

The scope of the application of the Consumer Protection Act 68 of 2008 in the context of the sale of defective goods in comparative perspective

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Abstract

The Consumer Protection Act 68 ('the CPA') came into effect on 31 March 2011. In broad terms, the purpose of the CPA is to promote the social and economic welfare of consumers. Specific reference is made to reducing disadvantages suffered by vulnerable consumers. The question posed in this thesis is whether the scope of the application of the CPA in relation to transactions for goods is consistent with the purpose of the Act, but also how it compares to the approaches taken in the European Union, United Kingdom and Australia. It is argued that the application provisions are not always fair, rational, clear, efficient and consistent with reasonable expectations. The following issues relating to the application of the Act are addressed: the approach to the protection of small juristic persons, the omission of an exclusion based on the purposes for which the transaction is concluded, the onus of proof, the exclusion of transactions outside the ordinary course of business, the definition of 'supplier', whether transactions should be 'for consideration' in order for the consumer to qualify for protection, whether the whole supply chain should be liable and whether all goods should fall within the scope of the Act. Recommendations on these issues are made in light of rationales for consumer protection legislation, proposed criteria for evaluating such legislation (namely whether the legislation is fair, rational, clear, efficient and consistent with reasonable expectations) and comparative research. Suggested amendments to the wording of relevant sections in the Act are made in the final chapter.

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1. Chapter 1: Background and methodology

1.1. Background

The Consumer Protection Act 68 of 2008 ('the CPA') came into effect on 31 March 2011. It resulted from the acknowledgment that there was an imbalance between consumers and suppliers, which had arisen

because the traditional (or classical) law of contract applies regardless of the identity of the parties, their relationship to each other, the subject matter of the contract, and the social context of the contract.¹

The notion of protecting consumers through legislation is not new, nor is it unique to South Africa. The United Nations adopted guidelines for consumer protection in 1985, which are internationally recognised as a minimum standard for consumer protection.² Consumer protection legislation has been adopted all over the world.³

The purpose of the CPA is to

‘promote and advance the social and economic welfare of consumers in South Africa by–

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumer–
 - (i) who are low-income persons or persons comprising low-income communities;
 - (ii) who live in remote, isolated or low-density population areas or communities;
 - (iii) who are minors, seniors or other similarly vulnerable consumers; or
 - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other

¹ P N Stoop ‘The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts’ (2015) 18(4) *PELJ* 1091 at 1092.

² United Nations Guidelines for Consumer Protection (as expanded in 1999) (Res 29/248). See David Harland ‘The United Nations Guidelines for Consumer Protection’ (1987) 10 *Journal of Consumer Policy* 245 at 245.

³ For example in the European Union, the United Kingdom, sub-Saharan Africa, the Caribbean, Asia, South America, North America and Australia. See Monique L du Preez ‘The Consumer Protection Bill: A few preliminary comments’ (2009) 1 *TSAR* 58 at 62.

visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

- (c) promoting fair business practices;
- (d) protecting consumers from–
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
 - (ii) deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
- (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers’.

A great deal has been written about the CPA, but no comparative study relating to the scope of the application of the CPA has been undertaken.⁴ The question posed in this thesis is whether the scope of the application of the CPA in relation to transactions for goods is consistent with the purpose of the Act, but also how it compares to the approaches taken in foreign law.

It will be argued that if the CPA is to have any hope of achieving its purpose, the scope of its application must be fair, rational, clear, efficient and consistent with reasonable expectations.⁵ Unfortunately, the current formulation gives rise to the following questions:

- a) The definition of ‘consumer’ in the CPA includes small ‘juristic persons’. Should juristic persons be protected? If so, should the protection be extended to all juristic persons or only small juristic persona, and how should size be determined?

⁴ The most comprehensive discussion of the definitions and application provisions of the CPA is Elizabeth de Stadler ‘Section 5’ in Tjakie Naudé & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) para 5125.

⁵ These criteria for evaluating the law are discussed in chapter 2, para 2.5.

- b) The CPA does not exclude transactions concluded for business purposes. This relates to the fact that ‘juristic persons’ are also protected. Should the CPA apply to transactions taking place for business purposes?
- c) A complex definition of ‘consumer’ creates questions regarding the onus of proof. Who will be burdened with proving whether a customer is a consumer?
- d) The definition of ‘supplier’ is limited to suppliers acting in the ‘ordinary course of business’. Does this mean that suppliers are not responsible for ‘atypical’ transactions that do not form part of their core business? If so, should that be the case?
- e) The CPA requires that a transaction must be ‘for consideration’. Should this requirement be introduced into South African law?
- f) Liability flows up the supply chain in many instances. Are the definitions establishing this clear enough? Does this impose unreasonable liability on suppliers?
- g) Should all goods be included in the scope of the legislation? The inclusion of immovable, second-hand and intangible goods has been particularly controversial.

These issues will be analysed compared to the approaches taken in foreign law, and alternatives will be proposed. The analysis will take place in the context of the sale of goods and the regulation of the quality of goods. This decision will be discussed in the next section.

1.2. A note on methodology: Which statutory instruments will be compared?

The developments in foreign and international law are relevant for two reasons. First, section 2(2) of the CPA provides that appropriate foreign and international law may be used when interpreting or applying the Act. Secondly, the experiences in other jurisdictions may provide valuable guidance in determining whether the protection afforded to consumers in South Africa is adequate; in other words, whether the

provisions of the CPA will be successful in protecting consumer rights, and whether legislative reform is needed to bolster this protection.

Van der Walt⁶ makes the following statement with regard to the role of the analysis of foreign law:

‘As a history of errors, comparative study shows us a range of fallacious doctrines, theories and arguments that have already been discredited and should be avoided. As a history of possibilities, comparative study shows us that certain doctrines, theories and arguments could still be used as possible explanations of or solutions for individual problems. As a history of examples, comparative study shows us the methods, techniques and approaches that are available to us. Like the historical study of law, the comparative study of law liberates us from what we need not do; it cannot and should not enslave us by telling us what we have to do.’

When embarking upon a comparative analysis of the CPA in order to determine whether the level of protection of the consumer’s right to quality goods is in keeping with international best practice, one must take heed of the words of Chaskalson in *Makwanyane*:

‘[W]e must bear in mind that we are required to construe the South African Constitution, and not ... the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from ... foreign case law, but we are in no way bound to follow it.’⁷

These ‘warnings’ apply to both a substantive comparative analysis as well as the use of foreign law to interpret the CPA. In this, as in everything else, context is king, and the unique socio-economic circumstances in South Africa have to be taken into account when considering the scope of consumer protection measures.⁸

For purposes of the comparative sections of this thesis, three principal jurisdictions were considered: the European Union (EU), the United Kingdom (UK) and Australia. The selection of foreign consumer protection laws to use in this comparative study was challenging, as consumer protection legislation has become exceedingly common.⁹ The selection was informed by the fact that the European

⁶ A J van der Walt *The Constitutional Property Clause* (1997) 38 as quoted in Lourens du Plessis *Re-interpretation of Statutes* (2002) 273.

⁷ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

⁸ The identity or characteristics of the South African ‘consumer’ are discussed in para 2.2.

⁹ Consumers International *The State of Consumer Protection Around the World* (2013) available at <http://www.consumersinternational.org/news-and-media/resource-zone/state-of-consumer-protection>,

Union, the United Kingdom and Australia have all undergone reviews in the past ten years. The analysis and revision of these instruments has generated useful source material. Practical considerations such as the accessibility of primary and secondary source material in English also played a role.

Discussing the application of consumer protection legislation in the abstract may be impractical, as some categories of goods, services and contracts may require different approaches. The contract of sale is central to consumer protection law. In light of this, the issues will be discussed against the background of consumer laws with general application (as is the case with the CPA), the specific regulation of problems relating to the quality of goods and, to a lesser degree and with deference to the context, the regulation of unfair contract terms in contracts of sale and unfair business practices.

The consumer protection laws (and, in certain cases, preparatory works) of the European Union that will be considered are primarily the Consumer Sales Directive,¹⁰ the Unfair Terms Directive,¹¹ the Consumer Rights Directive¹² and the Unfair Commercial Practices Directive.¹³ Other instruments of the European Union

accessed on 6 April 2016; Federal Trade Commission ‘Competition and consumer protection authorities worldwide’ available at <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>, accessed on 4 March 2016.

¹⁰ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees *Official Journal L 171, 07/07/1999 P. 0012 - 0016* (the Consumer Sales Directive) and the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees *Official Journal C 307/8, 16/10/1996 P. 0008* (Proposal for a Consumer Sales Directive).

¹¹ Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts *Official Journal L 095, 21/04/1993 P. 0029 - 0034* (the Unfair Terms Directive).

¹² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council *Official Journal L 304/64, 22/11/2011 P.260 – 284* (the Consumer Rights Directive), and the Proposal for a Directive of the European Parliament and of the Council on consumer rights 2008/0196 (COD) COM (2008) final. Initially, the Consumer Rights Directive was intended to consolidate eight Directives, but only two (distance selling and doorstep selling) were ultimately repealed. This was the result of the ‘political reality’. See Chantal Mak ‘EP adopts CRD’ available at <http://recent-ecl.blogspot.com/2011/06/ep-adopts-crd.html>, accessed on 18 December 2013.

¹³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council *Official Journal L 149/22, 11/6/2005* (the Unfair Commercial Practices Directive).

that will be referred to are the Common European Sales Law¹⁴ and the Draft Common Frame of Reference.¹⁵ The choice of European contract law is informed by the fact that it underwent a relatively recent process of modernisation and harmonisation.¹⁶ First, the Consumer Acquis Review led to the publication of the Consumer Rights Directive.¹⁷ Secondly, the project of a Draft Frame of Reference resulted in the publication of a wealth of research and is intended to serve as inspiration ‘for suitable solutions for private law questions’, and it is hoped that ‘[i]t will have repercussions for reform projects within the European Union’.¹⁸ The Draft Common Frame of Reference was preceded by the Principles of European Contract Law and the Principles of European Law: Sales.¹⁹ Given this recent (and continuing)

¹⁴ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final (the CESL). This proposal was withdrawn on 16 December 2014 in the EU Commission’s Work Programme for 2015 to the European Parliament (see item 60 of Annex II of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions *Commission Work Programme 2015: A New Start* COM (2014) 910 final). The reason for the withdrawal was that a ‘[m]odified proposal [was to be made] in order to fully unleash the potential of e-commerce in the Digital Single Market’. The Commission committed to publishing an amended proposal, which would include ‘a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods’ before the end of 2015 (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions *A Digital Single Market Strategy for Europe* COM (2015) 192 final 5). No new proposal has been tabled to date. However, the formulation suggested in the CESL remains instructive. Also see Out-Law ‘Common European Sales Law proposals to be replaced as new consultation is opened on online sales barriers’ available at <http://www.out-law.com/en/articles/2015/june/common-european-sales-law-proposals-to-be-replaced-as-new-consultation-is-opened-on-online-sales-barriers/>, accessed on 21 March 2016.

¹⁵ The Draft Common Frame of Reference (DCFR) was prepared and presented to the European Commission by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law. One of the purposes is to serve as a draft for drawing up a ‘political’ Common Frame of Reference (CFR). The history of the CFR dates back to July 2001. See European Union Committee *European Contract Law: The Draft Common Frame of Reference: Report with Evidence (12th Report of Session 2008-09 of the House of Lords)* (2009) para 6. Its other purposes are to ‘promote knowledge of private law in the jurisdictions of the European Union’ and to ‘show how much national private laws resemble one another and have provided mutual stimulus for development’. In contrast, the DCFR is described as an academic text that originated ‘in an initiative of European legal scholars’ (Christian von Bar, Eric Clive & Hans Schulte-Nölke (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) (Outline Edition)* (2009) 6). It contains principles, definitions and model rules of European private law. Books II and III of the DCFR contain rules derived from the Principles of European Contract Law (PECL). However, changes were made, in part, because the principles had to be broadened to address consumer protection issues (ibid at 30).

¹⁶ See generally Geraint Howells & Reiner Schulze ‘Overview of the proposed Consumer Rights Directive’ and Hans Schulte-Nölke ‘Scope and role of the Horizontal Directive and its relationship to the CFR’ in Geraint Howells & Reiner Schulze (eds) *Modernising and Harmonising Consumer Contract Law* (2009).

¹⁷ Acquis Group (eds) *Principles of the Existing EC Contract Law* (2007); Green Paper on the Review of the Consumer Acquis, COM (2006) 744, final, 30, *Official Journal* 2007 C 61/1; European Parliament resolution of 6 September 2007 on the Green Paper on the Review of the Consumer Acquis 2007/2010 (INI), A-0281/2007.

¹⁸ Von Bar, Clive & Schulte-Nölke *DCFR (Outline Edition)* op cit note 15.

¹⁹ Prepared by Hondius, Heutger, Jeloschek, Sivesand & Wiewiorowska.

process of modernisation and harmonisation, a comparative analysis of the European law in relation to the scope of the application of consumer protection may provide a ‘history of examples’ alluded to by Van der Walt.²⁰

The United Nations Convention on Contracts for the International Sale of Goods (the CISG) will also be discussed.²¹ While it does not apply to consumer sales,²² it remains a relevant and necessary point of comparison, as many of the provisions of the Consumer Sales Directive are based on it, and the formulation of the exclusion of consumer sales is revealing.²³

The Consumer Sales Directive is a minimum harmonisation directive, which means that while member states must see to it that the necessary laws are enacted to ensure that the national rules comply with the Directive,²⁴ nothing prevents member states from maintaining or enacting laws that are more stringent — in other words, laws that provide more consumer protection.²⁵ The consumer rights that result from the Directive apply concurrently with any rights created in terms of national legislation.²⁶ The United Kingdom, for example, had no legislation governing consumer sales contracts specifically, but rather relied on a legislative framework

²⁰ The Unfair Commercial Practices Directive, the Consumer Sales Directive and the Unfair Contract Terms Directive (along with other Directives) are currently undergoing a ‘fitness check’. European Commission ‘Review of EU Consumer Law (Fitness Check)’ available at http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm, accessed on 25 May 2016.

²¹ As its name suggests, the CISG applies to ‘contracts of sale of goods between parties whose places of business are in different states’ (art 1(1)). The CISG aims to ‘contribute to the removal of legal barriers in international trade and promote the development of international trade’ (see the preamble). It does this by providing uniform rules to govern the international sale of goods. To date, 80 countries have ratified the convention (UNCITRAL ‘Status – United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)’ available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, accessed on 2 December 2013).

²² Article 2(a).

²³ David Oughton & Chris Willett ‘Quality Regulation in European Private Law’ (2002) 25 *Journal of Consumer Policy* 299 at 306; T Krummel & R D’Sa ‘Sale of consumer goods and associated guarantees: A minimalist approach to harmonised European Union consumer protection’ (2001) 26 *European Law Review* 312 at 316; Dirk Staudenmayer ‘The Directive on the Sale of Consumer Goods and Associated Guarantees — a milestone in the European consumer and private law’ (2000) 4 *European Review of Private Law* 547 at 551; Sonja A Krusinga ‘What do consumer and commercial sales law have in common? A comparison of the EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods’ (2001) 2&3 *European Review of Private Law* 177 at 179.

²⁴ Article 11(1). This is referred to as the transposition of the Directive.

