework governing consumer protection against fake, counterfeit and substandard goods and services in the country", Tanzania Daily News, 6 August 2013, available at <http://www.24tanzania.com/consumer-protection-law-in-pipeline/>, accessed 24 March 2014.

²³¹ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014. Consequently, UNCTAD decided not to review the consumer protection provisions in its report.

11.5 Zambia

- 11.5.1. The Competition and Consumer Protection Act, 2010 (Act No. 24 of 2010) establishes the consumer protection framework in Zambia. The Zambian Parliament passed the Competition and Consumer Protection Act on 13th August 2010, repealing the Competition and Fair Trading Act, 1994.²³²
- 11.5.1.1. The statute addresses both competition and consumer protection matters and is a statute of general application.²³³ Zambia based its legislation on models from Australia, the United Kingdom, the United States, and the COMESA Competition Regulations and Rules.²³⁴
- 11.5.1.2. In 2011, Competition and Consumer Protection Regulations were issued, though these do not appear to be widely available.²³⁵
- 11.5.2. The original Fair Trading Act established the Zambia Competition Commission, which the Competition and Consumer Protection Act renamed as the Competition and Consumer Protection Commission.²³⁶
- 11.5.3. The Competition and Consumer Protection Act, 2010 also created a Competition and Consumer Protection Tribunal, which was established in 2011. The Tribunal is not a court of first instance but limited to appeals under the Competition and Consumer Protection Act, 2010.²³⁷ As of 2012, the rules of the Tribunal had not been gazetted so all

²³² “Structure and Functions of Competition & Consumer Protection Commission”, Brian M. Lingela, Presented to Stakeholders’ Seminar on Competition & Consumer Protection, 7 March 2011, Lusaka. The statute came into operation on 8 October 2010.

²³³ Competition and Consumer Protection Act, 2010, section 3(1).

²³⁴ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditccplp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014.

²³⁵ Competition and Consumer Protection (General) Regulations, 2011 (Statutory Instrument No. 97 of 2011), 19 August 2011.

²³⁶ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditccplp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014.

²³⁷ Consumers International, *Developing rights-based consumer protection advocacy strategies: Based on the legal frameworks in place in Botswana, Namibia and Zambia* (14 April 2013).

appeals against the decisions of the Commission were being made directly to the High Court.²³⁸

- 11.5.4. Part VII of the Competition and Consumer Protection Act, 2010 addresses consumer protection.
- 11.5.4.1. The statute generally prohibits unfair trading practices, which it defines as those that mislead consumers, compromise the standard of honesty and good faith that an enterprise can be reasonably expected to meet, or place pressure on consumers by use of harassment or coercion and thereby distort the purchasing decisions of consumers.²³⁹
- 11.5.4.2. The statute then identifies specific practices that may fall within the definition of unfair trading practices, including false or misleading representations, display of disclaimers, supply of defective and unsuitable goods and services, product labels that lack certain information, goods that don't meet established standards, charges over the displayed price, goods that don't conform to product safety standards, and unfair contract terms.²⁴⁰
- 11.5.5. Consumers may lodge complaints with the Commission, and the Commission may open an investigation if it chooses. If the Commission decides not to investigate, it may refer the complaint to another regulatory authority.²⁴¹
- 11.5.6. The statute authorises the Commission to enter consent agreements, which it then submits to the Tribunal for confirmation. There does not appear to be a direct means of recourse in the first instance for consumers under the statute beyond submitting a complaint to the

²³⁸ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014.

²³⁹ Sections 45-46 of the Competition and Consumer Protection Act, 2010.

²⁴⁰ Sections 47-53 of the Competition and Consumer Protection Act, 2010.

²⁴¹ Section 56 of the Competition and Consumer Protection Act, 2010.

Commission. If a consumer is aggrieved by a decision of the Tribunal, however, it may appeal that decision to the High Court.²⁴²

- 11.5.6.1. Zambia also has small claims courts in Lusaka and Ndola, established under the Small Claims Court Act, 1992 (Act No. 23 of 1992). The Competition and Consumer Protection Act, 2010 however, does not directly refer to the power of the consumer to approach these courts.
- 11.5.7. Zambia currently has some overlap in the area of financial consumer protection. The World Bank reviewed Zambia's statute and recommended that regulation and supervision of financial consumer protection rest with existing financial sector regulators, and not the Commission.
- 11.5.7.1. The World Bank also recommended that Zambia propose a new law incorporating all key financial consumer protection provisions currently included in the statute and add provisions relating to disclosure, complaints handling, unfair terms, false and misleading advertising, and debt collection. It also recommended that the statute clarify that it does not apply to consumer protection in the financial sector.²⁴³
- 11.5.8. Before the passage of the new Competition and Consumer Protection Act, 2010 consumer protection was very fragmented in Zambia, with no central agency to enforce the various pieces of legislation. Analysts and commentators claim the new statute better harmonises the various pieces of consumer protection legislation in Zambia by designating the Commission as the enforcement agency.²⁴⁴

²⁴² Section 75 of the Competition and Consumer Protection Act, 2010.

²⁴³ The World Bank, *Republic of Zambia, Diagnostic Review of Consumer Protection and Financial Literacy, Volume I, Key Findings and Recommendations* (October 2012), available at <http://responsiblefinance.worldbank.org/~media/GIAWB/FL/Documents/Diagnostic-Reviews/Zambia-CPFL-Vol-I.ashx>, accessed 24 March 2014.

²⁴⁴ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditccplp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014.

- 11.5.9. Both the UN and Consumers International have called Zambia's new statute "very comprehensive".²⁴⁵ For example, the previous statute only had one section addressing consumer protection, whereas the new statute has ten. The language pertaining to consumer protection under the statute is fairly broad, but the broad language is not necessarily seen as an impediment to enforcement.²⁴⁶ The new statute defines various competition and consumer protection terms that were previously not defined in the old statute, which previously made enforcement difficult.
- 11.5.10. Stakeholders have commended the Commission for its awareness campaigns that highlight consumer benefits available under the statute. In particular, stakeholders complimented the Commission on its programs related to product safety and sub-standards goods as well as sensitising the business community on consumer issues.