²⁵ Article 8(2).

²⁶ Article 7(1).

covering all sales.²⁷ In the United Kingdom, the process of transposition of the Consumer Sales Directive took place through the Sale and Supply of Goods to Consumers Regulations 2002,²⁸ which amended the UK Sale of Goods Act.²⁹ However, the regime was seen as too complicated,³⁰ and this led to the Law Commission of England and Wales and the Scottish Law Commission publishing their *Consumer Remedies for Faulty Goods: A Joint Consultation Paper* in November 2008.³¹ The UK SoGA provided the consumer with the remedies of rejection of goods and termination of the contract, and it was felt that the introduction of new remedies by way of the Sales Directive was unsuccessful.³²

These criticisms and reviews resulted in the enactment of the Consumer Rights Act,³³ which came into effect on 1 October 2015. Amongst other things, it governs the sale of goods and unfair contract terms.

The last jurisdiction that will be considered is Australia. The Competition and Consumer Act³⁴ is similar to the UK SoGA, but the departures from its UK roots provide insight into alternative approaches to the protection of consumers. Australian Consumer Law has undergone a review and ‘a major overhaul’ since 2009, which ultimately led to reforms to the Competition and Consumer Act. The review and reform has led to the publication of various studies on the consumer policy framework, which provide valuable insights into the scope of consumer legislation.³⁵

²⁷ There are other member states that deviate from these instruments. Valuable insight can be gleaned from these jurisdictions, and they have therefore been taken into account where this is the case.

²⁸ SI 2002/3045. The regulations came into force on 31 March 2003.

²⁹ Sale of Goods Act 1979 (c. 54) (the UK SoGA). The application provisions of the Unfair Contract Terms Act 1977 (c. 50) (the Unfair Contract Terms Act) will also be discussed.

³⁰ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods: A Summary of Responses* (2009) available at http://www.scotlawcom.gov.uk/files/2812/7877/5993/dp139_responses_summary.pdf, accessed on 15 April 2016 at 1.

³¹ Law Commission & Scottish Law Commission (Law Com Consultation Paper No 188 and Scot Law Com Discussion Paper No 139) *Consumer Remedies for Faulty Goods: A Joint Consultation Paper* (2008).

³² See generally Christian Twigg-Flesner ‘Fit for Purpose? The Proposals on Sales’ in Geraint Howells & Reiner Schulze (eds) *Modernising and Harmonising Consumer Contract Law* (2009) 147.

³³ Consumer Rights Act 2015 (c. 15).

³⁴ Competition and Consumer Act 2010 (Schedule 2 of this Act is also referred to as the Australian Consumer Law).

³⁵ Productivity Committee *Review of Australia’s Consumer Policy Framework* (2008) available at <http://www.pc.gov.au/inquiries/completed/consumer-policy/report>, accessed on 20 July 2015; Commonwealth Consumer Affairs Advisory Council *Consumer Rights: Reforming Statutory Implied Conditions and Warranties* (October 2009) available at http://archive.treasury.gov.au/documents/1682/PDF/Report_CCAAC_091029.pdf, accessed on 13 March 2016; National Education and Information Advisory Taskforce *National Baseline Study on Warranties and Refunds (Research*

The Australian Consumer Law is currently under review and a final report is due in March 2017.³⁶

1.3. Structure of the thesis

Discussing the application of consumer protection legislation in the abstract is impractical. In this thesis, the scope of application of such legislation is discussed (primarily) against the backdrop of problems relating to the quality of goods, as the approach to the consumer contract of sale can be used as a model for the general rules governing consumer law. There may be instances where the type of problem with which the consumer is faced will dictate a different approach to the application of the legislation. Apart from unfair contract terms, however, those are the exception rather than the rule.

This thesis is limited to a discussion of the typical provisions that determine the scope of legislation: the ‘definitions’ and ‘application’ sections. It is of course possible to determine the scope of legislation in other ways, such as including limitations in certain sections. There are two examples of this in the CPA. The section on fixed-term contracts (s 14) ‘does not apply to transactions between juristic persons regardless of their annual turnover or asset value’. Another example is reg 44, which contains the so-called ‘grey-listed’ terms presumed to be unfair.³⁷ The application of the regulation is limited to agreements between ‘a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession’ and ‘an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession’. This provides some fodder for arguments that the provisions regulating the content of consumer contracts should be contained in separate legislation. While there is some discussion of the scope of application of regulations relating to consumer contracts, the question of whether it ought to be regulated separately, and whether the application of such a separate instrument should be different from other consumer protection laws, is not discussed in detail.

Paper No 2) (October 2009) available at <http://apo.org.au/resource/national-baseline-study-warranties-and-refunds>, accessed on 13 March 2016.

³⁶ Consumer Affairs Australia and New Zealand *Australian Consumer Law Review: Issues Paper* (2016) available at http://consumerlaw.gov.au/files/2016/03/ACLreview_issues_paper.pdf, last accessed on 6 August 2016.

³⁷ Regulation 44 in GN 293 GG 34180 of 1 April 2011.

This thesis does not address the application of the CPA to services or the combination of goods and services. This was done to limit the scope of the thesis. The policy considerations that underpin the application of consumer protection measures to specific types of services may be less ‘universal’ than those underpinning the sale of goods. In other words, the type of service is more likely to influence the scope (and often the substance) of the protection measures. This is evidenced by the fact that consumer protection measures for services tend to be industry-specific.³⁸

In order to make consistent and rational recommendations, it is not enough to look at foreign jurisdictions. It is equally important to understand the theoretical underpinnings of consumer protections. The answer to ‘how’ consumers should be protected relates to ‘why’ the legislative intervention is necessary in the first place. This will be discussed in chapter 2.

The questions regarding the current formulation of the CPA referred to in paragraph 1.1 will be outlined in chapter 3. The approach taken by the South African legislature will be analysed in comparison with the approaches taken by the European Union, the United Kingdom, Australia and some international instruments. The aim of the comparative study is to make recommendations on how the relevant provisions of the CPA can be improved and suggest alternative formulations, which is done in chapter 4.

³⁸ In South Africa, banking, consumer credit, insurance, medical schemes, electronic communications and advertising are just some of the industries that are either regulated by legislation or self-regulated.

2. Chapter 2: A theoretical perspective on consumer protection

2.1. Introduction

This chapter will provide a theoretical perspective on the scope of consumer protection. It is necessary to consider the identity of the ‘consumer’ in consumer protection, and to determine what motivates consumers’ decisions, as this should be the backdrop against which lawmakers make decisions about the scope of consumer protection. Put differently, the study of the theories that inform legislative control over the relationship between consumers and suppliers reveals why legislative control is necessary in the first place, and what the scope of that intervention ought to be.

This chapter starts with a discussion of the characteristics and vulnerabilities of the ‘consumer’. This is followed by a discussion of the two major (and often competing) theories that inform consumer protection policy: the neoclassical (rational choice) theory and the theory grounded in behavioural science. This forms the background to the specific rationales for legislative intervention, which will be identified and discussed in the third part of this chapter. Lastly, five criteria for measuring the success of a particular form of legislative intervention over another will be discussed.

2.2. Who is the ‘consumer’ in consumer protection? ‘Defining’ vulnerability

The legislative approach to consumer protection depends on the characteristics of the theoretical ‘consumer’ whom the legislature wants to protect.³⁹ Is this hypothetical consumer aware of the risks associated with buying goods in the modern market? For instance, is this consumer aware that if he or she purchases products at a very

³⁹ Chapter 3 includes a comparative discussion of the definition of ‘consumer’ in the CPA, which draws from this discussion. In addition to giving insight into what the scope for consumer protection laws ought to be, this picture of who the ‘consumer’ is serves as the guiding principle when deciding on appropriate remedies. For instance, the consequence of the ‘definition of vulnerability’ discussed in this section is that remedies aimed at improved information alone will not address the plight of the vulnerable consumer (Norbert Reich, Hans-W. Micklitz & Peter Rott (et al) *European Consumer Law* 2 ed (2014) 47). Legislative intervention should rather be focussed on improving the consumer’s access to redress to help the consumer lead ‘a self-determined’ life. This thesis is aimed at providing this backdrop, but an exhaustive discussion of the remedies chosen by the South African legislature is beyond its scope.

low price, chances are that the products are of a lower quality? Or must the lawmaker accept that, for various reasons, some of which will be discussed below, consumers are not alert, and that the theoretical consumer is rather gullible?⁴⁰ Essentially, the lawmaker must ‘conceptualise vulnerability’.⁴¹

These conceptual consumers are used to explain why particular legislative intervention may be necessary. This can be done through what is referred to as ‘consumer images’ or ‘consumer benchmarks’.⁴² These are ‘abstract constructions of the qualities of consumers, based on certain perceptions of reality’ that ‘normatively function as starting points (*Leitbilder*) for the regulation of the consumer area’.⁴³ In Europe, an ‘active and critical information-seeker’ is an image that has influenced consumer policy and has led to an emphasis on transparency (information). This consumer is ‘reasonably well informed and reasonably observant and circumspect’.⁴⁴ The European approach ‘is based on an assumption of rational-acting consumers and suppliers and is deeply rooted in the information paradigm’. This paradigm is built on the notion that ‘there are consumers who are able, willing and competent to deal with information provided, to read different languages, to take informed rational decisions and to enforce their information-based rights’.⁴⁵ The average consumer benchmark still influences EU law, but two alternative benchmarks – the vulnerable consumer benchmark and the target group benchmark – have also emerged.⁴⁶ This will be discussed later in this section in the context of the Unfair Business Practices Directive.

The approach taken by the European Court of Justice has been described as trade-oriented and liberal, and has been criticised as setting too high an expectation for

⁴⁰ Geraint Howells & Stephen Weatherill *Consumer Protection Law* 2 ed (2005) 6.

⁴¹ James Devenney & Mel Kenny *European Consumer Protection: Theory and Practice* (2012). This phrase is borrowed from the heading of part II of Devenney and Kenny’s publication.

⁴² Bram B Duivenvoorde *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (2015).

⁴³ Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (et al) (eds) *Handbook of Research on International Consumer Law* (2010) 12.

⁴⁴ Ibid. Also see Reich, Micklitz & Rott op cit note 39 at 45; Ewoud Hondius ‘The notion of consumer: European Union versus member states’ (2006) 28(1) *Sydney Law Review* 89 at 94; Duivenvoorde op cit note 42 at 19.

⁴⁵ Hans-W Micklitz, Lucia A Reisch & Kornelia Hagen ‘An introduction to the special issue on “Behavioural Economics, Consumer Policy, and Consumer Law”’ (2011) 34 *Journal of Consumer Policy* 271 at 271.

⁴⁶ Duivenvoorde op cit note 42 at 27.

consumers, as it is an ‘idealised image’.⁴⁷ However, this image is not applied in all European countries. For instance, the European Court of Justice (ECJ) consumer is an evolved consumer compared to the ‘passive glancer’ of the Nordic countries, who does not take all available information into account.⁴⁸ In Spain, it has been held that the average consumer of common consumer products (in this case, olive oil) does not pay significant attention to external appearance.⁴⁹ In Belgium and Germany, the courts in the past also ‘referred to an uncritical or casually observant consumer’.⁵⁰ A stricter benchmark of the ‘average consumer’ was adopted in Germany, but is tempered by taking the context into account. So, for instance, consumers are expected to be more critical in cases involving products of a higher value.⁵¹

This is an aspect of the challenge with which European consumer policy is faced

‘to reconcile the emphasis found in much of EU protection on the alert and circumspect consumer, well able to look after him- or herself in the market and “empowered” by the pro-competitive integration of markets in the EU, with the plain reality that a great many consumers behave in ways that are remote from this supremely rational and confident paradigm’.⁵²

The passage refers to two (often competing) theories that inform consumer protection policy, which will be discussed below: the rational choice theory⁵³ and behavioural economics.⁵⁴ The latter theory acknowledges ‘the inattentive consumer, the vulnerable consumer, the consumer who is bewildered by the complexity of modern markets and the consumer whose head spins when confronted by a mass of information that is meant to help him or her through the choices available’.⁵⁵

⁴⁷ H Unberath & A Johnston ‘The double-headed approach of the ECJ concerning consumer protection’ (2007) 44 *Common Market Law Review* 1237 at 1282; Duivenvoorde op cit note 42 at 22, and chapter 2 generally; G Howells ‘The scope of EU consumer law’ (2005) 1(3) *European Review of Contract Law* 360 at 366.

⁴⁸ Howells, Ramsay & Wilhelmsson (eds) op cit note 43 at 12. This ‘consumer image’ is by no means limited to Nordic countries.

⁴⁹ Hans-W Micklitz, Jules Stuyck & Evelyne Terryn (eds) *Cases, Materials and Text on Consumer Law* (2010) 39.

⁵⁰ Duivenvoorde op cit note 42 at 19.

⁵¹ *Ibid* at 101.

⁵² Stephen Weatherill *EU Consumer Law and Policy* (2014) 310.

⁵³ See para 2.3.1.

⁵⁴ See para 2.3.2.

⁵⁵ Weatherill op cit note 52 at 310.

In a country such as South Africa, where approximately 45.5% of the population live below the poverty line⁵⁶ and only approximately 30% of the population complete grade 12⁵⁷ and 15.4% of the population are functionally illiterate,⁵⁸ the ‘identity’ of the consumer is surely different to that of the average resident of a ‘First World’ or ‘Developed’ country.⁵⁹ The implication is that higher levels of protection are required where a particular population is more vulnerable than another. After all, it seems obvious that

‘[m]ore complex markets and the growing amount of information needed to make responsible choices bear particularly hard on those who have low levels of education and skills and the socially excluded. These are also the consumers who can least afford to make bad choices’.⁶⁰

It is then also not surprising that protecting the poor and the vulnerable ‘has been a continuing undercurrent in consumer protection’.⁶¹ Viewed in this way,

‘[c]onsumer policy might therefore be part of a general policy of “positive welfare” designed to establish minimum standards in the marketplace, provide access to consumption opportunities and enforce rights’.⁶²

In South Africa, the legislature created the concept of the ‘vulnerable consumer’.⁶³ In terms of s 3(1)(b) of the CPA, these vulnerable consumers are consumers:

⁵⁶ Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 12, available at <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>, last accessed on 6 August 2016.

⁵⁷ Statistics South Africa *Statistical Release: Census 2011* (2011) 33, available at <http://www.statssa.gov.za/publications/P03014/P030142011.pdf>, last accessed on 1 March 2016; also see Statistics South Africa *General Household Survey, 2015* (2015) 20, available at http://www.statssa.gov.za/?page_id=1854&PPN=P0318&SCH=6475, last accessed on 27 July 2016.

⁵⁸ ‘Functional illiteracy’ is defined as a person who either has no schooling, or left school before completing grade 7. See Statistics South Africa *General Household Survey* op cit note 57 at 20, available at http://www.statssa.gov.za/?page_id=1854&PPN=P0318&SCH=6475, last accessed on 27 July 2016.

⁵⁹ L Hawthorne ‘The “new learning” and transformation of contract law: reconciling the rule of law with the constitutional imperative to social transformation’ (2008) *SA Public Law* 77 at 84.

⁶⁰ UK Government *Modern Markets, Confident Consumers — Government’s Consumer White Paper* (1999) para 1.5 available at <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/consumer/whitepaper/wpmenu.htm>, accessed on 13 February 2014.

⁶¹ Iain Ramsay *Consumer Law and Policy: Texts and Materials on Regulating Consumer Markets* 3 ed (2012) 70.

⁶² *Ibid.*

⁶³ The ideology of protecting vulnerable consumers was discussed in *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD). According to the judgment, the CPA is ‘aimed specifically at consumers to reverse historical socio-economic inequalities and adjust the imbalances’. See para 32. Also see Minette Nortje ‘Informational duties of credit providers and mistake’ 2014 *TSAR* 212 at 214; Robert Sharrock & Lienne Steyn ‘The problem of the illiterate signatory: *Standard Bank of South*

- (i) who are low-income persons or persons comprising low-income communities;
- (ii) who live in remote, isolated or low-density population areas or communities;
- (iii) who are minors, seniors or other similarly vulnerable consumers; or
- (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented’.

‘Vulnerable consumers’ in terms of the CPA are not given additional rights, but the entire Act is aimed at ‘reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services’, because s 4(3) provides that

‘[i]f any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)’.

The courts and the Tribunal have to develop the common law to ‘improve the realisation and enjoyment of consumer rights’ by these vulnerable consumers. In addition, vulnerability is expressly taken into account in the context of the consumer’s right to fair and honest dealing, as s 40(2) provides that

‘it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor’.

Literacy and economic exclusion are also taken into account when establishing whether information has been provided in plain language.⁶⁴ Lastly, s 52(2)(b) provides that ‘the nature of the parties ... their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position’ must be taken into account by a court when considering whether a supplier acted unconscionably, misled the consumer through its marketing, or made use of an unfair, unjust or unreasonable contract term. In all of these instances, vulnerability is

Africa v Dlamini’ (2014) 26(1) *SA Merc LJ* 150; Jacolien Barnard ‘Consumer rights of the elderly as vulnerable consumers in South Africa: Some comparative aspects of the Consumer Protection Act 68 of 2008’ (2015) 39(2) *International Journal of Consumer Studies* 223 at 226.

⁶⁴ Section 22(2) read with s 50(2)(b)(ii).

a factor considered in establishing liability, but is not a requirement for liability. Assessing whether there are any other instances in which vulnerability of the consumer should play a role, or whether the penalties imposed on suppliers who exploit vulnerability should be more severe, is beyond the scope of this thesis. The question here is whether vulnerability should play a role at all, and if so, how it should be defined.

This can be compared with the approach taken to the incorporation of vulnerability in the Unfair Commercial Practices Directive. Article 5(3) of the Directive provides:

‘Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.’

The following aspects of this article are noteworthy: First, before vulnerability is taken into account, the practice must be directed at a clearly identifiable group, at which point the average consumer *in that group* will be used as the benchmark. This is also referred to as the ‘target group benchmark’.⁶⁵ Secondly, the vulnerability of individual consumers is not taken into account – the test is objective. Thirdly, the effect of the practice on the vulnerable group must have been reasonably foreseen before the supplier will be liable. Lastly, ‘credulity’ is also used as a factor indicating vulnerability. ‘Credulity’ is described as ‘a tendency to be too ready to believe that something is real or true’.⁶⁶ The inclusion of this factor is significant because it is not really an indicator, but rather a symptom of vulnerability. The list of ‘vulnerabilities’ is not a closed list, but is significantly more limited than the one contained in s 3(1)(b) of the CPA.⁶⁷

⁶⁵ Duivenvoorde op cit note 42 at 24.

⁶⁶ Oxford Dictionaries Online ‘Credulity’ available at <http://www.oxforddictionaries.com/definition/english/credulity>, accessed on 3 May 2016.

⁶⁷ See recital 19, which indicates that the vulnerabilities listed are examples instead of a closed list. The EC Guidance on the implementation/application of the Unfair Commercial Practices Directive also indicates that ‘the reasons mentioned by Article 5 as the basis to establish the vulnerability of a specific category of consumers are listed indicatively and cover a wide range of situations’. See

The CPA's definition of 'vulnerability' extends beyond poverty to instances of 'social exclusion', namely where a set of often interrelated personal circumstances make it difficult or impossible for consumers to access goods or services⁶⁸ or to access justice.⁶⁹ These are consumers 'who run the risk of being isolated from social and economic life, be it by over-indebtedness, illness or lack of possibilities to communicate [and] ... who cannot, or can no longer, cope with the requirements of the modern consumer society'.⁷⁰ Consumer policy not only concerns itself with access to so-called essentials, but rather those goods or services that are required to take part in the 'life of the community'. An inability to access these goods and services can lead to further 'social exclusion'. This may include televisions, computers, the internet and cellphones. One survey in the United Kingdom defined poverty as a 'lack of access to a list of goods and services that 50 per cent or more of a representative sample of the population believe no one should be without'.⁷¹ Having access to these goods is not necessarily where it ends, though. Consumers who purchase these goods from the 'alternative retail sector' (in South African terms, the 'informal retail sector') can also be viewed as excluded because the mode of access differs from the mainstream (and, therefore, regulated) consumption practices.⁷² Another component of social exclusion is the 'digital divide'. This refers to 'the extent to which information and communication technology (ICT) increases or reduces social divisions and contributes to social exclusion'.⁷³ Increasingly, ICT is used to provide access to product information, transaction information (such as returns policies) and access to consumer redress (retailers and regulators increasingly handle complaints via email or call centres). Not having access to these channels of communication therefore contributes significantly to social exclusion. Golding sums up the disenfranchising effect of poverty as follows:

Commission Staff Working Document *Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices* COM (2016) 320 final at 45.

⁶⁸ Ramsay *Consumer Law and Policy* op cit note 61 at 73; Iain Ramsay 'Consumer redress and access to justice' in Charles E F Rickett & Thomas G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (2003) 23.

⁶⁹ A J Barnard 'A different way of saying: On stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa' (2005) 21 *SAJHR* 278 at 283.

⁷⁰ Reich, Micklitz & Rott (et al) op cit note 39 at 46.

⁷¹ David Gordon, Ruth Levitas & Christina Pantazis (et al) *Poverty and Social Exclusion in Britain* (2000) 10.

⁷² Ramsay *Consumer Law and Policy* op cit note 61 at 74.

⁷³ *Ibid.*

‘[P]overty is not just about money but about powerlessness. ... [A]ctive citizenship requires the capacity to confront the institutions, public and private, which frame people’s lives. Tackling the town hall, getting to see and challenge your child’s teacher, battling with the shop which sold you faulty goods, seeking advice in an unexpected run-in with the law, all demand that easy access to time, telephones, transport, and the soft terrorism of middle-class articulacy which are denied so many.’⁷⁴

A further consequence of ‘social exclusion’ is that lower-income households are under-represented in figures relating to complaints because the poor tend to complain less frequently. This may also be the result of a lack of confidence.⁷⁵ In short, ‘individualised redress procedures’ (where the consumer must claim in order to access consumer protection) may in fact operate against vulnerable consumers.⁷⁶

Sometimes, a consumer will be made ‘more vulnerable by virtue of their lesser *decision-making skills* to participate in the consumer market’.⁷⁷ This is also referred to as ‘commensurability’, which

‘requires that actors are able to identify the perceived consequences of all the options available in a given situation in advance, to measure the expected utilities, and to transform the result into numbers, in order to make a comparison and to pick the option that promises the most utility’.⁷⁸

The description of vulnerability in terms of s 3(1)(b) of the CPA and ‘social exclusion’ are essentially both factors or circumstances that would contribute to impaired decision-making skills.

Section 3(1)(b) is comparable to five ‘dimensions’ of vulnerability identified in a study commissioned by the European Commission aimed at conceptualising and assessing consumer vulnerability in the EU.⁷⁹ The study referred to the five ‘dimensions’ as being:

- a) A ‘[h]eightened risk of negative outcomes or impacts on well-being’;

⁷⁴ P Golding *Excluding the Poor* (1986) x.

⁷⁵ Ramsay ‘Consumer Redress’ op cit note 68 at 28.

⁷⁶ Ibid at 38.

⁷⁷ Deeksha Bhana & C J Visser ‘The capacity of a minor to enter into a consumer contract: A reconciliation of section 39 of the Consumer Protection Act and the common law’ (2014) 77(1) *THRHR* 177 at 188.

⁷⁸ Gerhard Wagner ‘Mandatory contract law: Functions and principles in light of the proposal for a directive on consumer rights’ (2010) 3(1) *Erasmus LR* 47 at 56.

⁷⁹ Consumers, Health, Agriculture and Food Executive Agency *Consumer Vulnerability across Key Markets in the European Union: Final Report* (2016) 41 available at http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf, accessed on 6 June 2016.

- b) '[h]aving characteristics that limit ability to maximise well-being';
- c) '[h]aving difficulty in obtaining or assimilating information';
- d) '[i]nability or failure to buy, choose or access suitable products'; and
- e) '[h]igher susceptibility to marketing practices, creating imbalance in market interactions'.⁸⁰

It would therefore seem that the definition of 'vulnerability' in the CPA is appropriate. However, in the context of determining the scope of consumer legislation, the question is also whether the recognition of 'vulnerability' in the CPA is appropriate at all. According to Ramsay, the findings of behavioural economics suggest that the distinction between vulnerable and more rational consumers should be reconsidered, given that the biases exhibited by consumers are universal.⁸¹ For instance, the biases revealed by behavioural economics apply throughout the population;⁸² they are not confined to 'orphans and widows'.⁸³ It is not surprising that the study commissioned by the European Commission revealed that the majority of consumers showed signs of vulnerability in at least one of the five dimensions.⁸⁴ This is relevant in the context of one of the most controversial questions, namely whether juristic persons can be included in the definition of 'consumer' despite the perception that they do not exhibit the same vulnerabilities as described above. This perception may not be entirely correct, as juristic persons are always represented by individuals who bring their own vulnerabilities to work.⁸⁵

⁸⁰ Ibid at 47.

⁸¹ Ramsay *Consumer Law and Policy* op cit note 61 at 63. Also see Ramsay 'Consumer Redress' op cit note 68 at 24. In the EU, the argument against specific protection for 'vulnerable' consumers is that it is 'disproportionate in relation to the free movement of goods' (Duivenvoorde op cit note 42 at 22). Also see the minority judgment of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 149, where he pointed out that standard-term contracts 'hit the computer-literate owner of a relatively new BMW who buys online with the same impact as they do the owner of the jalopy close to the scrapyard who signs with a thumbprint'.

⁸² The biases identified by this theory are discussed in para 2.3.2.

⁸³ Ramsay *Consumer Law and Policy* op cit note 61 at 302; Bastian Schüller 'The definition of consumers in EU consumer law' in James Devenney & Mel Kenny *European Consumer Protection: Theory and Practice* (2012) 130. Also see Norbert Reich 'Diverse approaches to consumer protection policy' (1992) 14 *Journal of Consumer Policy* 257 at 258.

⁸⁴ Guidance on the implementation/application of the Unfair Commercial Practices Directive op cit note 67 at 45.

⁸⁵ Schüller 'op cit note 83 at 130. This will be discussed in para 3.3, but the traditional counterargument is that when they are at work, they have access to resources such as attorneys and other risk management resources, including procurement processes.

In addition, the vulnerability of consumers is also considered in terms of their relative weakness compared to suppliers in relation to bargaining power and their level of knowledge about the transaction or product.⁸⁶ This is referred to as inequality of economic or bargaining power.⁸⁷ In this sense, all consumers, potentially even juristic persons, are vulnerable to exploitation.

Another argument mitigating against the overstatement of ‘vulnerability’ as a ‘requirement’ is that behavioural scientists do not necessarily define consumers according to who they are (in other words, whether they are vulnerable or not), but rather in terms of what they do (in other words, buying consumer goods as opposed to goods bought for commercial purposes). Using the aim of the transaction (purchasing consumer goods) as the distinguishing factor is not unheard of. It is referred to as the functional-occupational test, which is also discussed below.⁸⁸

The approach in the CPA does not rule out that all consumers may be vulnerable (even juristic persons) — it simply allows for the possibility that in some cases, certain types of consumers may be in need of further protection. Put differently, the importance of ‘vulnerability’ is not overstated. However, this does give rise to the broader question of why consumers should be protected at all.

2.3. Why is legislative control necessary? A tale of two theories

In this section, two theories that provide a backdrop to the theoretical rationales for legislative intervention will be discussed. The first is the rational choice theory (the neoclassical theory) and the second, behavioural economics. Why these two theories? Ramsay calls them ‘two influential contemporary paradigms for regulation’.⁸⁹

Just looking at the consumer interest columns of daily newspapers, *Carte Blanche*⁹⁰ or Hellopeter.com makes it seem trite to say that consumers are in need of protection. However, a coherent consumer protection policy can only be formulated if the policymaker knows exactly why this is so. As Howells and Weatherill put it

⁸⁶ *VB Penzügi Lizing v Schneider* European Court of Justice (9 November 2010) (C-137/08) para 46.

⁸⁷ This is discussed in paragraph 2.4.1.

⁸⁸ Paragraph 3.2.

⁸⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 41.

⁹⁰ A South African investigative journalism television programme.

‘[i]t is critically important to appreciate that simply because some things go wrong for some consumers, nonetheless it is vital to examine precisely how and why the law might intervene in the market’.⁹¹

For purposes of this thesis, one needs to add that it is equally vital to examine who should be protected. When analysing the rational choice and behavioural economics theories, it is important to ask who is affected by the vulnerabilities that they reveal. For instance: Are consumers only vulnerable when purchasing goods for their personal use, or do the market failures and heuristics discussed below also exist when they are entering into commercial transactions? Are only individuals affected, or does the vulnerability also exist in respect of juristic persons?

2.3.1. *The rational choice theory (neoclassical theory)*

The neoclassical or rational choice economic theory is a non-interventionist theory centred on the notion that the market has a built-in self-correcting mechanism. Consumer behaviour is explained by means of this rational choice theory.⁹² The point of departure is the assumption that where consumers are presented with several choices, they will always select the one that will best satisfy their preferences; that ‘people make decisions based upon stable and consistent preferences’ and ‘optimally assess and acquire information, including information about the risks and possible outcomes of the decisions involved’.⁹³ As Luth puts it: ‘Homo economicus “knows it all”: he knows all his preferences and is able to assess both the full set of options and corresponding risks and probabilities.’⁹⁴

Howells and Weatherill summarise neoclassical theory as follows:

‘Producers have to sell their goods to consumers in order to survive. They will only be able to sell to consumers what consumers want to buy. Consumer preferences will dictate what is made available. Producers compete. Consumers choose [rationally]. The “invisible hand” of producers behaving in response to consumer preference organises the market. The survival instinct among producers which is instilled by the mechanism of competition will ensure an efficient allocation of resources. Given the stimulus of competition, resources will not be wasted. Production will stand in equilibrium with consumption.

⁹¹ Howells & Weatherill op cit note 40 at 6.

⁹² There are several versions of the theory, the discussion of which falls outside the scope of this thesis. See Hanneke Luth *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms on Consumer Contracts Revisited* (2010) 16.

⁹³ Ibid at 15; Ramsay *Consumer Law and Policy* op cit note 61 at 47.

⁹⁴ Luth op cit note 92 at 41.