11.6. Australia

- 11.6.1. The Australian Consumer Law commenced on January 1, 2011 and is set out in Schedule 2 of the Competition and Consumer Act, 2010 (Act No. 103 of 2010)—the new name of the Trade Practices Act, 1974.²⁴⁷
- 11.6.1.1. The Competition and Consumer Commission Act, 2010 replaced twenty national and state consumer laws, and Australia's state governments now enforce the one national law. The Act is a general law designed to apply across all sectors but is supported by industry-specific consumer laws where appropriate.

²⁴⁵ United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: a Tripartite Report of the United Republic of Tanzania – Zambia – Zimbabwe* (2012), available at http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf, accessed 24 March 2014.

²⁴⁶ Consumers International, *Developing rights-based consumer protection advocacy strategies: Based on the legal frameworks in place in Botswana, Namibia and Zambia* (14 April 2013).

²⁴⁷ The Australian Consumer Law, An introduction, http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf, accessed 24 March 2014. Two Acts implemented the Australian Consumer Law: the Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 and Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010.

- 11.6.1.2. Parts 6 and 7 of the Competition and Consumer Protection Regulations 2010 give practical effect to the provisions under the statute.²⁴⁸
- 11.6.2. The Australian Competition and Consumer Commission shares responsibility for enforcing the statute with each State and Territory's consumer law agency.
- 11.6.3. The statute contains both general and specific provisions relating to consumer protection.²⁴⁹
 - 11.6.3.1. Chapter 2 offers general consumer protections and creates standards of business conduct in the market, including prohibiting the use of unfair contract terms in standard consumer contracts and general bans on misleading, deceptive, and unconscionable conduct. Chapter 4 specifies some acts as criminal.
 - 11.6.3.2. Chapter 3 offers specific protections for consumers and includes provisions that stipulate the following:
 - 11.6.3.2.1. Ban specific unfair practices, including false or misleading representations, pyramid schemes, bait advertising, pricing practices, harassment, and coercion;
 - 11.6.3.2.2. Create a single set of statutory consumer guarantees;
 - 11.6.3.2.3. Provide for the safety of consumer goods, including safety standards, bans, recalls, and warning notices;
 - 11.6.3.2.4. Provide for the creation and enforcement of information standards; and
 - 11.6.3.2.5. Impose liability on manufacturers for goods with safety defects.

²⁴⁸ http://www.consumerlaw.gov.au/content/content.aspx?doc=the_acl/legislation.htm, accessed 24 March 2014.

²⁴⁹ The Australian Consumer Law, An introduction, http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf, accessed 24 March 2014.

- 11.6.4. The Commission may seek orders, monetary penalties, or injunctions from the court. Consumers also have direct forms of redress and may seek injunctions, damages, or compensatory orders. In addition, Australia has an ombudsman for consumer protection and a specialised tribunal.
- 11.6.5. The Australian Securities and Investments Commission Act, 2001 (Act No. 51 of 2001) applies to financial products and services and has similar provisions on consumer protection as the Consumer Law.²⁵⁰ Australia also has a National Consumer Credit Protection Code.
- 11.6.6. The Consumer Law resulted from the 2008 Productivity Commission's *Review of Australia's Consumer Policy Framework*. It replaced a variety of national, state, and territory consumer laws and provides clarity of the law for both Australian consumers and businesses.²⁵¹
- 11.6.6.1. Although the statute was considered a breakthrough for consumers, some have concerns that there is a general lack of awareness about the law, by both consumers and businesses alike.
- 11.6.6.2. Some also have criticised the statute for being too complicated and not user-friendly, particularly regarding what falls within the definition of "consumer".²⁵²
- 11.6.7. The statute has not been in existence long so there is not much commentary on the effectiveness of the statute or the Commission yet. Despite the little analysis, however, some have expressed that they

²⁵⁰ The Australian Consumer Law, An introduction, http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf, accessed 24 March 2014. Generally, amendments to the Consumer Law will also prompt amendments to ASCI to ensure consistency.

²⁵¹ The Australian Consumer Law, An introduction, http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf, accessed 24 March 2014.

²⁵² "Australian Consumer Law", Elise Dalley, Choice, 23 December 2011, <http://www.choice.com.au/reviews-and-tests/money/shopping-and-legal/legal/australian-consumer-law---one-year-on.aspx>, accessed 24 March 2014.

wish that there were more regulatory enforcement, both at the national and state law.²⁵³

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²⁵³ Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators, March 2013, <http://consumeraction.org.au/wp-content/uploads/2013/04/CALC-Regulator-Report-FINAL-eVersion.pdf>, accessed 24 March 2014.

12. Conclusion

12.1. Summary

12.1.1. Currently, Namibia has elements of consumer protection spread throughout its various laws and regulations. The number and variety of laws addressing consumer protection make it difficult for consumers to actually enforce their rights for several reasons.

12.1.1.1. First, the majority of consumers do not know that certain laws exist and that these laws have provisions protecting them. Even if consumers do know that a particular law exists, they likely do not have access to the law or know how to assert their rights under the law. This is further evidenced by repeated calls from consumer advocacy groups to establish a consumer protection law in Namibia. Consumer advocates do not seem to realise that there are a number of provisions scattered throughout the law that already protect them against the very conduct of which they complain.

12.1.1.2. Second, most of the current statutes that address consumer protection in some form have low penalties for non-compliance. As such, these statutes do not really deter conduct that may harm consumers.

12.1.1.3. Third, many of the statutes do not provide adequate opportunities or means for consumers to enforce their rights. The majority of these statutes only offer limited protection to consumers, failing to include a full range of substantive protections.

12.1.1.4. Finally, the nature of consumer transactions has changed greatly in Namibia over the last several decades so many of the current laws, particularly those from the South African dispensation, are outdated and don't properly address the interests of today's consumers.

1.2. Considerations

12.2.1. It is recommended that Namibia consider adopting a consumer protection statute that harmonises the various laws and regulations currently offering

- protection to consumers. Namibia does not have to start completely from scratch but may draw from these various laws. The common law, in particular, offers a number of protections to consumers—many of which are unknown—that should be enshrined in legislation. Any consumer protection policy or statute should also reform the common law as to certain rules that have evolved that are harmful to consumers, such as sales *voetstoots*.
- 12.2.2. As Namibia contemplates how it wishes to approach consumer protection going forward, it should carefully consider two primary types of regulatory intervention: the regulation of information and the regulation of transactions. Economists typically prefer regulating information to regulating the transaction itself.²⁵⁴ In the consumer context, however, a mix of information and transaction regulation will likely achieve the ideal balance.
- 12.2.3. To begin, those developing the consumer protection framework should prioritise areas of consumer protection in accordance with the economic, social, and environmental circumstances of Namibia and the needs of the Namibian population.²⁵⁵ Although it is useful to look to other jurisdictions in formulating consumer policy, it is not advised to wholly import other consumer protection laws. For instance, what may be effective in South Africa may not be appropriate in Namibia, especially given the differences in economies. Once priorities have been established, Namibia may decide on the best way to approach consumer protection, whether as a policy, comprehensive statute, or a statute implemented in parts over time.
- 12.2.4. Any resulting consumer protection law should be one of general applicability, though it would be advisable to investigate the wisdom of excluding certain industry sectors, such as banking or communications. As discussed, the World Bank recently recommended that Zambia entrust financial consumer protection to the financial sector supervisors, given their

²⁵⁴ Giesela Ruhl, *Consumer Protection in Choice of Law*, 44 CORNELL INT'L L.J. 569 (2011).

²⁵⁵ United Nations Guidelines on Consumer Protection of April 9, 1985 (UN General Assembly Res. 39/248 of 1985); UN Guidelines on Consumer Protection (as expanded in 1999).

- unique technical expertise and stronger institutional capacity. It also advised Zambia to amend its Competition and Consumer Protection legislation to clarify that it does not apply to the financial sector.²⁵⁶ Namibia should carefully contemplate what industry sectors require specialised expertise and consider developing a separate consumer protection framework for those sectors.
- 12.2.5. As part of the development of a consumer protection framework, there should be an emphasis on providing effective redress for consumers to ensure enforcement against fraudulent and deceptive commercial practices.²⁵⁷ Namibia's current standing rules would make it extremely difficult for consumers to enforce any relevant consumer protection statute in court. Thus, a consumer protection law may prove meaningless without an effective means of enforcement. A statute reforming the standing rules is imperative.²⁵⁸
- 12.2.6. If the decision is made to enact a consumer protection statute, Namibia should carefully consider whether it wants this statute to be a stand-alone statute or combined with the Competition Act. Different jurisdictions have taken a variety of approaches—with varying degrees of success—so there are numerous examples to draw from.
- 12.2.7. Finally, much consideration needs to be given to what institutional body will enforce the consumer protection statute. Some jurisdictions have one body that enforces both competition and consumer protection, whereas others have consumer protection in a stand-alone commission or under the Ministry of Trade. If it is decided to have one government body serve as the enforcer of both competition and consumer protection, it is essential that this body be granted additional resources so that it does not just enforce one of the substantive areas at the detriment of the other.

²⁵⁶ The World Bank, *Republic of Zambia: Diagnostic Review of Consumer Protection and Financial Literacy, Volume 1, Key Findings and Recommendations* (October 2012).

²⁵⁷ Organisation for Economic Co-operation and Development, *Recommendations on Consumer Redress* (2007).

²⁵⁸ In this regard, the LRDC has published *Locus Standi Discussion Paper*, 2014. LRDC 27 (ISBN 978-99945-0-072-7)

Moreover, as this report has discussed, the goals of competition and consumer protection policies may conflict in some instances. Accordingly, it is recommended that these enforcement functions be clearly separated out into separate divisions if competition and consumer protection are housed together under one body.

12.3. Moving Forward

12.3.1. Consumer Study: To most effectively protect consumers in Namibia, it is imperative to fully understand the breadth of issues that Namibian consumers face. Although several consumer advocacy groups have voiced concerns about a number of commercial practices, it is difficult to know whether these practices are widespread or one-off incidences.

12.3.1.1. Accordingly, it is recommended that a study be undertaken to identify the most prevalent complaints among Namibian consumers. This study would not necessarily need to be a formalised, expensive process. Instead, each government institution that receives complaints from consumers could maintain a database of the complaints it receives. The government institutions involved could include the Ministry of Trade and Industry, CRAN, NAMFISA, Bank of Namibia, FLI, Namibia Competition Commission, and any others that may receive consumer complaints. Some of these institutions already track complaints, but do not make this information public.

12.3.1.2. After an established time—six months to one year—the complaints could be compiled and analysed. Such an analysis could greatly benefit Namibia in developing an effective consumer protection framework.

12.3.2. Consumer Policy: Instead of delving directly into a consumer protection statute, some have advocated for adopting a consumer protection policy first that will then drive legislation. The adoption of a policy could even be accomplished relatively soon. The legislation could then follow later, perhaps after a study of consumer complaints. Adopting a detailed consumer protection statute likely seems daunting

whereas a policy could serve as a useful starting point in initiating and furthering the dialogue about consumer protection in Namibia.

12.3.3. Consumer Committee: Going forward, it may prove useful to form a consumer committee to consider the adoption of a consumer protection statute or policy. At a minimum, the committee could ensure that all the various pieces of legislation that have elements of consumer protection—either in force or in draft form—are harmonised and do not overlap or conflict with one another. This committee could be comprised of those persons responsible for consumer issues at the government institutions identified above. The committee could also include a representative from the consumer advocacy groups and a representative from the business sector. By forming a committee representing the various interests and viewpoints at the outset, Namibia could ensure the success of the consumer protection framework that it chooses to adopt, avoiding many of the problems that other countries, such as South Africa, have encountered.

12.4. Relevant Guidelines

12.4.1. As Namibia develops its consumer protection framework, a number of resources and guidelines exist that Namibia should consider consulting. This report specifically highlights the United Nations Guidelines on Consumer Protection, the Organisation for Economic Co-operation and Development Recommendation on Consumer Dispute Resolution and Redress, and the Model Law for Consumer Protection in Africa, though there are a variety of other available sources.