Viewed from this perspective, the market economy is a self-organised system.⁹⁵

Because the market looks after itself, legislative intervention is frowned upon, except where there is a ‘market failure’.⁹⁶

Many types of market failures do not affect the decision to regulate consumer sales in particular and will therefore not be discussed.⁹⁷ However, the following two market failures are relevant for the determination of the scope of legislative intervention:

- a) The ability of the market to correct itself may be restricted if transaction costs become too high. Transaction costs refer to the ‘funds, effort and time spent on a transaction that do not (directly) benefit the counterparty’.⁹⁸ When they become too high, an individual may be prevented from concluding a transaction, thereby disrupting the market. In other words, the institutional framework that regulates ‘market exchanges’ must be efficient.⁹⁹ Typical examples of transaction costs include ‘search and information costs, negotiation costs, contracting costs and monitoring and enforcement costs’.¹⁰⁰ The disruptive effect of high transactional costs is particularly acute in the context of consumer sales where the price of products tends to be low, whereas the impact of the harm could be large in aggregate.¹⁰¹ Many, if not most, of the specific rationales for legislative intervention discussed below are examples of transactional costs that have become too high.

- b) Information asymmetry also leads to a market failure. This refers to a situation ‘where one party possesses information about a certain product characteristic and the other party does not’¹⁰² — in other words, the distribution of information is asymmetrical. This, in turn, influences those parties’ respective bargaining power. Typically, consumers will not have as

⁹⁵ Howells & Weatherill op cit note 40 at 1.

⁹⁶ Ramsay *Consumer Law and Policy* op cit note 61 at 42.

⁹⁷ For example imperfect competition, the low incentive to pay for public goods (encouraging people to ‘free ride’), ‘moral hazard’ and negative consequences for third parties (externalities). See Luth op cit note 92 from 19; Ramsay *Consumer Law and Policy* op cit note 61 from 43.

⁹⁸ Luth op cit note 92 at 21.

⁹⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 43.

¹⁰⁰ Luth op cit note 92 at 19; Ramsay *Consumer Law and Policy* op cit note 61 at 43.

¹⁰¹ Ramsay *Consumer Law and Policy* op cit note 61 at 43.

¹⁰² Luth op cit note 92 at 22; Ramsay *Consumer Law and Policy* op cit note 61 at 43.

much information about the quality of goods as the supplier, leading to information asymmetry and a process called ‘adverse selection’, whereby good products are driven out of the market by lower-quality (but cheaper) products because the consumer is unable to assess the quality of the goods. This leads to a loss in welfare as the market for high-quality goods evaporates.

In the consumer context, the neoclassical economic theory has been described as ‘as alluring as it is unrealistic’.¹⁰³ The following are some criticisms of this theory:

- a) First, ‘[o]ne of the main ideas behind consumer protection is that the individual is entitled to protection notwithstanding that, on the basis of a cost-benefit analysis, the economy might benefit if the individual consumer receives defective goods or hazardous products’.¹⁰⁴ The limits on rational behaviour discussed in the next section (dealing with behavioural economics) are present, whether there are market failures or not. As such, it may be justified to always protect consumers against their own bad decisions. So, consumer protection is seen as a ‘third-generation’ human right.
- b) The rational choice theory is predicated on the notion that consumers determine their own wants and needs. This was perhaps true in the past, but suppliers are now increasingly able to create demand for their product through complicated and expertly devised and targeted marketing strategies.¹⁰⁵ This creates a ‘false consciousness’ because consumers are not entirely in control of what they want; their preferences are moulded.¹⁰⁶
- c) Consumers are less and less capable of making informed choices about what the ‘best product’ will be as a result of the absence of appropriate information, the inaccessibility or complexity of information when it is available, and the bewildering array of products available on the market.¹⁰⁷

¹⁰³ Howells & Weatherill op cit note 40 at 1.

¹⁰⁴ Sinai Deutch ‘Are consumer rights human rights?’ (1994) 32 *Osgoode Hall Law Journal* 537 at 552. Such paternalism is traditionally criticised by economists. See Ramsay *Consumer Law and Policy* op cit note 61 at 81; Luth op cit note 92 at 82. This is discussed in para 2.3.3.

¹⁰⁵ Ramsay *Consumer Law and Policy* op cit note 61 at 47.

¹⁰⁶ Howells & Weatherill op cit note 40 at 2.

¹⁰⁷ *Ibid.* This criticism is one of the key ‘insights’ developed by the behavioural science theory discussed in detail in para 2.3.2.2 below.

While this is acknowledged as one of the market failures that qualify the theory, it can be argued that it is so prevalent in consumer transactions that it actually renders the rational choice theory stripped of all practical relevance.

- d) Even when consumers have all the information they need, they often make miscalculations. This is because consumer behaviour is much more erratic than the rational choice theory would have us believe. So, for instance, consumers are prone to overestimate some risks, while underestimating others.¹⁰⁸ The study of these behaviours is called behavioural economics, which will be discussed in the next section.

It can be argued that the criticisms above are simply market failures, and that the rational choice theory, therefore, makes allowances for these failures by permitting regulation — in other words, that the theory has not failed. However, it could also be said that in respect of consumer goods, the market is in a permanent state of failure, which makes the theory more illusionary than real. These criticisms show that, in the context of regulating the quality of consumer goods, consumers have ‘lost their role as the balancing factor in the economic system’.¹⁰⁹

2.3.2. *Behavioural economics*

2.3.2.1. *Introduction*

Behavioural economics challenges many of the predictions made based on the rational choice theory and echoes the criticisms of rational choice theory alluded to above.¹¹⁰ Therefore, in a sense, behavioural economics ‘automatically’ disproves the rational choice theory.¹¹¹ It posits that consumer decision-making varies because of the emotional state of an individual before, during and after the decision to buy a product is made. As Ariely puts it, consumers are ‘predictably irrational’.¹¹² However, the more recent explanations offered for consumer decision-making can be seen as an attempt to consolidate the rational choice theory and the behavioural

¹⁰⁸ Ibid.

¹⁰⁹ Schüller ‘op cit note 83 at 126.

¹¹⁰ Luth op cit note 92 at 45.

¹¹¹ Ibid.

¹¹² Dan Ariely *Predictably Irrational — The Hidden Forces that Shape our Decisions* (2009).

sciences.¹¹³ The emergence of a completely new economic framework has not been ruled out. The current existence of both is in keeping with the fact that, in reality, both methods of decision-making are used. Sometimes a person's decision-making will be rational, and at other times more intuitive. In other words, the traditional economic analysis should not be abandoned completely. The existence of a limitation on a consumer's ability to make a rational decision does not in itself necessarily justify intervention.¹¹⁴

In short, behavioural economics is the study of biases ('a decision outcome that is systematically different from rational choice predictions')¹¹⁵ and heuristics ('simple rules of thumb which people use in day-to-day decision making') in an attempt 'to increase the predictive value of theories by making the underlying assumptions more realistic'.¹¹⁶ These predictions paint a more realistic picture of the impact of particular legal interventions on consumers. In addition, behavioural insights might reveal rationales for legislative intervention.

In the remainder of this section, some of the most prominent behavioural insights will be discussed briefly. These insights have particular bearing on consumer decision-making and policy.

2.3.2.2. *Information overload*¹¹⁷

It has been said that 'the economics of consumer protection is the economics of information'.¹¹⁸ However, there is not necessarily a direct correlation between increased information and increased consumer protection. In other words, even 'well-informed' consumers can behave irrationally.

¹¹³ Schüller 'op cit note 83 at 129.

¹¹⁴ See Luth op cit note 92 at 127.

¹¹⁵ Ibid at 46.

¹¹⁶ Ibid at 44; Schüller 'op cit note 83 at 130.

¹¹⁷ Ramsay believes that information overload is not an aspect of behavioural economics (see Ramsay *Consumer Law and Policy* op cit note 61 at 59). Nonetheless, it is useful to include it here. Likewise, Luth does not include it by name, but rather as a significant contributor to the occurrence of 'bounded rationality' (see Luth op cit note 92 at 48).

¹¹⁸ Luth op cit note 92 at 26.

With the advent of the era of mass production came a proliferation of new technology, products, suppliers and marketing campaigns.¹¹⁹ This, in turn, led to an increase in the amount and complexity of information that a consumer must process in order to make an informed, rational decision between products and/or suppliers.¹²⁰ When too much information is made available to consumers, they will suffer from information overload, and the quality of their decision-making will be affected due to ‘the limited capacity of the human mind to evaluate every possible alternative and calculate the corresponding results’.¹²¹ In other words, their rationality becomes bounded or restricted.¹²² As a result, consumers will base their choice on some of the product characteristics instead of considering all of them (this is called ‘satisficing’). For instance, consumers are more likely to base their choice on price alone.¹²³ This can be exploited by suppliers, who may overemphasise certain characteristics in marketing, thereby guiding consumers’ choice of which characteristic to base their decision on (known as ‘priming’).¹²⁴ The problem is that these characteristics may be unreliable, leading to the ‘wrong’ choice. In other cases, information overload may lead to ‘decision paralysis’ or inertia. Where the choice set is too large, consumers will rather walk away without entering into a transaction than to engage in the decision.¹²⁵ Studies about this occurrence abound. One of the most famous studies was done by Iyengar and Lepper.¹²⁶ It showed that 30% of consumers would buy jam when presented with six choices, while that number fell to 3% when they were presented with 24. In addition, consumers were more satisfied with their decisions in cases where the set of choices was smaller.

¹¹⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 2; Tanya Woker ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ (2010) 31(2) *Obiter* 217 at 230.

¹²⁰ Board of Trade *Final Report of the Committee on Consumer Protection* (Molony Committee) Cmnd 1781, July 1962 at para 41.

¹²¹ Ramsay *Consumer Law and Policy* op cit note 61 at 59; Luth op cit note 92 at 48.

¹²² Luth op cit note 92 at 48; Bastian Schüller ‘The definition of consumers in EU consumer law’ in Devenney & Kenny op cit note 41 at 131.

¹²³ Ramsay *Consumer Law and Policy* op cit note 61 at 60; Lynden Griggs ‘The [ir]rational consumer and why we need national legislation governing unfair contract terms’ (2005) 13 *Competition & Consumer Law Journal* 1 at 20.

¹²⁴ Luth op cit note 92 at 49.

¹²⁵ Luth op cit note 92 at 49; Ramsay *Consumer Law and Policy* op cit note 61 at 60.

¹²⁶ S S Iyengar & M R Lepper ‘When choice is demotivating: Can one desire too much of a good thing?’ (2000) 51(6) *Journal of Personality and Social Psychology* 995. Also see Ramsay *Consumer Law and Policy* op cit note 61 at 60.

However, consumers also often suffer because they have insufficient information about the reliability, durability and running costs of products, and about their legal rights.¹²⁷ The knee-jerk reaction is to force suppliers to provide more information through mandatory disclosures. However, increasing information may have the unintended result of overloading consumers with information, which undermines the objective of the notification duty. In other words, while transparency is alluring, it may have a detrimental effect on consumer decision-making. This deserves further discussion, as the apparent contradiction illustrates the dichotomy between the rational choice theory and behavioural science, while also revealing much about the nature of the vulnerability of consumers.

The following rationale for mandatory disclosure duties is based on the principles of the rational choice theory:

‘By *requiring* particular types of information to be made available to consumers, the law serves to bridge the information gap, permitting the consumer to choose between different types of product in an informed manner. The technique avoids the objection to the setting of minimum standards that the State is thereby taking away from the market the decision of what will and will not be available. Information disclosure addresses the market failings of informational imbalance, but then leaves the market to set its own quality levels. The technique is also usually cheaper to enforce.’¹²⁸

In a similar vein, Beales, Craswell and Salop point out that ‘information remedies allow consumers to protect themselves according to personal preferences rather than place on regulators the difficult task of compromising diverse preferences with a common standard’.¹²⁹ The standard they are rejecting is a quality standard. They assume that consumers can accurately reflect their personal preferences in the choices they make, which assumes rationality.

Behavioural scientists point out that there are pitfalls associated with mandatory disclosure. The lives of consumers have become so saturated with information that ‘consumer protection instruments that actually generate information that is costly for

¹²⁷ Ramsay *Consumer Law and Policy* op cit note 61 at 505.

¹²⁸ Howells & Weatherill op cit note 40 at 62. Luth (op cit note 92 at 36) refers to ‘process-based interventions’ and points out that they ‘interfere to a lesser extent with party autonomy, as consumers are still allowed a choice from all provided options’. Also see H Beales, R Craswell & S Salop ‘The efficient regulation of consumer information’ (1981) 24 *Journal of Law and Economics* 419 at 419.

¹²⁹ Beales, Craswell & Salop op cit note 126 at 513.

consumers to interpret or access may be counterproductive'.¹³⁰ Howells and Weatherill also point out that '[a] wealth of valuable research in recent years has exposed limitations in the cognitive capacity of consumers to process information and to act on it in a manner that is rational'.¹³¹ The risk is that the decision-making process becomes too complex and the information too costly to assess — this cost is referred to as the 'opportunity cost of attention'.¹³² At some point, the cost of assimilating all the information becomes more than the value of the information itself. Put differently, the transactional costs (particularly time) outweigh the benefit of having more information and thereby obtaining a marginally better product.¹³³ In simple terms, if the effort required to understand and weigh the information is too high, the consumer will not take the information into account. In such cases, regulating the product standard may be more appropriate.¹³⁴

However, the field of behavioural economics suggests that even if consumers had 'perfect information', their decisions are not always rational, but are instead skewed by their biases and heuristics. These will be discussed in the remainder of this section.

2.3.2.3. *Risk perception biases*

Contrary to what the rational choice theory would have us believe, consumers do not interpret or weigh risk rationally. As Ramsay puts it, 'individuals are poor statisticians'.¹³⁵ This phenomenon is explained by several risk perception biases. All

¹³⁰ Michael J Trebilcock 'Rethinking consumer protection policy' in Charles E F Rickett & Thomas G W Telfer (eds) *International Perspectives on Consumers' Access to Justice* (2003) 75; Howells & Weatherill op cit note 40 at 64; Luth op cit note 92 at 36; Ramsay *Consumer Law and Policy* op cit note 61 at 101.

¹³¹ Howells & Weatherill op cit note 40 at 64; Ramsay *Consumer Law and Policy* op cit note 61 at 101.

¹³² Luth op cit note 92 at 36. It is also referred to as 'information processing cost'. Also see Stoop op cit note 1 at 1096. He points out that there are many reasons other than a lack of information that may prevent consumers from overcoming a lack of transparency. These include consumers' reluctance to read contracts (due to the perception that they have no power to change the terms), their expectation at the time of concluding the contract that the relationship with the supplier will be successful, a lack of understanding of the terms and their implications, even if they are transparent, and information overload.

¹³³ 'Transaction cost' was discussed in para 2.3.1 in the context of the rational choice theory.

However, in a broad sense, all of the rationales for legislative intervention, whether based on rational choice theory or behavioural economics, are aimed at addressing a 'transaction cost'.

¹³⁴ Ramsay *Consumer Law and Policy* op cit note 61 at 53.

¹³⁵ *Ibid* at 59.

of these biases cause consumers to over or underestimate risks that play a part in their decision-making:

- a) Consumers are often over-optimistic about future risks, which leads them to underestimate the risk factor.¹³⁶
- b) Similarly, consumers tend to assess risk in their own favour, saying ‘it won’t happen to me’ (the ‘self-serving bias’).¹³⁷ This could have an impact on the efficacy of generic warnings. Consumers will not heed such warnings, as they are over-optimistic about the chances of the risk affecting them.¹³⁸
- c) They also tend to be overconfident about their own capabilities, for instance overestimating their driving ability.¹³⁹ This is referred to as ‘low probability neglect’.¹⁴⁰
- d) However, if a particular risk is well publicised (such as aeroplane disasters) or happened recently, the risk will be overestimated. This is known as the ‘focussing effect’,¹⁴¹ which is closely related to the strong bias towards certainty (the ‘certainty bias’). Luth explains it as follows: ‘The certainty effect describes how people have a strong preference for things that are certain. There is a large gap between 100% probability and 99%, whereas the difference between 99% and 98% probability is not interpreted to be that large.’¹⁴²
- e) If the risk involves something unpleasant or gruesome, such as death or pain and suffering, consumers tend to shy away from considering the risk. This is referred to as the ‘dread factor’.¹⁴³
- f) The ‘hindsight bias’, in turn,

‘describes how events seem much more likely in retrospect than they were assessed to be before or at the time of the occurrence of the event.

¹³⁶ Ibid at 58.

¹³⁷ Luth op cit note 92 at 51.

¹³⁸ Ramsay *Consumer Law and Policy* op cit note 61 at 58.

¹³⁹ Schüller ‘op cit note 83 at 136; Luth op cit note 92 at 51.

¹⁴⁰ Luth op cit note 92 at 50.

¹⁴¹ Ibid; Ramsay *Consumer Law and Policy* op cit note 61 at 59.

¹⁴² Luth op cit note 92 at 50.

¹⁴³ Ibid.

Looking back, a certain event taking place, such as a machine malfunctioning during a certain dangerous procedure causing injuries to employees, seems almost inevitable. However, at the time, the risk may have been well looked into and well understood by experts who designed the production line, and it may have been a freak accident'.¹⁴⁴

- g) 'Ambiguity aversion' or 'confirmation bias'¹⁴⁵ refers to the phenomenon that when consumers interpret information, they 'tend to take information that is in line with their previously held thoughts into account, and neglect information that is contrary to their beliefs'.¹⁴⁶

2.3.2.4. *Hyperbolic discounting*

'Hyperbolic discounting' is a particular aspect of behavioural psychology. In short, it entails people's tendency to attach more weight to short-term gratification than long-term gratification. Put differently, people are myopic in the short term, but become more rational in the long term.¹⁴⁷ It is also referred to as 'present bias'.¹⁴⁸ For instance, a consumer will prefer \$100 today over \$110 tomorrow, but if gratification is delayed, the same consumer would prefer \$110 in 31 days over \$100 in 30 days. Clearly, 'people discount for risks in a non-linear way'.¹⁴⁹ According to Ramsay, '[t]his conflict suggests that we cannot assume that consumer choice always reflects consumer preferences'.¹⁵⁰ Hyperbolic discounting also reflects the certainty bias and the focussing effect, as people perceive the present to be more certain than the future.

2.3.2.5. *Status quo biases*

Consumers have a strong bias towards leaving things as they are (maintaining the status quo).¹⁵¹ People tend to value things that they already own more than those

¹⁴⁴ Ibid at 51.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ramsay *Consumer Law and Policy* op cit note 61 at 57; Luth op cit note 92 at 52.

¹⁴⁸ Luth op cit note 92 at 52.

¹⁴⁹ Ibid at 51.

¹⁴⁹ Ibid.

¹⁵⁰ Ramsay *Consumer Law and Policy* op cit note 61 at 57.

¹⁵¹ Ibid at 58; Luth op cit note 92 at 52.

they still have to acquire (in other words, they will accept a higher price when selling than they would offer when buying).¹⁵² This is referred to as the ‘endowment effect’.

The ‘regret aversion’ or ‘cognitive dissonance’, in turn, causes people to rationalise bad decisions in retrospect in order to avoid regret.¹⁵³ Therefore, they attempt to justify the status quo rather than to feel (or even act on) dissatisfaction.

The ‘omission–commission bias’ relates to the fact that a person will ‘generally feel less bad over inactions that proved to be wrong than active choices that turned out to be the chooser’s detriment [*sic*]’.¹⁵⁴ So, when in doubt, people will act conservatively by choosing doing nothing over doing something.

2.3.2.6. *Context and framing*

When people make decisions, they take more into account than just the price and benefits of the respective options; the context and available alternatives are also considered.¹⁵⁵

Advertising often exploits what is referred to as the ‘affect heuristic’. This is when people attach positive perceptions to a product that have nothing to do with the product itself. An example is when advertisers place a beautiful woman in a car they are marketing, to make the car more appealing to male consumers.¹⁵⁶

Decisions are also guided by ‘loss aversion’, namely people’s tendency to prefer avoiding loss over acquiring gain.¹⁵⁷ In fact, research has revealed that losses are given twice as much weight as gains.¹⁵⁸ Suppliers can take advantage of this through the way in which options are framed.¹⁵⁹ This is another iteration of the status quo biases discussed above.¹⁶⁰

¹⁵² This was illustrated in a famous experiment by Kahneman, Knetsch & Thaler (D Kahneman, JL Knetsch & RH Thaler ‘Experimental tests of the endowment effect and the Coase theorem’ (1990) 98(6) *Journal of Political Economy* 1325).

¹⁵³ Luth op cit note 92 at 52.

¹⁵⁴ Ibid.

¹⁵⁵ Schüller ‘op cit note 83 at 136; Luth op cit note 92 at 53.

¹⁵⁶ Luth op cit note 92 at 53.

¹⁵⁷ Schüller ‘op cit note 83 at 138; Luth op cit note 92 at 53.

¹⁵⁸ Schüller ‘op cit note 83 at 138.

¹⁵⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 58.

¹⁶⁰ Schüller ‘op cit note 83 at 138.

2.3.2.7. *Anchoring and adjustment*

If someone forms an early impression (for instance, that a car drives well in rough conditions), that person will have trouble adjusting this impression later on, despite receiving information that justifies an adjustment (for instance, a warning that how the car handles would depend on the skill of the driver). This is referred to as ‘anchoring’.¹⁶¹ This bias is exploited by marketers by initially attaching a high price to goods to eventually enable them to sell the goods at a lower price. The consumer uses the initial high price as an anchor, and then experiences the sale price as more reasonable than it actually is. This practice is referred to as ‘hi-lo pricing’.¹⁶² Put differently, consumers often use the price of a product to estimate its value, which leaves them open to being misled. Disturbingly, this happens even where consumers are given other information about the value of the product.¹⁶³ This is probably the result of information overload, which was discussed above.

2.3.2.8. *Fairness*

The rational choice theory is predicated on the assumption that consumers will always act in their own interest, even if it is to the detriment of society as a whole. However, studies in behavioural economy show that individuals are willing to ‘punish’ suppliers who act unfairly or exploit other consumers by boycotting their products.¹⁶⁴

2.3.2.9. *The bounded consumer*

It is widely acknowledged that ‘the most important deviation from standard economic theory is the notion of bounded rationality (which is acknowledged nowadays by nearly all economists), bounded willpower and bounded self-interest’.¹⁶⁵ This can be caused by any number of the biases discussed above.

‘Bounded rationality’ refers to consumers’ inability to clearly evaluate all options open to them.¹⁶⁶ ‘Bounded willpower’ refers to the phenomenon that people will act

¹⁶¹ Luth op cit note 92 at 53.

¹⁶² Ramsay *Consumer Law and Policy* op cit note 61 at 59.

¹⁶³ Schüller ‘op cit note 83 at 135.

¹⁶⁴ Ramsay *Consumer Law and Policy* op cit note 61 at 60.

¹⁶⁵ Schüller ‘op cit note 83 at 131.

¹⁶⁶ Ibid; Luth op cit note 92 at 48.

against their long-term interests if there is a short-term cost.¹⁶⁷ Examples of this are dieting or to quit smoking. Schüller illustrates it with reference to Ulysses' journey to the sirens:

‘[H]e demanded to be bound to the mast in order to enjoy the songs of the sirens while his comrades had to put wax in their ears to prevent them from steering the boat into the cliffs. Like Ulysses, most consumers cannot avoid acting against their own long-term interest on their own and may regret their choices afterwards, and therefore need some kind of institution to prevent them from doing so.’¹⁶⁸

‘Bounded self-interest’ refers to the influence of consumers’ sense of fairness discussed in the immediately preceding section above. Consumers will act against their own best interests if they feel that they are being treated fairly. Conversely, if consumers feel hard done by, they will punish the supplier to their own detriment.¹⁶⁹

2.3.3. *Concluding remarks*

In general terms then, the use of behavioural economics in policy-making seems to be called for because

‘the thrust of empirical work since the 1960s in a variety of approaches is that the rational consumer is a fiction, and that choice is often fallible. The choices people make do not always accord with what, from a different temporal viewpoint, they would judge as being good for themselves’.¹⁷⁰

Behavioural economics does not necessarily aim to discard conventional law and economics, but rather to improve on it by offering behavioural insights into decision-making.¹⁷¹ The criticism against behavioural science is that it ‘is just a conglomeration of rationality biases and fallacies, but without any theory of how to predict or weight the different phenomena’.¹⁷² However,

‘this is perhaps the basic misunderstanding in the whole discussion; behavioural economics is not a new paradigm which can replace the old rationality paradigm, but it is like a toolbox which can help to explain deviations from

¹⁶⁷ Luth op cit note 92 at 55; Schüller ‘op cit note 83 at 131.

¹⁶⁸ Schüller ‘op cit note 83 at 131.

¹⁶⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 60; Schüller ‘op cit note 83 at 131.

¹⁷⁰ See A Offer *The Challenge of Affluence: Self-control and Well-being in the United States and Britain since 1950* (2006) 70 in Ramsay *Consumer Law and Policy* op cit note 61 at 61. Also see R Weber & R Dawes ‘Behavioral economics’ in N J Smelser & R Swedberg (eds) *The Handbook of Economic Sociology* 2 ed (2005) 91.

¹⁷¹ Luth op cit note 92 at 57.

¹⁷² Schüller ‘op cit note 83 at 140.

predicted rational behaviours; and at the same time it is a warning not to follow the predictions of neoclassical theory blindly'.¹⁷³

Consumer policy must therefore be 'debiasing interventions'.¹⁷⁴

Behavioural economics challenges the notion that 'it is not the role of the government to protect individuals against making "foolish" choices'.¹⁷⁵ In that sense, it has been said that '[b]iased decision making might provide a justification for paternalistically protecting consumers from their own errors'.¹⁷⁶ Behavioural economics has shown the economists' rejection of 'paternalism' to be a hopelessly oversimplified view, as it has proved 'consumer choice' to be a much more complicated concept than the rational choice theory presupposes. In answer to this criticism, the concept of 'soft paternalism' (also known as 'light paternalism') developed.¹⁷⁷ Given that not all consumers will have the biases identified by behavioural economists, soft paternalism guides or nudges consumers towards the optimal decision, without completely taking away their ability to choose. There are many iterations of this regulatory approach, but they are all characterised by a non-intrusive nature that respects sovereignty and free choice.¹⁷⁸ The strategies employed in this brand of paternalism are choice architecture (the manipulation of contexts, the alternatives provided and the presentation of the choices), switching defaults, debiasing and rebiasing.¹⁷⁹ However, Ramsay points out that 'it is often very difficult to distinguish between situations where governments are responding to problems that prevent individuals from reaching a rational judgment and those where government is overruling individual preferences and substituting its own judgment'.¹⁸⁰

The question is whether this theoretical framework sheds any light on what the scope of the application of consumer legislation should be. For instance, it may feel counterintuitive to say that paternalism over businesses is justified. The question for purposes of this thesis, is whether businesses would be vulnerable to the biases and

¹⁷³ Ibid. Also see Luth op cit note 92 at 127.

¹⁷⁴ Ramsay *Consumer Law and Policy* op cit note 61 at 61.

¹⁷⁵ Ibid at 62.

¹⁷⁶ Luth op cit note 92 at 82.

¹⁷⁷ Ibid at 73.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid at 76.

¹⁸⁰ Ramsay 'Consumer Redress' op cit note 68 at 21.

heuristics described here. It could be argued that there is always an individual who makes a final decision on whether to enter into a transaction and what to buy. However, this argument may be undercut by the fact that when juristic persons enter into transactions (particularly large ones), a group of people make the decisions. A group is less susceptible to the biases and vulnerabilities discussed in this chapter. This goes back to the old adage that two heads are better than one. It could also be argued that there should be a distinction between consumers (particularly juristic persons) who buy goods for commercial (such as resale) purposes, and consumers who buy goods for personal use. The underlying assumption here is that consumers will be less susceptible to biases when acting for commercial purposes and will have the means to protect themselves. Both of these questions are discussed in detail in chapter 3.

2.4. Specific rationales for legislative intervention

The two theories discussed above create the backdrop against which legislative interventions in consumer transactions can be justified. There are also specific rationales for legislative intervention. Some of them respond to certain specific vulnerabilities of consumers, such as inequality of economic power, information asymmetry, the failure of regulating through contracts, and the inability of the consumer to guard against or absorb risk. The nature of these vulnerabilities provides insight into what the scope of application of consumer legislation should be in order to neutralise them.

Other rationales such as an increase in quality, an increase in consumer confidence and increases in efficacy of consumer redress indicate the positive effects on the market that can be achieved through consumer legislation.

2.4.1. *Inequality of economic power*

The overarching reason why there is general ‘scepticism about the modern unregulated market as an adequate defender of the consumer interest’ is because the market is characterised by ‘inequality of economic power between consumer and supplier’.¹⁸¹ This is also referred to as inequality of bargaining power or a ‘lack of

¹⁸¹ Howells & Weatherill op cit note 40 at 6; J Ziegel ‘The future of Canadian Consumerism’ 1973 (52) *Canadian Bar Review* 191; Stoop op cit note 1 at 1105.

equilibrium’.¹⁸² Mass production and the technological advances of the last century have disturbed the equilibrium between consumer and supplier.¹⁸³

In the context of standard-term contracts, inequality in bargaining power is created by the phenomenon of ‘contracts of adhesion’. Consumers are not in a position to negotiate because goods are offered on a ‘take it or leave it’ basis — the supplier ‘lays down the law’, as it were. This problem is alleviated by legislation prohibiting unfair contract terms.¹⁸⁴

The following quote by Ziegel refers to various forms of inequality that illustrate the need for consumer protection:

‘I believe it will be found that every consumer problem exhibits one or more of the following characteristics. First, a disparity of bargaining power between the supplier of goods or services and the consumer to whom they are being offered; secondly, a growing and frequently total disparity of knowledge concerning the characteristics and technical components of the goods or services; and thirdly, a no less striking disparity of resources between the two sides, whether that disparity reflects itself in a consumer’s difficulty to obtain redress unaided for a legitimate grievance or in a supplier’s ability to absorb the cost of a defective product as part of his general overhead as compared to the consumer to whom its malfunctioning may represent the loss of a considerable capital investment.’¹⁸⁵

However, the role of consumer ‘weakness’ should not be overstated. As Wagner points out,

‘[t]he *bargaining power* that consumers have does not come in the currency of negotiating power, but manifests itself in the form of an option to walk away. In competitive markets, consumers are strong since they are free to turn down offers they do not like, and to turn to a competitor who offers better quality or lower prices’.¹⁸⁶

What are the implications of inequality of bargaining power for this thesis? It seems clear that individuals (particularly vulnerable individuals) are affected, but the position is murkier when it comes to juristic persons. Schüller points out that ‘consumers are the weaker party, not because they are natural persons, but because

¹⁸² Micklitz, Stuyck & Terryn (eds) op cit note 49 at 2; Woker op cit note 119 at 230.