12.4.2. UN Guidelines on Consumer Protection²⁵⁹

12.4.2.1. The UN Guidelines advocate that governments develop or maintain a strong consumer protection policy. In doing so, the Guidelines recommend that each government set its own priorities for the

²⁵⁹ United Nations Guidelines on Consumer Protection of April 9, 1985 (UN General Assembly Res. 39/248 of 1985); UN Guidelines on Consumer Protection (as expanded in 1999).

protection of consumers in accordance with the existing economic, social, and environmental circumstances in that country.

12.4.2.2. The UN Guidelines identify basic consumer needs that governments must address:

12.4.2.2.1. Protection of consumers from hazards to their health and safety;

12.4.2.2.2. Promotion and protection of the economic interests of consumers;

12.4.2.2.3. Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;

12.4.2.2.4. Consumer education, including education on the environmental, social, and economic impacts of consumer choice;

12.4.2.2.5. Availability of effective consumer redress;

12.4.2.2.6. Freedom to form consumer groups; and

12.4.2.2.7. Promotion of sustainable consumption patterns.

12.4.2.3. The UN then presents guidelines that governments should consult in seeking to protect these consumer needs, including:

12.4.2.3.1. Adopting various safety regulations and policies to ensure that products are safe;

12.4.2.3.2. Protecting against practices that could adversely affect the economic interests of consumers and their exercise of choice, including false or misleading claims, fair business practices, goods suitable for certain purposes, and the avoidance of one-sided standard contracts;

12.4.2.3.3. Adopting national and international standards for the safety and quality of consumer goods and services;

- 12.4.2.3.4. Ensuring distribution facilities for essential consumer goods are not endangered, particularly in rural areas;
- 12.4.2.3.5. Establishing or maintaining legal and/or administrative measures to enable consumers or, as appropriate, relevant organisations to obtain redress through both formal and informal channels;
- 12.4.2.3.6. Developing general consumer education and information programs;
- 12.4.2.3.7. Promoting sustainable consumption so to meet the needs of present and future generations; and
- 12.4.2.3.8. Adopting measures relating to essential areas of concern, such as food, water, and pharmaceuticals.

12.4.3. OECD Recommendation on Consumer Dispute Resolution and Redress²⁶⁰

- 12.4.3.1. The OECD Committee on Consumer Policy has promulgated various guidelines and recommendations on consumer policy.²⁶¹ This Committee also has a working party on consumer product safety. Although Namibia is not a member of the OECD, Namibia should still consider consulting the various materials that the OECD has published to understand what may be considered international best practices pertaining to consumer protection.
- 12.4.3.2. The OECD Recommendation on Consumer Dispute Resolution and Redress sets out common principles for member countries regarding

²⁶⁰ 2007 Recommendation on Consumer Dispute Resolution and Redress.

²⁶¹ Other relevant OECD sources include the 2009 Recommendation on Consumer Education; 2008 Policy Guidance on Online Identity Theft; 2008 Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce; 2008 Policy Guidance for Protecting and Empowering Consumers in Communications Services; 2006 Recommendation on Cross-border Cooperation in the Enforcement of Laws Against Spam; 2003 Guidelines for Protecting Consumers from Fraudulent and Deceptive Practices Across Borders; and 1999 Guidelines for Consumer Protection in the Context of Electronic Commerce.

mechanisms made available to consumers to resolve disputes and obtain redress from transactions with businesses.

- 12.4.3.3. This Recommendation encourages members to review their existing dispute resolution and redress frameworks to ensure that they provide consumers access to fair, easy to use, timely, and effective dispute resolution and redress. It also recommends that members ensure that their domestic frameworks provide for a combination of different mechanisms for dispute resolution and redress. Specifically, it recommends dispute resolution and redress mechanisms for consumers acting individually, acting collectively, and through consumer protection enforcement authorities.
- 12.4.3.4. In addition, the Recommendation emphasises that members should encourage businesses and industry groups to provide consumers with voluntary mechanisms to informally resolve their disputes and obtain redress. These mechanisms will be most effective if members cooperate with businesses, industry groups, and consumer groups in understanding how to avoid disputes.
- 12.4.3.5. Finally, to better understand the issues facing consumers, the Recommendation advises members to implement systems to collect consumer complaints and analyse market trends.

12.4.4. Model Law for Consumer Protection in Africa²⁶²

- 12.4.4.1. The Africa Conference on Consumer Protection, held in Harare, Zimbabwe in 1996, launched the Model Law for Consumer Protection in Africa. Consumers International developed this model law.
- 12.4.4.2. The Model Law is a set of legal principles designed to guide consumer legislation, intervention, and activism. It provides sample legislative language and formatting to facilitate implementation.
- 12.4.4.3. The Model Law includes the following features:

²⁶² Consumers International, Model Law for Consumer Protection in Africa.

12.4.4.3.1. Interpretation clause to facilitate negotiating, concluding, construing, and enforcing or implementing consumer contracts;

12.4.4.3.2. Declaration of substantive and procedural consumer rights;

12.4.4.3.3. Consumer protection in transactions involving technology transfer and services, including standard form contracts, implied contract terms, restrictive trade practices, credit contracts, financial and banking services, regulation of advertising, and liability;

12.4.4.3.4. Standard setting and implementation in field of environmental health and physical safety; and

12.4.4.3.5. Administrative and judicial procedures for consumer redress.

12.4.4.3.6. Although the Model Law is fairly dated at this point, it would serve as a useful starting reference in developing a consumer protection framework.

End.