¹⁸³ Ramsay *Consumer Law and Policy* op cit note 61 at 2; Trebilcock op cit note 130 at 68. Also see the historical overview in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson ‘Consumer law in its international dimension’ in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson (et al) (eds) *Handbook of Research on International Consumer Law* (2010) 4.

¹⁸⁴ Deutch op cit note 104 at 553.

¹⁸⁵ Ziegel op cit note 181 at 193.

¹⁸⁶ Wagner op cit note 78 at 67.

consumers do not have the resources to analyse and overcome their biases'.¹⁸⁷ The disparity of economic power, knowledge concerning the product, and ability to obtain redress (cost of litigation) is generally considered to be less acute when the buyer is a juristic person. However, there are underlying assumptions (wealth, knowledge, control over the terms of the transaction, and insulation against loss) that exclude smaller juristic persons from the general rule, particularly if they are small retailers who also have no (or very little) economic power in relation to their suppliers.¹⁸⁸

2.4.2. *Information asymmetry*

The phenomenon of information asymmetry was discussed in the context of the rational choice theory as one of the market failures that justifies legislative intervention.¹⁸⁹ The related issue of information overload was discussed as one of the behavioural insights derived from behavioural economics.¹⁹⁰ In summary, although it would seem logical to suggest that this information asymmetry should always be rectified by providing more information, the reality is that compulsory disclosure duties can often lead to an information overload, which can be just as detrimental to consumers. Juristic persons (as buyers) often also do not have the same level of knowledge about the product as the supplier of the goods. However, some juristic persons may have more experience in transacting, better access to redress, and better insulation against loss.

2.4.3. *Increase in quality of goods*

There is a link between information asymmetry and the standards maintained in a particular market. Twigg-Flesner argues the following based on a seminal article by Akerlof:¹⁹¹

¹⁸⁷ Schüller 'op cit note 83 at 141.

¹⁸⁸ Juristic persons (as buyers) who have a large market share in the resale of the goods in question often have a lot of bargaining power, but this does not hold true for smaller juristic persons. This is discussed in more detail in para 3.3.

¹⁸⁹ See para 2.3.1.

¹⁹⁰ See para 2.3.2.2.

¹⁹¹ Christian Twigg-Flesner *Consumer Product Guarantees* (2003) at 7; G Akerlof 'The market for "lemons": Quality uncertainty and the market mechanism' (1970) 84 *Journal of Law and Economics* 488 at 490.

‘[T]he inability of consumers to identify whether a particular product is a low-quality or a high-quality item, together with the inability of sellers and manufacturers to communicate the level of quality of their products, may result in a drop of the overall standard of quality in a particular product sector. If consumers cannot ascertain the level of quality before purchase, there is no incentive for a seller to offer high-quality products. There is also no encouragement for manufacturers to avoid design and manufacturing defects. As a result, low-quality products (“lemons”) will push high-quality products off the market.’

Akerlof’s theory is also referred to as the theory of ‘adverse selection’.¹⁹² If a consumer is confronted with two products — one cheap and one expensive — and has no information about the respective quality of the products, the consumer will always choose the cheaper one.¹⁹³ Consequently, the bad products will drive the good products off the market. The market does not correct itself, because although consumers may be aware that the quality has decreased, they cannot recognise higher quality, and consequently, cannot demand it. Therefore, the process repeats itself in what is known as ‘a race to the bottom’.¹⁹⁴

This is a further rationale for regulating quality through mandatory standards, as it may lead to an actual increase in the quality of goods. Sivesand refers to it as the theory of ‘risk reduction’, namely where ‘the legal obligation imposed upon the seller by the warranty induces him to care about the quality of the goods’.¹⁹⁵ In short, a supplier faced with far-reaching remedies will be incentivised to invest more in the prevention of quality problems.¹⁹⁶

How does this relate to a discussion of the scope of the application of consumer legislation? As with information deficits in general, it is possible to argue that the

¹⁹² Akerlof op cit note 191 at 488; Luth op cit note 92 at 22.

¹⁹³ J A Jolowicz ‘The protection of the consumer and purchaser of goods under English law’ (1969) 32 *Modern Law Review* 1 at 8; Ramsay *Consumer Law and Policy* op cit note 61 at 51.

¹⁹⁴ Luth op cit note 92 at 23.

¹⁹⁵ Hanna Sivesand *The Buyer’s Remedies for Non-conforming Goods* (2005) 222.

¹⁹⁶ This relates to what is called the ‘signalling theory’, which plays a role in rationalising the regulation of guarantees. If manufacturers are forced to make certain guarantees (signals of quality), they will strive to meet the signalled quality. Robert Bradgate & Christian Twigg-Flesner ‘Expanding the boundaries of liability for quality defects’ (2002) 25 *Journal of Consumer Policy* 345 at 357. The theory has been criticised because it does not account for the role of the consumer’s behaviour in the product failure. It has been argued that if consumers are given comprehensive rights in respect of the quality of goods, they are more likely to be careless in handling a product. Put differently, consumers are de-incentivised to take proper care of goods because of the expectation that the supplier will be held liable if something goes wrong. This can be remedied (and the criticism, therefore, neutralised) by limiting the warranty in time, or through limiting access to the rights in cases where the goods were misused or neglected. See Sivesand op cit note 195 at 222.

assumption that juristic persons (as buyers) have more knowledge than consumers will be a fallacy in many cases.¹⁹⁷

2.4.4. *Failings of regulating quality through contracts*

All things being equal, the aim of contract law is to provide ‘security for the recipient of a promise who has given something in return for that promise’.¹⁹⁸ It is ‘enshrined in a notion of the efficiency of exchange’, which means that it ‘promotes bargains’ as a result of which both parties are better off.¹⁹⁹ The following examples illustrate this principle:

‘If A has an item worth 100 to him, which is worth 200 to B, they will exchange it at 150 (assuming there are no other bidders) and both are better off as a result. Overall, society generally is better off as a result of a transaction beneficial to both A and B which prejudices no third party.’²⁰⁰

If this is the case, legislative intervention is not justified.²⁰¹ However, all things are not equal. Jolowicz refers to the ‘fetish of freedom of contract which, as everybody knows, has much more of myth than of substance so far as consumer contracts are concerned’.²⁰² And according to Lord Denning, ‘[t]he freedom was all

¹⁹⁷ See para 3.3.

¹⁹⁸ Howells & Weatherill op cit note 40 at 9.

¹⁹⁹ Ibid at 10.

²⁰⁰ Ibid.

²⁰¹ This is referred to as the ‘Coase Theorem’. See R Coase ‘The problem of social cost’ (1960) 3 *Journal of Law and Economics* 1.

²⁰² Jolowicz op cit note 193 at 8. This topic has received extensive attention in South Africa. See generally *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Brisley v Drotosky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); *Breidenkamp v Standard Bank of South Africa Ltd* 2009 (6) SA 277 (GSJ); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA); Tjakie Naudé ‘Section 48’ in Naudé & Eiselen (eds) op cit note 4; Tjakie Naudé & Gerhard Lubbe ‘Exemption clauses — a rethink occasioned by *Afrox Healthcare v Strydom*’ (2005) 122 *SALJ* 441; Tjakie Naudé ‘Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective’ (2010) 127 *SALJ* 515; Tjakie Naudé ‘The consumer’s “right to fair, reasonable and just terms” under the new Consumer Protection Act in comparative perspective’ (2009) 126 *SALJ* 505; Tjakie Naudé ‘Unfair contract terms legislation: the implications of why we need it for its formulation and application’ (2006) 17 *Stellenbosch LR* 361; Tjakie Naudé ‘The use of black and grey lists in unfair contract terms legislation: a comparative perspective’ (2007) 124 *SALJ* 128; Stoop op cit note 1 at 1091; P N Stoop ‘Background to the regulation of fairness in consumer contracts’ (2015) 27 *SA Merc LJ* 191; Tjakie Naudé & Charlotte Koep ‘Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms’ (2015) 26 *Stellenbosch LR* 85; P N Stoop ‘The current status of the enforceability of contractual exemption clauses for the exclusion of liability in the South African law of contract’ (2008) 20 *SA Merc LJ* 496; R D Sharrock ‘Judicial control of unfair contract terms: the implications of Consumer Protection Act’ (2010) 22 *SA Merc LJ* 295; P J Sutherland ‘Ensuring contractual fairness and consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC)’ (2008) 19 *Stellenbosch LR* 390; P J Sutherland ‘Ensuring contractual fairness and consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) — part 2’ (2009) 20 *Stellenbosch LR* 50; Y Mupangavanhu

on the side of the big concern. ... The big concern said, “Take it or leave it”. The little man had no option but to take it’.²⁰³

It will rarely, if ever, be the case that both parties are equally informed (the so-called information asymmetry); consumers suffer from information overload (often as a result of the contract itself)²⁰⁴ and standard-form contracts are rarely the result of arm’s-length negotiation. Even if these contracts were negotiated, consumers do not have the resources to match those of the average supplier, resulting in disparities between their bargaining powers. Howells and Weatherill give an example that is apposite in the context of legislative control over the quality of goods:

‘[I]n a market where goods of different quality are available at prices varying from 100 to 500, but where the consumer is completely unable to distinguish between goods on the basis of quality, the result will be consumer [*sic*] unwillingness to pay at the higher end of the price scale. As a result, sellers will simply withdraw better quality goods from that market.’²⁰⁵

So, Akerlof’s theory of ‘adverse selection’, in which the bad products drive out the good products, resurfaces as justification for legislative intervention ‘as a means of correcting problems caused by intransparency [*sic*]’.²⁰⁶ Because consumers do not read standard-form contracts (nor would it make any difference if they did), contracts are inappropriate vehicles for information about quality. Although consumers will pay attention to ‘salient’ terms such as the price and warranties, which may signal quality, ‘[c]onsumers are also over-optimistic and may underestimate certain risks’.²⁰⁷ In the words of Howells and Weatherill, ‘[i]t points towards the adoption of a legal approach which is more receptive to controlling the

‘Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)’ (2014) 17 *PELJ* 1166; Deeksha Bhana & Marius Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 *SALJ* 865; Deeksha Bhana ‘Contract law and the Constitution: *Bredenkamp v Standard Bank of South Africa Ltd* (SCA): Case note’ (2014) 29 *Southern African Public Law* 508; Dikgang Moseneke ‘Transformative constitutionalism: its implications for the law of contract’ (2009) 20 *Stellenbosch LR* 3; C-J Pretorius ‘Exemption clauses and mistake: *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA)’ (2010) 73 *THRHR* 492; Gerhard Lubbe ‘Taking fundamental rights seriously: the bill of rights and its implications for the development of contract law’ (2004) 121 *SALJ* 395.

²⁰³ *George Mitchell v Finney Lock Seeds Ltd* [1983] 1 *AER* 109 at 113.

²⁰⁴ Luth op cit note 92 at 63. She also points out that consumers will be prone to accepting the terms as they are, due to the status quo bias, or will not read the terms as a result of decision paralysis (inertia). Both of these biases were discussed under para 2.3.2. Information asymmetry was discussed in para 2.3.1.

²⁰⁵ Howells & Weatherill op cit note 40 at 11.

²⁰⁶ *Ibid* at 12; Wagner op cit note 78 at 61.

²⁰⁷ Ramsay *Consumer Law and Policy* op cit note 61 at 302. This is one of the biases that impede a consumer’s ability to make rational choices. This was discussed in para 2.3.2 as part of the discussion of the principles of behavioural economics.

substance of deals rather than simply enforcing them once they display the requisite legal form'.²⁰⁸

One such approach is an implied warranty that the goods will be of a certain quality. Terms that are implied in the contract function independently from any facts relating to the negotiations between the parties, the information to their disposal, or any other imbalances in the bargaining power between them – they 'reflect State-imposed minimum standards for the transaction, divorced from individual will', and '[c]onsumers cannot bargain away such protection, wittingly or unwittingly'.²⁰⁹

What are the implications for the scope of application required for effective consumer protection? It could be argued that contracts of adhesion can be to the detriment of juristic persons. Wagner points out that

'it seems plausible that the same toxic combination of rational apathy and failure of competitive forces also affects transactions between businesses. In the business world too, it is rational, and therefore common, not to over-invest in contract negotiations. The fine print often goes unnoticed and unanalysed, even in transactions involving more than small stakes'.²¹⁰

He does acknowledge that business will be in a better position to impose their own terms or to negotiate with the contracting partner, particularly in the case of large, high-stakes transactions (for instance, where the buyer is a large and, therefore, valued customer). The question of whether unfair contract terms legislation should specifically apply to business-to-business transactions and, if this is the case, whether the rules should be different, is beyond the scope of this thesis.

2.4.5. *The collective insurance theory*

Sivesand points out that 'remedies might fulfil an insurance function with the seller acting as insurer' because the statutory remedies 'protect the buyer against a product

²⁰⁸ Howells & Weatherill op cit note 40 at 21; Jolowicz op cit note 193 at 8.

²⁰⁹ Howells & Weatherill op cit note 40 at 30. Article 7 of the Consumer Sales Directive provides that guarantees are not binding if they 'directly or indirectly waive or restrict the rights resulting from this Directive, as provided for by national law'. In the United Kingdom, s 6(2)(b) of the Unfair Contract Terms Act provides that liability for the breach of terms about quality and fitness implied by statute (in this case, the UK SoGA) 'cannot be excluded or restricted by reference to any contract term' against a person who is 'dealing as a consumer'. In South Africa, the CPA prohibits terms that directly or indirectly result in the waiver of a right or obligation provided for in the Act (see s 51(1)(b)).

²¹⁰ Wagner op cit note 78 at 62.

failure as a negative and uncertain event'.²¹¹ The implicit decision that the legislature must make in each instance is whether the loss of one individual should be passed on to all consumers of a particular product, in the form of slight price increases occasioned by the increased risk faced by the supplier as a result of the new legislation.²¹²

Detractors of the regulation of the quality of consumer goods use the potential increase in price as an argument why such regulation is not desirable, thereby taking the implicit stance that lower prices are always 'better' for the consumer. This is referred to as the 'futility argument'. The argument is predicated on the assumption 'that so long as individuals remain free to contract, businesses will *pass along* the increased costs of any redistributive measure to consumers, and that if businesses are prevented from doing so, then they may be unwilling to deal with consumers. In short, the measure intended to protect consumers will *backfire*'.²¹³

There are limited concrete studies of the actual economic impact of quality regulation on the price of goods.²¹⁴ Ramsay criticises the fact that in academic writing, the futility argument is used in 'a priori terms without much serious investigation of the nature of particular markets'. He points out that '[w]hen the distributional effects are studied carefully the potential detrimental effects may be much more modest and need to be balanced against the benefits of the legislation and other social values which might be furthered by the regulation'.²¹⁵ One study done by the Department of Trade and Industry in the United Kingdom during the implementation of the Consumer Sales Directive showed that the new remedial scheme would lead to a marginal cost increase (0,25%) as a result of the anticipated 'ease' with which consumers would understand the alternative remedies and the reversed burden of proof.²¹⁶ Business, on the other hand, estimated the increase in

²¹¹ Sivesand op cit note 195 at 222.

²¹² Jolowicz op cit note 193 at 10; Luth op cit note 92 at 36.

²¹³ Ramsay *Consumer Law and Policy* op cit note 61 at 48; Wagner op cit note 78 at 63; Ton Hartlief 'Freedom and protection on contemporary contract law' (2004) 27 *Journal of Consumer Policy* 253 at 258.

²¹⁴ Sivesand op cit note 195 at 223; Ramsay *Consumer Law and Policy* op cit note 61 at 48; Ewoud Hondius 'The protection of the weak party in a harmonised European contract law: A synthesis' (2004) 27 *Journal of Consumer Policy* 245 at 247.

²¹⁵ Ramsay *Consumer Law and Policy* op cit note 61 at 48.

²¹⁶ Department of Trade and Industry *Consultation Paper of 26.2.2002* at 63.

cost at 3-5% of their turnover.²¹⁷ A study carried out by the European Commission on the economic impact of the Consumer Sales Directive concluded that it was difficult to predict the influence of the reform on sellers' costs.²¹⁸ The significance of these studies does not lie in the answers, but rather in the underlying question. The question asked — namely, what the expense will be to the supplier — recognises the fact that the regulation of product quality is, at its core, the regulation of the cost of doing business; it is not about punishing the supplier for some perceived wrongdoing, or primarily about preventing quality-related problems. The latter is an impossibility; things will and do go wrong. Liability, therefore, becomes a legislative 'expense' taken into account by the supplier as part of the bottom line.²¹⁹ In addition, Sivesand points out that the retailer will often absorb the costs or find ways to pass the risk (and, therefore, the costs) back to producers rather than on to the consumer.²²⁰ This is not hard to believe, given the substantial bargaining power of large retail chains.

The collective insurance theory counters the perceived negative effect of price increases by characterising these increases as a 'premium' that all consumers pay to belong to a collective insurance scheme, which will compensate consumers for the 'loss' of the product due to non-conformity.²²¹ The term 'compensation' is used in a wide sense here. It not only refers to monetary compensation in the form of a full or partial refund, but also to compensation in the form of a new or repaired product.

This argument is particularly persuasive in the case of vulnerable consumers who, due to their precarious social position (whether through poverty, illiteracy or other socio-economic impediments), will not be able to absorb the loss of the product by buying another, or do not possess the faculties or resources needed to obtain redress in the absence of a consumer protection regime. It is less persuasive when considering whether juristic persons deserve protection, as they are more likely to self-insure by either purchasing insurance or factoring the risk (and cost) of buying sub-par goods into the price. This relies on the underlying assumption that juristic

²¹⁷ Ibid at 65.

²¹⁸ Sivesand op cit note 195 at 223. In Sweden, it was concluded that any price increase would be insignificant. The finding in Sweden is not surprising, given that the reforms only led to minor changes to the existing legislation.

²¹⁹ Jolowicz op cit note 193 at 10.

²²⁰ Sivesand op cit note 195 at 222.

²²¹ Ramsay *Consumer Law and Policy* op cit note 61 at 70.

persons are more ‘well off’ than individuals. Obviously, this assumption will not be true in all cases — particularly not for ‘small’ juristic persons (measured in turnover).

2.4.6. *The risk should lie with the party who can avoid it*

Consumer law is also about the redistribution of risk. It is suggested that ‘[i]n consumer sales, it is generally considered the best solution that the seller bears the risk of the goods being non-conforming, as he has financial power and the possibility to insure against such risks, as well as the possibility to spread them over a larger number of sales transactions’.²²² This is another example of the inequality of economic power between the supplier and consumer. According to Ziegel, the inequality in economic power manifests in the ‘supplier’s ability to absorb the cost of a defective product as part of his general overhead as compared to the consumer to whom its malfunctioning may represent the loss of a considerable capital investment’.²²³ In addition to being able to insure against the risk of non-conformity, the seller is in a better position to prevent non-conformity by investing in quality control measures. Suppliers are the ‘cheapest cost avoider’.²²⁴

In this respect, it is necessary to distinguish between different types of sellers, namely retailers or distributors versus the manufacturer. As a general proposition, it is the manufacturer who is in control of the quality of the product. Retailers and distributors are often not only uninvolved in the production processes, but are also not in a position to do much in the way of quality control. That being said, however, the notion of the retailer as a powerless conduit for consumer goods should not be overstated. In the modern marketplace, many retailers closely control quality through ‘spot testing’, have the bargaining power to force manufacturers to produce quality goods through stringent contractual controls, invest in their manufacturers’ businesses, and even provide detailed instructions regarding manufacturing methods. It is only smaller retailers who remain unable to control the quality of their wares in

²²² Sivesand op cit note 195 at 223. In South Africa, this has also been accepted by consumer law authorities (see Consumer Goods & Services Ombud ‘Advisory note 2: Incorrect pricing 2’ available at <http://www.cgso.org.za/dl/cgso%20advisory%20note%20%20incorrect%20pricing.pdf>, accessed on 5 June 2015).

²²³ Ziegel op cit note 181 at 193.

²²⁴ This phrase was coined in the seminal work of Guido Calabresi (Guido Calabresi *The Cost of Accidents: A Legal and Economic Analysis* (1970) 135). The goal of the lawmaker should be to find the cheapest cost avoider and place legal responsibility on him.

an effective manner. It is necessary to consider whether these retailers, who will often be small to medium-sized enterprises (or ‘SMEs’), (a) should be held to the same standards as other sellers through a full or partial exemption from the application of consumer laws, and (b) should not in fact be protected as consumers to insulate them against losses caused by defective products.²²⁵

2.4.7. *Consumer confidence*

Legislative intervention can be justified because it has a positive effect on consumer confidence. This rationale is used in the context of the right to reject goods that are defective. On the one hand, it is argued that giving the consumer an ‘absolute’ right to reject is a very potent remedy, while on the other hand, suppliers are concerned about the resultant ‘bad faith rejections’ — the rejection of goods displaying only minor defects. However, it is likely that consumers who reject goods for seemingly minor defects do so because their confidence in the supplier has been undermined for reasons either related or unrelated to that specific defect. It might be that it is a small defect, but the supplier can either not ‘diagnose’ it properly, or after a couple of attempts, the defect still recurs. Products such as these are often referred to as ‘lemons’, and the fear of having purchased a lemon can motivate a consumer to reject the product, despite the relatively minor nature of the defect. The consumer’s confidence can also be shaken as a result of media reports about the same or other defects having occurred in other cases, or if the supplier in question does not seem willing (to the consumer) to repair the goods. If one considers that the amount consumers spend on goods will often be relatively large when measured against their expendable income (as opposed to the relative value of that same goods in the hands of a large business), the consumers’ confidence or right to feel secure in their choice of product deserves protection.²²⁶

The absence of consumer confidence can also have a detrimental effect on the economy. During the consultations by the Law Commission of England and Wales and the Scottish Law Commission on the retention of a general right to reject, Willet, Morgan-Taylor and Naidoo said the following:

²²⁵ These issues are discussed in para 3.6.2 and 3.3 respectively.

²²⁶ Howells & Weatherill *op cit* note 40 at 189.

‘Losing the short-term right to reject could have an adverse impact on the competitiveness of SMEs and new entrants into the market. This is because the absence of the right to reject means that consumers are locked into longer relationships with traders following the sale of faulty goods. It means that there is an incentive for consumers to favour who they perceive as being capable ... of repairing the product effectively. This may well impose a competitive disadvantage on SMEs, new entrants and new traders from outside the UK.’²²⁷

The importance of consumer confidence in the EU is obvious, as it promotes the free movement of goods in the internal market. It is equally obvious that consumer confidence is an important driver of economic growth in a developing country such as South Africa. This is because²²⁸

‘[c]onsumers benefit from competitive markets, but they generate them too. Policy is therefore sensibly directed at improving consumer information and education, so that people are able to perform the role as demanding consumers which is a pre-condition to efficiently functioning markets’.

This means that ‘consumer protection can be seen as operating in harmony with, rather than contrary to, the encouragement of commerce, the law providing consumers with a safety net, which in turn gives them the confidence to enter the market’.²²⁹

As discussed above, the rationale of creating confident consumers will have a beneficial effect on both SMEs (as suppliers) and new entrants to the market. However, creating consumer confidence amongst businesses (as consumers) may also be beneficial for the market. The nature of this rationale does not exclude protecting the business consumer.

2.4.8. Improved consumer redress

Consumers are faced with very high enforcement costs when using the private-law system to enforce their rights. This is caused by procedural hurdles and information asymmetry, in that the consumer does not have the necessary technical knowledge to assert a claim. Other hurdles in this context are evidentiary burdens (it is often

²²⁷ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* (Law Com No 317 and Scot Law Com No 216) (2009) para 3.6.

²²⁸ Howells & Weatherill op cit note 40 at 48. This is based on UK Government op cit note 60; Ramsay *Consumer Law and Policy* op cit note 61 at 116.

²²⁹ Robert Bradgate *Consumer Rights in Digital Products: A Research Report Prepared for the UK Department for Business, Innovation and Skills* (2010) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf, accessed on 27 April 2016 at 11.

difficult for consumers to substantiate claims), the cost of legal representation, geography, and time. Importantly, high enforcement costs can also be the result of vague standards and rights that are hard to interpret, and that lead to disputes.²³⁰ In short, '[t]he law cannot empower consumers if there are grey areas'.²³¹

The aim of improving consumer redress refers to the interaction of the consumer with the law — whether the law is useable in practice. The notion of access to justice in a consumer context is of no use if it is simply equated to access to courts or other 'legal' institutions. Justice is hard to achieve in courts in the context of consumer rights because consumers' claims are often 'small in monetary value, but large in aggregate'.²³² In this regard, Laura Nader wrote:

'Little injustices are the greater part of everyday living in a consumption society, and, of course, people's attitudes towards the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and, something else, alternatives to the law become all they have.'²³³

Most consumer disputes are therefore resolved informally.²³⁴ In fact, studies published by the UK Office of Fair Trading in 2000²³⁵ and the UK Department of Trade and Industry in 2001²³⁶ found that 87% of consumers complained directly to the supplier of the faulty goods. Of those, only 50% were successful, and 40% of these consumers did not press matters further. Ramsay points out that '[t]he great majority of consumer disputes are settled by bargaining between the parties or in the shadow of the law'.²³⁷ This means that the law itself must give consumers clear rights, which they can then use in bargaining and settlement instead of focussing on enforcement mechanisms. This, for instance, is a prominent argument in favour of retaining a clear right to terminate.²³⁸

²³⁰ Ramsay *Consumer Law and Policy* op cit note 61 at 507.

²³¹ National Education and Information Advisory Taskforce op cit note 35 at 69.

²³² Iain Ramsay 'Consumers' access to justice: an introduction' in Rickett & Telfer (eds) op cit note 68 at 19.

²³³ L Nader (ed) *No Access to Law: Alternatives to the American Judicial System* (1980) 4.

²³⁴ Robert Bradgate & Christian Twigg-Flesner *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003) 12; Ramsay *Consumer Law and Policy* op cit note 61 at 542.

²³⁵ Office of Fair Trading *Consumer Detriment* (2000).

²³⁶ Department of Trade and Industry *Consumer Knowledge Survey* (2001) and Department of Trade and Industry *Consumer Knowledge Performance Monitor* (2001).

²³⁷ Ramsay *Consumer Law and Policy* op cit note 61 at 542.

²³⁸ *Ibid.*

Legislative intervention could fulfil three roles in the context of improving consumer redress. First, the legislature can decide to combat ignorance of the law. Secondly, regulations can lower search costs. Thirdly, consumer redress will be improved if enforcement costs are lowered. These three aspects are discussed below.

2.4.8.1. *Combatting ignorance of the law*

Consumers are faced with practical difficulties that prevent them from exercising the consumer rights they are afforded on paper. The most fundamental of these difficulties is that consumers are often ignorant of the law.²³⁹

‘[P]aradoxically, the more sophisticated and nuanced consumer protection law is on paper, the greater the risk that consumers will be confused by it and alienated from it in practice. Legal rights should be easy to grasp and to use. Lack of understanding of the law among consumers plainly defeats much of the purpose of the law. Moreover, it should not be left out of account that ignorance of and/or disinterest in the nuances of consumer law among practising lawyers, perhaps even combined with antipathy to consumer disputes as trivial complaints, constitute a yet further impediment to its practical effect.’

In South Africa, the CPA has expressed the particular aim of protecting vulnerable consumers.²⁴⁰ Vulnerable consumers are faced with particular challenges such as illiteracy and social isolation (in rural communities), which increase their likelihood of being ignorant of the law. This creates ‘information apartheid’²⁴¹ and has led to the allegation that consumer law is the law of the middle class.²⁴²

‘The middle class complains about purchases, whereas poorer sections of society worry about being able to make purchases in the first place. It hardly matters whether a product is of satisfactory quality if you cannot afford it. The middle class understands the law and can either use it or threaten to use it; poorer sections of society are doubtful about its relevance to their needs. The allegation that consumer law is middle class law is not without foundation, though it would be churlish to hurl aside the accumulated body of legal protection on that under-articulated basis alone. However, if it is true that adjustment of the private law is of disproportionate assistance to already affluent members of society, then a stronger commitment to public law regulation may be appropriate.’

²³⁹ Howells & Weatherill op cit note 40 at 46.

²⁴⁰ This was discussed in para 2.2 above.

²⁴¹ This phrase is borrowed from a TED talk by Sandra Fisher-Martins on the use of plain language (Sandra Fisher Martins *The Right to Understand* (11 March 2011) available at https://www.ted.com/talks/sandra_fisher_martins_the_right_to_understand, accessed on 21 March 2016).

²⁴² Howells & Weatherill op cit note 40 at 47.

Reich points out that the problem in developing countries is often that the basic needs of consumers are not met. In his words, '[a]ccess to consumption, not consumer protection is the central problem'.²⁴³

Ignorance of the law does not necessarily result in a lowering of the level of protection. According to research done by the Law Commission of England and Wales and the Scottish Law Commission in 2008 as part of their investigation into remedies for faulty goods,

‘the impression from these focus groups was that only rarely did lack of understanding of their legal rights really work against these particular consumers. While most were sympathetic to the principle of simplifying the law, confusion surrounding current laws and consumer rights coupled with the policies of retailers to please and appease customers means the current situation can sometimes work to the benefit of consumers’.²⁴⁴

However, while it may be true that many retailers will often give consumers more rights than the law when they complain, it has to be borne in mind that vulnerable consumers generally do not complain (simply because they are not able to).²⁴⁵

Educating consumers is a complex task that is about much more than just providing consumers with information, as this could contribute to information overload and higher search costs.²⁴⁶ In addition, ‘[t]he confidence and skills that consumer education aims to develop depend on sound levels of numeracy and literacy’, and education initiatives tend to ‘target those consumers who are easiest to reach, rather than those with the greatest need’.²⁴⁷ An exhaustive study of consumer education is however beyond the scope of this thesis.