Annexure A

CONSUMER PROTECTION PROJECT ISSUE PAPER: CONSOLIDATION OF COMMENTS FROM STAKEHOLDERS

1. Despite the Namibian Constitution providing that both the seller and buyer are equal, the consumer protection system is based on principles contrary to a democratic system.
2. The fact that Namibia has no mechanisms in place to review its consumer protection laws is an injustice to the majority, an arrangement that only favours the elite.
3. The National Credit Act, 2005 (Act No. 34 of 2005) of South Africa has been cited as part of the legislation that defines a consumer. However, it is acknowledged that the Act may not have achieved its desired effect. The South African experience should be examined, and the Act in particular, when trying to define who a consumer is in the Namibian context.
4. Rental agreements should also be categorized as agreements that have unfair contract terms.
5. Advertisements should conform to standards of decency, sincerity, and truth and should not exploit consumers' ignorance. For example, some businesses will state "while stock lasts" as bait to lure consumers' to their businesses, but these businesses never had any intention to reduce their prices.
6. In framing a way forward on a consumer protection legal framework, Article 98(1) should be taken into account.
7. The principles of a mixed economy, human rights, economic rights, and social rights should be considered and included in the new legal framework.

Issues on the UN Guidelines for Consumer Protection of 1985

8. The laws pertaining to the auctioning of erven in municipal areas at unreasonable prices (which makes it difficult for low income consumers to afford houses) is discriminatory against the poor and is contrary to the UN Guidelines. Hence, such laws must be changed.

9. The right of consumers to be protected against defective and hazardous products was violated when the Namibian Agronomic Industry planted and distributed GMO food. In this regard, it is important to re-examine the Biosafety Act.
10. The so-called *voetstoots* clause violates consumers' right to choice as provided for in the Guidelines. Many have expressed concerns about the quality of goods sold in the shops in Chinatown.
11. The Ministry of Education in collaboration with all educational institutions (from primary to tertiary levels) should incorporate consumer education into the curriculum.
12. The consumer's right to a healthy environment, as provided for in the Guidelines, should not be legislated for in isolation from the Tobacco Products Control Act, 2010.

Annexure B

**Consumer Protection Workshop 05-07 April 2011
Okahandja Country Hotel
OKAHANDJA**

Workshop Report

**By Roswitha Gomachas
Researcher- Directorate: Law Reform**

**Day1
05 April 2011**

The purpose of this workshop was to solicit further comments on the issue paper.

The presentation on consumer protection canvassed the following:

- Consumer consumes goods and services within the goods and services markets;
- Goods are movable and immovable goods;
- Services included professional and non-professional services;
- Consumptions included purchasing of goods and markets by the consumer by way of cash or on credit;

- Goods and services markets discussed separately with reference to complaints from the media and any other complaints not reported through the media.

(1) Service Market

- Services in some cases are based on contract, made tacitly, orally and in writing;
- Services are provided to the consumer by professionals, such as doctors, legal practitioners, engineers, etc;
- Consumers also make use of basic services, services provided by the state, services provided by small and medium business enterprises, airline services, internet services, mobile services, transport services, etc.

a) Basic services

-basic services include sanitation (refuse and sewer), water, electricity and streets:

-basic services provided by local authorities such as municipalities, town councils, village councils in Namibia in exchange for payment by the residents for those services;

a) Otavi is one of the examples where the village council is allegedly failing to provide adequate services in the form of sanitation and water;

(b) Some local authorities have contracted electricity to regional Electricity Distributors, who have been alleged to overcharge residents in some towns, electricity cut off in some towns for up to 4 days without adequate reasons.

(b) Taxi and Bus service

- Namibian Bus and Taxi Services regulates the industry of taxi and busses (long distance busses), however there is no legal framework governing the dealings with the consumers;
- Taxis are allegedly over- charging customers, drivers negligently and recklessly while having passengers in the taxi, taxis are sometimes said

not to be roadworthy. In these cases, where should the consumer go to complain?

- Long distance busses are accused of over loading, speeding and over charging especially during holidays. Taxis are further accused of reckless and negligent driving. If passenger complains about this, they are told to disembark the bus in the middle of no-where;
- NABTA described as a toothless dog in media reports, if that is the case where should the consumer go report the above incidences?

(c) Services provided by Small and Medium Business Enterprises

- SMEs also provide service such as repair and mechanical repair services;
- there are allegation that in certain instances when repairing a motor vehicle, the SME's discriminate against women, do not finish the work timeously, sometime claim that they did the work but did not do the work.

(d) Professional Services

- Reference was made here only to legal services provided by legal practitioners;
- Legal practitioners are governed by the **Legal Practitioners Act 15 of 1995**;
- The Law Society of Namibia regulates the industry based on the abovementioned Act;
- Rules of the Law Society provides for disciplinary procedures and also complaint procedures which can be utilised by the clients of registered legal practitioners who feel aggrieved by the service of legal practitioners;
- The Act also makes provision for a Fidelity Fund and directs that legal practitioner that receives monies from clients for future legal matters should have a fidelity Fund certificate, which certificate must be displayed in such practitioners offices;

- An Act of Parliament governs professional services, in most cases, and the custodian of the Act is a Board, which has to set forth rules to govern that service.

(e) Banking services

- Fees charged by banks were also discussed, for example cheque fees, ATM fees, credit card fees and service fees, why do banks charge so many fees?
- Also banks affiliated with South Africa, still orders some of their cards and cheque books from South Africa. This causes delay and forces clients to withdraw money over the counter. Over the counter withdrawal fees are then charged, who is responsible for such fees?
- The ordering of the above documents is mostly a problem for customers in rural towns as they have to wait for the documents for a longer period than those in Windhoek;
- What is the rationale behind paying for a house in 20 years and paying for a car in 4 to 6 years? Yes, there are options of paying for a house over 10 to 15 years.

(f) E-commerce

- Online payment options such as Internet Banking;
- People not using internet banking do not use it because they have confidence or little trust in internet banking, they don't feel that their information is safe.

(2) Goods Market

- Goods become part of the economy through imports or from local producers; goods are sold by the manufacturer, producer and the retailer. Banks and Insurance companies also sell goods in the form of products;
- In the goods market the following complaints are referred to:

(a) China Town

- Sells almost any type of goods which you can get elsewhere;
- No guarantee or warranty on goods for example “**if you was no guarantee**”;
- Mobile phones have no manufacturer make or type, although phone has features for internet, it cannot be used, registration for use of internet linked to make and type of phone;
- Some goods misrepresented, such as the TV game;
- Return of goods difficult, sales person claim not to understand English when good are returned:
- Labelling on products in Chinese, not understood by consumer;
- Consumer will choose to buy goods at China Town, as goods are cheap and affordable.

(b) Contracts

- Some good purchases based on contract;
- Contracts are rarely drafted in simple understandable language that is understandable to the lay person;

1) Voetstoots clause

- The clause states that the buyer is buying property as it stands, in other words, with all its defects;
- Does the Namibian Consumer know the consequences of the voetstoots clause in the contract that s/he sign?

2) Pay-per view TV

- Only one such company in Namibia;
- You cannot downgrade from full bouquet to mini bouquet;
- Repetition of programs and movies;
- Not much variety claimed when signing the contract.

3)Insurance Contracts

- Insurance contracts based on products sold by insurance agents;
- Insurance contracts is a legal contract with legal terms;
- Sales agents have level background;
- Sometimes they omit to explain to clients important information, which if excluded affects the success of the subsequent claims, if the insurance agent limits information, the insurance company not liable for the actions of the agent;
- Also argument is that if such information is omitted then, if the client pays the relevant premiums and the claim is unsuccessful, the premiums must be refunded to the client;
- With household insurance, you can only claim on account of housebreaking, what of the scenario where no house breaking occurs?
- In the case of legal insurance, it is advertised that you will have a choice of your own legal practitioner, but when you claim then you are given a list of legal practitioners who are in contract with the insurer.

4)Mobile phone contacts

- Contract packages sold
- You pay for a subscription fee, you get a phone depending on the package, you receive free minutes and sms and you pay a monthly subscription. At the end of the month, even if you have not finished your free minutes, you are charged for some phone calls made, why?
- In conclusion, there are certain sectors that are regulated and some that are not regulated. It is

agreeable that the consumer needs more protection, whether it is in all sectors of economy or only in sectors, there is a need for legal framework to protect the consumer.

Discussion, Comments and Questions

- With regard to contracts, one should consider the freedom of contract, the sanctity of contract. Voetstoots form part of a contract; there is a common law presumption that one knows what he or she is signing including the terms of the contract you are signing. The focus should not be on the removal of voetstoots, but rather on drafting contracts in plain and understandable language and explaining the terms of contract.
- A need for a legal framework identified, however we to think how to approach the “ poor consumers” as sometimes choice is not the question, rather than what is affordable at that particular price;
- Explaining the bank charges to the consumer may also stop the allegation that bank charges too many fees;
- People, knowing the complaints about China Town, still purchase goods from China Town, therefore, it is a question of choice where you want to purchase goods from;
- When will our banks delink from South Africa?
- The following comments and suggestions were made towards a possible Consumer Protection Legal Framework:
 - (1) There is a definite need for legislation to protect the consumer, but this legislation should strike a balance between the consumer and supplier (service provider or seller of goods and services). People should be protected against themselves;
 - (2) how will the various pieces of legislation on ‘ consumer protection’ work together, the pieces of legislation need to be harmonised;
 - (3) A number of laws are already in place for various sectors;
 - (4) Current concern is that the general law on consumer protection framework may be fed by sectorial laws;

- (5) There are 2 options:
 - To have a general law, with rights and obligation, a main body regulating all markets and sector are guided by this law; or
 - To have sectors to regulate themselves with own consumer protection laws, or rule, or code of practice.
- (6) Principal Act to be crafted in very board terms which will cover all sectors.
The Act should at least cover minimum rights;
- (7) The Act should not unduly burden businesses;
- (8) Focus of legislation should be plain language, informed consumers who can make informed choices, to be translated into different languages;
- (9) The term “ consumer” should be defined;
- (10) Should not be too broad to create interpretation and implementation problems;
- (11) Simple language is very important, the obligations should be clear;
- (12) Principal Act should be aligned to subsidiary Acts;
- (13) Adopt the UN Guidelines on Consumer Protection as a basic framework;
- (14) Should address contracts;
- (15) There should be different chapters in the Principal Act covering the specific sectors;
- (16) Specific redress mechanisms for example the establishment of an adjudicator;
- (17) Quick redress mechanism should be put in place;
- (18) Institutions to be put in place to protect the consumer for example a Consumer Protection Commission;
- (19) There should be an institutional body to deal with a complaint first then the right to appear to higher body, this higher body should be independently;
- (20) A Principal Act with industry specific regulations;
- (21) Sector specific consultation through meetings and workshops;
- (22) Simple and quick redress mechanisms needed and self-representation;
- (23) E-commerce- buying of goods online, if you do not receive the product you ordered.

- Use of Electronic Communications and Transaction Bill
 - Privacy
 - Confidentiality
 - Security
 - Sector specific
 - E-commerce, establish a framework and put in place protection measures for consumers. Whether to implement e-commerce will be a matter of choice.
- (24) Imported products- will specific requirements (e.g. labelling) not negatively impact on our imports. How will we address imports to protect consumers?
- (25) Labelling- EU V Southern Africa;
- (26) Balance between consumer protection// underlying fundamental economic issue. Focus on direct sellers not the producers, to get results;
- (27) Remedies should be responsive to market realities;
- (28) Next Consultation group should be largely the consumer, who will be directly protected by this law;
- (29) Bottom line of consumer protection- informed choice. Principles of fairness and reasonableness for both the consumer and businesses;
- (30) General provisions-inform and educate.

DAY2

06 April 2011

NAMFISA

NAMFISA's role in protecting Consumer Rights and the measure for such protection

Regulates:

- Friendly societies;
- Medical aid funds;
- Pension funds;
- Long and short term insurers, reinsurers, agents and brokers;

- Money and Micro Lenders;
 - Stock exchanges;
 - Unit trust management companies; and
 - Auditors and accountants.
- Mandate does not specifically include consumer protection.
 - Mandate is the systematic stability of regulated institutions.
 - No legislation directly aimed at regulating the market conduct with respect to consumers;
 - No consumer rights enforcement mechanism
 - Some provisions however used to protect consumer (indirect regulation)
 - Non-discrimination (equal treatment)-medical aid;
 - Privacy and confidentiality-micro lenders;
 - Choice-prohibition of conditional selling;
 - Disclosure-money and micro lenders;
 -
 - Fair and honest dealings-money and micro lenders;
 - Terms and Conditions (contract terms)-money and micro lenders;
 - Others- declaration of irregular or undesirable practices and approval of compromises, arrangements, transfers and amalgamations.
 - consumer complaints
 - Consumer complaints department (no enforcement powers outside the scope of jurisdiction)-settle complaints through the courts (civil suits)

The future of consumer protection in the regulated sector

-FIMBILL [Financial Institute & Markets Bill]

- The framework to protect:
 - Fair business practice;
 - Consumer protection; and
 - Improved consumer awareness and information.

- Gives NAMFISA the mandate to directly deal with consumer issues and market related issues;
- Equal treatment of consumers in respect of credit consumer information;
- Choice-prohibition of conditional selling, cooling off credit agreements, right to terminate credit agreements;
- Disclosure;
- Fair reasonable marketing;
- Fair and honest dealings;
- Terms and conditions of credit agreements;
- Accountability
- Enforcement mechanisms in place;
- Complaints establishes a consumer adjudicator;
- Remedies for aggrieved persons;
- Appeal procedure in place;
- Power to enforce penalties;
- Provides for administrative penalties in addition to criminal penalties;
- Regulates only those sectors that fall under NAMFISA;
- Other market not regulated by this Bill;
- Baseline on this bill is also the UN Guidelines on consumer protection;
- Does not define the term “consumer” refer to “members”, “beneficiaries”, “insured” etc;
- Plain and simple language contracts;
- Codification of existing common law simply unenforceable;
- Small Claims Courts- how viable to enforce common law rights? – common law rights not known
- Institutions to be the first part of call for complaints;
- One complaints adjudicator, preferable a judge or someone at this level for all financial sectors;
- Currently- only need to register with NAMFISA to operate;
- Qualification and training requirements;

- Alignment between FIMBILLLL and new consumer legislation;
- Consultation stage for FIMBILL [on-going];
- New law- reporting provision for regulators.

New Law- FIMBILL

Namibia Standards Institution (NSI)

The role of Namibia Standards Institution in promoting standardization and related activities in protecting the rights of consumer

Standards Act 18 of 2005:

- Provides for technical regulations as opposed to voluntarily standards;
 - Technical regulations are enforceable as oppose to voluntarily standards;
 - Based on international standards;
 - Local and imported goods should be treated equally;
 - Measure should be traceable to international standards.
- The NSI started to operate from 2008;
 - Core mandate of NSI is the developing and setting of standards, certification, examination, control and inspection;
 - In the next 1 to 2 years to build capacity to enforce technical regulations;
 - To establish labs to enforce standards;
 - Inspection facilities canned fish also established, in the process establishing more facilities;
 - Consumer Protection- verification and re-verification and regulation of measuring equipment or instruments and labelling;
 - Will propose new Metrology Law, NSI given the responsibility to administer the Act;
 - NSI administers the Standards Act and the Metrology Act;
 - No redress mechanisms to the consumer, some products not covered by the technical standards.

Discussion

- Law on food stuffs out-dated, 1919 law currently applicable;

- Road transportation falls under metrology Act, certification by NSI;
- NSI can be approached by the consumer directly;
- Retailers issued with certificates and accredited by NSI;
- Limited capacity;
- Inspections only for products that fall within the technical standards.

Bank of Namibia

The role of the Bank of Namibia as regulator of the banking sector in the protection of consumers

- It is difficult to assess quality in financial services;
- Within the financial services, consumers consume products they do not understand, thus financial stability compromised;
- Banking Institutions Act makes reference to “customers” meaning “consumers”;
- Namibia complies with best banking practices;
- Contracts can be declared illegal based on unfair terms;
- Vulnerable Consumer//Affluent consumer-poor, uneducated consumer which consist of 99% of the Namibian Consumer;
- Financial education should be introduced at a very early age, Malaysia currently in the process of doing this;
- Banking code in the process;
- There is a need to issue standards for bank fees and charges;
- Fees and charges should be disclosed to the consumer to be able to make an informed choice;
- Amendment to the Payment Systems Management Act;
- Pyramid schemes to be covered under new consumer law;
- As custodians of consumer protection and competition in Namibia, Ministry of Trade and Industry should extend the mandate of the Competition Commission to also cover consumer issues and be renamed to Competition and Consumer Commission;
- Must protect the consumer not only from suppliers but also from themselves;
- ATM cards to be issued locally;

- Difficult for SME's to access banking finance, barriers to entry, branchless banking and innovative products in the process;
- Village banks in the North of Namibia catering for low income groups;
- Banking hiding costs through their system, how will the Bank of Namibia ensure, say if you do away with cash deposit fees, that the banks will not recover these costs through other means?

Namibia Competition Commission

The Role of the NaCC in Consumer Protection and efforts towards the Promotion of Consumer Protection

-Competition Policy:

- Laws to regulate anti-competitive conduct, thus promoting market competition;
- Measures developed as a strategic guiding framework affecting behaviour of firms and structure.

-Competition Act 2 of 2003:

- Purpose of the Act: to promote and safeguard competition;
- Specific public interest provisions:
 - Protecting consumers by safeguarding prices and product choice; and
 - Promoting employment, investment and advancing the social and economic welfare of Namibians.
- Section 2 of the Act deals with competitive pricing, product choice and false and misleading advertisements;

-Link between consumer protection and competition:

- Common goal of promoting consumer welfare;
- Competition approaches this goal from the supply side, whereas consumer protection approaches it from the demand side.

- Some Countries have competition law and consumer protection law housed within one institution;
- Competition Commission to be notified of any merger or acquisition, review the application to see the merger is not anti-competitive and does not result in a monopoly or dominance.
- The Commission ensures that there is competition in the market that will result in lower prices for the consumer;
- Commission working on a paper on the link between competition and the consumer protection.
- Prices dictated by the central bank, does this not amount to price fixing? No, not when it is regulated.

Namibia Consumer Trust

The Namibian Consumer Trust and its role to promote consumer rights in Namibia.

- The NCT was founded in 2005;
- It is a non-governmental, no profitable Organisation;
- Mandate is derived from the Constitution, amongst others, Article 2(e);
- The mission is to identify weaknesses in the system;
- Official partner and member of Consumer International;
- Purpose of the Institution is not to lobby but to advise;
- Calls for internationally recognized standards to be the basis of the consumer protection legal framework;
- Consumer protection rights not to be restricted to legal rights
- Defines consumer as any person that consumes goods and services, including SME's but does not include juristic persons.

Discussion

- Definition of consumer does not include the middleman, question is does that not make the definition a bit narrow;
- Voetstoots protects dishonest behaviour, does not fit in with UN guidelines on consumer protection;
- NCT not mandated to receive consumer complaints and act upon it. Become aware of consumer complaints or issues through research comparing Namibia to other countries;
- Needs to look at whom the consumer is when coming up with the definition.

Day 3

07 April 2011

Situation in other countries

(1) Botswana

- Consumer Protection Act of 1998
- Consumer Act only makes provision for complaints about unfair business practices;
- The Act does not set, any rights, obligations and enforcement mechanisms;
- The Act is criticized to be outdated and not conforming to what is going on currently in Botswana.
- Calls made for the amendment of the Act.

(2) Mauritius

- Legislation affording the Consumer protection in Mauritius are the following:

(a) Consumer Protection Act 11 of 1991

The Act lays down general standards regarding safety and quality of goods supplied.

(b) Consumer Protection (Price and Supplies Control) Act 12 of 1998

The Act provides the legal framework which ensures that general retailers in respect of basic items (ration rice, sugar, raw and white, flour laundry soap, edible oil) and managers of petrol filling stations, in respect of white oil, do not cease to supply the general public with these essential commodities in order to avoid consumers hardships of any distribution in supply. Non-compliance with the provisions of the Act constitutes an offence.

(c) Consumer Commodities Act 8 of 1991

The Act aims at providing better protection to the consumer against abusive practices by regulating trade, supply and price of goods.

(d) Fair Trading Act 26 of 1979

The Act aims at securing consumer confidence by ensuring fair markets for goods and services, through the prohibition of abusive and unethical trade practices. Non-compliance with the provisions of the Act as well as certain acts done for the purpose of or in connection with the Act, constitutes an offence.

The Act was amended in 1988 to provide that there shall be open competition between traders and that no monopoly of any kinds shall be established.

(e) Hire Purchase and Credit Sale Act 6 of 1964

The Act draws a distinction between hire purchase agreements and credit sale agreements in respect of transactions for the supply of certain goods and services.

(f) Prices and Consumer protection Advisory Committee Act 57 of 1983

The Act establishes the Advisory Committee on Prices and Consumer Protection.

The duties of the Commission are to advise the Minister, to whom the responsibility for the subject of consumer protection is assigned, on-

- (i) Any matter relating to the price and supply of consumer goods and services which the Minister may refer to it;
- (ii) The formulation and implementation of policies of policies relating to consumer protection; and
- (iii) Ensure the corporation and participation of consumers in matters, which affect their interest.

The Law Reform and Development Commission of Mauritius has called for consumer Protection Legislation to be reviewed and reformed.

According to the commission the current legal framework is inadequate, in that the-

- Provisions as to consumer guarantees in respect of supply of goods and services and as unfair business practices, are insufficient;
- There is no provision as to unfair contract terms in consumer agreements;
- Safety requirements are laid down only in respect of goods;
- Distance selling, doorstep selling and unsolicited consumer transactions and agreements needs to be strengthened.

The Commission has recommended that the consumer protection legal framework should be reformed and the following are the recommendations:

- To include, amongst other things, clearly formulated rights;
- To provide for a definition of “consumer” that includes both the natural and juristic persons;
- To establish and operate a National Consumer Council which would encourage consumer participation in decision-making process concerning the marketplace and the interest of consumers;
- To provide for an effective redress framework relating consumer transactions and agreements;
- To provide for an accessible, effective and efficient system of redress for consumers, including a mechanism for consensual resolution of disputes arising from consumer transactions.

(3) South Africa

The **Consumer Protection Act 68 of 2008** recently came into operation.

The main topics covered under the Act are:

- Consumers will be guaranteed equal access to markets;
- Consumers' privacy will be protected;
- Consumers will have a right to choose;
- Fair disclosure of information to consumers;
- Fair and Responsible marketing;
- Customers will be entitled to honest and fair dealings;
- Terms and Conditions need to be fair value, good quality and safe products;
- Suppliers need to be accountable to customers;
- Consumers have a right to be heard and receive compensation if they are unfairly treated;
- The Act introduces strict liability for example in section 61 it introduces a no-fault liability for damage caused by goods. A causal link between harm, as specified under this section, and the defective product is all that is required to establish liability of the supplier. No negligence needs to be proved;
- There are however certain exceptions to strict liability. The Act, while providing for strict liability, does not provide for absolute liability. There are exclusions to liability which benefit distributors or retailers, not producers or importers. The most significant exclusion being where it is unreasonable to expect a distributor or retailer to have discovered the unsafe product, characteristic, failure, defect or hazard having regard to that persons role in marketing the goods to the consumer and the state of scientific and technical knowledge at the time the goods were under the control of that person;
- Chapter 4 deals with the National Consumer Protection Institution.
- This chapter establishes the Provincial Consumer Protection Authorities and the National Consumer Commission;
- Chapter 6 deals with the enforcement of the Act. The Commission is responsible to enforce the Act by promoting informal resolution of any

dispute between a consumer and a supplier but is not responsible to intervene in or directly adjacent any such dispute.

Conclusion

In conclusion it was noted that there is a need for consumer protection legal framework in Namibia. It was however suggested, taking into account the above-mentioned, that-

- The further research on the “voetstoets” clause;
- The protection of the economy is to be considered;
- The impact of the law on businesses should be assessed;
- The cost implications must be considered;
- The education on rights and obligation and dissemination of information is the key;
- All relevant stakeholders should be consulted throughout the process.