The aim of ‘lower search costs’ is closely related to combatting ignorance of the law, as high search costs will lead to more ignorance. This is discussed in the next section.

²⁴³ Reich op cit note 83 at 258.

²⁴⁴ Law Commission & Scottish Law Commission *Joint consultation paper* op cit note 31 at 138.

²⁴⁵ Iain Ramsay ‘Consumer redress mechanisms for defective and poor-quality products’ (1981) 31 *University of Toronto Law Journal* 17 at 25.

²⁴⁶ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 from para 7.1.

²⁴⁷ Office of Fair Trading *A Strategy and Framework for Consumer Education — A Consultation Paper* (July 2004) (OFT 735) 6; Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 from para 7.23.

2.4.8.2. *Lower search costs*

The CPA is not a codification of the common law. Instead, '[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'.²⁴⁸ This is a conscious choice made by the legislature, born (at least in South Africa) from the fear that the new consumer protection legislature might limit consumers' rights if they are deprived from recourse to the common law.²⁴⁹ This is referred to as 'double-banking' in the United Kingdom and has been severely criticised, as it leads to complexity.²⁵⁰ Already in 1969, Jolowicz expressed the sentiment that

'[t]o try to regulate the civil remedies of the consumer by the manipulation of the commercial law, which is, I think, all that we have really been doing up to date, is bound to lead to ever-increasing complexity and artificiality if not worse. A fresh look at the whole basis of the law governing the civil remedies of the consumer is, I think, long overdue'.²⁵¹

In other words, 'double-banking' is not desirable, as it creates a system of consumer redress that is overly complex.²⁵²

The increased effort required by such an overly complex system leads to what is called 'search costs'.²⁵³ Search costs affect not only consumers, but suppliers also. Where consumer remedies are overly complex, suppliers have to spend additional time and money training staff on those rights. It is also likely that the lack of common understanding will increase litigation.²⁵⁴

²⁴⁸ Section 2(10).

²⁴⁹ A full investigation into the development of a consolidated set of rules is beyond the scope of this thesis. The discussion will be limited to whether the current definitions determining the scope of application of the CPA are rational.

²⁵⁰ UK Government *Davidson Review: Implementation of EU legislation* (November 2006) 3 available at http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/davidson_review281106.pdf, accessed on 16 December 2013.

²⁵¹ Jolowicz op cit note 193 at 9.

²⁵² In the Australian context, the Law Reform Commission of Victoria (*Discussion Paper No 27: An Australian Code* (September 1992) at 4) listed two basic characteristics of successful 'codes'. The first is that 'it must be the only authoritative statement of the law – it must function as a "clean slate"', and secondly, 'its propositions must be both sufficiently specific to serve as points of certainty and sufficiently general to be enduring'.

²⁵³ It is important to keep in mind that consumers rarely obtain legal advice in consumer disputes, which means that the legislation must be understood by the actual consumers and not their legal advisors. See Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 at para 1.21.

²⁵⁴ UK Government *Davidson Review* op cit note 250 at 40.

The following passage explains ‘search costs’ in the context of the implementation of the EU Consumer Sales Directive:

‘[T]hose who are affected by the rules must invest extra resources in working out the implications of the new (and unfamiliar) concepts emanating from the Directive and the relationship (and possible overlap) between these concepts and the existing concepts.’²⁵⁵

The risk(s) of transposing the Directive into national law without integrating it with the existing system are clearly analogous with enacting the CPA alongside the existing common law. The net effect is that it is more difficult for suppliers, but particularly consumers, to understand and exercise their rights. When rules are integrated with the existing system, this confusion is avoided, coordination of the old and new rules is facilitated, the number of rules is reduced, greater legal certainty is created, better compliance by suppliers may be facilitated, and the amount of time spent on disputes will be reduced.²⁵⁶ It is essential to compare the common law with the CPA in order to investigate whether a consolidated set of rules can be developed without detracting from the main aim of ensuring greater consumer protection. This exercise falls outside the ambit of this thesis, save where the definitions that determine the scope of the CPA have a negative impact on consumer redress. This is discussed in chapter 3.

2.4.8.3. *Lower enforcement costs*

The other reality with which consumers are faced is the high cost of litigation. This cost refers to the cost of legal and other experts, the time cost for formal legal proceedings to reach the courts and judgments to be written, the uncertainty of the outcome, as well as the emotional costs to which the consumer will be exposed.²⁵⁷

These costs are particularly high when one considers that the loss the consumer will be facing will be relatively small.²⁵⁸ Of course, these small claims add up to larger problems, but this will be concealed by the fact that the traditional private law system insists on each consumer pursuing their own claim, and the market will not

²⁵⁵ Oughton & Willett op cit note 23 at 306.

²⁵⁶ Ibid.

²⁵⁷ Ramsay *Consumer Law and Policy* op cit note 61 at 43.

²⁵⁸ Woker op cit note 119 at 230.

correct itself.²⁵⁹ It also means that ‘traders, typically with more resources at their disposal than consumers, will be able to use consumer reluctance to litigate as a method for fobbing off the vindication of consumer rights’.²⁶⁰

A discussion of procedural regulations aimed at improving consumers’ access to justice is beyond the scope of this thesis, save where the application provisions are a barrier to effective enforcement.²⁶¹ Some methods include representative actions brought by consumer organisations, legal aid, class actions, contingency fees, small claims courts, consumer agencies and industry-specific alternative dispute resolution.²⁶² Enforcement costs will be reduced by ensuring that legislation is clear and unambiguous, by providing for alternative dispute resolution (such as industry ombuds), by allowing for representative and class actions, and by strengthening small claims courts.²⁶³

2.4.9. Concluding remarks

The acknowledgment that all consumers of products are vulnerable in some ways, along with the rationales for legislative intervention in consumer protection discussed in this section, illustrates that the following assumptions and decisions made by the South African legislature when drafting the CPA require further interrogation:

- a) Should consumer protection be extended to juristic persons? There is no apparent reason why the bulk of the rationales discussed in this section could not also be valid for juristic persons. The question then becomes whether the rationales would be more (or less) valid in respect of SMEs.
- b) Should consumer protection be extended to consumers who purchase goods in the course of a business? Likewise, there is no apparent reason why the

²⁵⁹ Howells & Weatherill op cit note 40 at 48; Trebilcock op cit note 130 at 73.

²⁶⁰ Howells & Weatherill op cit note 40 at 48.

²⁶¹ Socio-legal research on the behaviour of consumers when it comes to exercising their rights has been considered superficially only. See for instance Ramsay ‘Consumer Redress’ op cit note 68 at 26.

²⁶² Anthony J Duggan ‘Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective’ in Charles E F Rickett & Thomas G W Telfer (eds) *International Perspectives on Consumers’ Access to Justice* (2003) 46.

²⁶³ Ramsay *Consumer Law and Policy* op cit note 61 at 103; Trebilcock op cit note 130 at 80; Steven Rares ‘Striking the modern balance between freedom of contract and consumer rights’ (2013) *Federal Judicial Scholarship*, available at http://www.austlii.edu.au/au/journals/FedJSchol/2013/21.html#_ftn57, accessed on 7 June 2016 para 48.

rationales would be less valid when goods are bought for commercial purposes (as opposed to goods bought for domestic purposes).

- c) Are there other aspects of the definitions of ‘consumer’ and ‘supplier’ that undermine effective consumer redress? In addition to the substantive questions raised, it appears that the way in which the definitions are formulated can have an impact on the efficacy of consumer redress.

All of these issues will be discussed in chapter 3 in comparative perspective. However, before commencing with that discussion, it is important to create a set of criteria for evaluating the law and proposing alternatives.

2.5. Criteria for evaluating the law and proposing alternatives

The methodology employed in this thesis is a comparative study of the legislative intervention made as part of the CPA, as seen against international precedent. In this section, a set of criteria is developed against which consumer protection regulations can be measured and analysed. These criteria, which are based on a set of criteria discussed in an article by Bradgate and Twigg-Flesner,²⁶⁴ are that the legislation must be fair, rational, clear and efficient, must give effect to the reasonable expectations of the consumer, and must provide for effective dispute resolution. These criteria will be discussed briefly below.

Many of the criteria mirror the ‘rationales’ for legislative intervention discussed above. This stands to reason, given that the rationales can also be seen as problems that need to be solved through regulation. When assessing the legislation, the question will be whether these problems have been addressed. The formulation of ‘criteria’ is simply a means of focussing that enquiry.

This is not the only set of published criteria for evaluating the ‘quality’ of consumer legislation. A similar set of criteria is referred to in the Draft Common Frame of Reference,²⁶⁵ which includes the principles of freedom, security, justice and efficiency. In addition, several EU directives (including the Consumer Sales

²⁶⁴ Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 345.

²⁶⁵ Christian von Bar, Eric Clive & Hans Schulte-Nölke (eds) *Draft Common Frame of Reference (DCFR): Principles, Definitions and Model Rules of European Private Law (Full Edition)* (2009) from 48.

Directive, the Unfair Contract Terms Directive, and the Unfair Commercial Practices Directive) are currently undergoing a ‘fitness check’ in order to ascertain whether they are ‘proportionate to their objectives and delivering as expected in all EU policy areas’. The criteria used in that evaluation are effectiveness, efficiency, coherence, relevance and ‘EU added value’.²⁶⁶ Lastly, Justice Steven Rares said the following in the context of Australian consumer protection laws:

‘Consumer protection legislation should be well thought through, clear, succinct and have an intelligible purpose. It should not result in significant “collateral damage” to unintended or unnecessary targets. A shotgun approach is not likely to be beneficial. Nor should a law impose disproportionate burdens on the whole community through increased costs, greater need, if not necessity, for every level of commerce to use professional advisers such as lawyers, and increased use of litigation over Delphic, legislative cascades of alternative causes of action.’²⁶⁷

These criteria are substantially similar to those argued for here.

2.5.1. *Is the legislation fair?*

The legislation should be fair to both the consumer and supplier. It has been suggested that fairness in this context means that ‘liability should fall where responsibility lies’.²⁶⁸ As Ramsay puts it:²⁶⁹

‘Consumer law and policy may be viewed as a general attempt to redistribute power and resources (eg rights) from producers to consumers... . This might not merely involve low prices but also policies of loss-spreading which shift risks from consumer to producer.’

This criterion ties in with the theory that risk should be allocated to the party who can avoid it, as well as the collective insurance theory, both of which were discussed above.²⁷⁰

The question is not only whether the legislation is fair to the consumer, but also whether it is fair to the supplier. Put differently, the legislation must not put undue strain on the supplier. If the legislation can utilise less invasive means to achieve a particular goal, it is overly burdensome and, therefore, unfair.²⁷¹ The legislation will

²⁶⁶ European Commission op cit note 20.

²⁶⁷ Rares op cit note 263 para 72.

²⁶⁸ Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 350.

²⁶⁹ Ramsay *Consumer Law and Policy* op cit note 61 at 70.

²⁷⁰ See paras 2.4.5 and 2.4.6.

²⁷¹ Evert van Eeden *Consumer Protection Law in South Africa* (2013) 40.

also be seen as inefficient, which is another criterion that is discussed below. To a certain extent, many of the criteria below are aimed at ascertaining whether the legislation is fair. In other words, fairness is not only an independent criterion, but also a by-product of rationality, clarity and efficiency.

2.5.2. *Is the legislation rational?*

The legislation should be rational, which means that the law should be internally consistent as well as consistent with the rest of the legal system.²⁷² Put differently, this criterion measures whether the legislation is both internally and systemically coherent.²⁷³

Internal coherence refers to whether the constituent parts of the legislation work together, and whether all overlapping provisions (if any) are necessary and explained in a satisfactory manner. In the context of consumer protection legislation in particular, this also becomes a matter of clarity and accessibility, as the need for rights that are easy to access and understand is stronger in this context than in a commercial context.

Systemic coherence involves much the same consideration, except that the comparison here is not between the various sections within a piece of legislation, but rather between the consumer protection legislation and other, potentially overlapping laws.²⁷⁴ The ultimate goal is that ‘the legislation needs to be clear and understandable, and, in so far as this is possible, should treat like transactions alike’.²⁷⁵

2.5.3. *Is the legislation clear?*

In a similar vein, legislation should make the rights of consumers and the obligations of suppliers clear. Unclear or overly technical regulation can ultimately undermine

²⁷² Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 350; Better Regulation Task Force *Principles of Good Regulations (Revised)* (2006) 1.

²⁷³ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 11. This is why it is also necessary to evaluate how any consumer protection legislation interacts with existing law — in the case of warranty liability in South Africa, how it interacts with the common law.

²⁷⁴ For instance, it has already been argued that the choice to retain the common law alongside the CPA does not meet the criteria of rationality or clarity, which results in higher search costs. See para 2.4.8.2.

²⁷⁵ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 11.

efficient consumer protection, as it gives suppliers too many technical grounds based on which justice for the consumer can be delayed. Put differently, regulations must be transparent and user-friendly.²⁷⁶ This lowers search costs, as it will be easier for consumers to establish what their rights are, while also making it easier for suppliers to comply, since they will have certainty regarding their obligations.²⁷⁷ Justice Steven Rares succinctly summarised the effect of convoluted and impenetrable statutory definitions in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* as follows: ‘The cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification.’²⁷⁸

2.5.4. *Is the solution offered by the legislation efficient?*

The solution offered by the legislature must be efficient. Aspects of the efficiency enquiry are that the regulation must be proportional and targeted.²⁷⁹

Proportionality in this context means that the intervention must be necessary, the remedy proposed must be appropriate for the risk it addresses, and costs must be identified and minimised. This means that the regulation must be the most direct way to achieve the desired outcome (solution) — nothing more must be possible with the same amount of resources. Put differently, the regulation must have a better cost-to-benefit ratio than other alternatives.²⁸⁰

Efficiency also requires the intervention to be targeted.²⁸¹ This, in turn, entails that the intervention must be focussed on the problem, must not be overly broad, and the possible ‘side effects’ of the legislation must be considered and minimised.

Efficiency is described as the central criterion used in the field of law and economics when assessing legal rules.²⁸² However, it should be treated with circumspection, as it presupposes the utilitarian approach taken by proponents of the rational choice theory, whereas in consumer law, ‘the individual is entitled to

²⁷⁶ Better Regulation Task Force op cit note 272 at 1.

²⁷⁷ UK Government *Davidson Review* op cit note 250 at 40. The lowering of search costs as a rationale for legislative intervention was discussed in para 2.4.8.2.

²⁷⁸ [2012] FCA 1028.

²⁷⁹ Better Regulation Task Force op cit note 272 at 1.

²⁸⁰ Luth op cit note 92 at 17.

²⁸¹ Better Regulation Task Force op cit note 272 at 1.

²⁸² Luth op cit note 92 at 17. Several concepts of efficiency are discussed there.

protection notwithstanding that, on the basis of a cost-benefit analysis, the economy might benefit if the individual consumer receives defective goods or hazardous products'.²⁸³

An example of inefficiency is 'circuitry of actions'. This should be avoided because it is wasteful and inefficient.²⁸⁴

'The avoidance of circuitry is a well-established objective of the law: circuitry is wasteful and inefficient, so that in the absence of special circumstances it is better if the party suffering the loss is given a remedy directly against the party responsible and ultimately liable for it, rather than liability being pursued by a circuitous route.'

2.5.5. *Does the legislation give effect to the reasonable expectations of honest men?*

In the words of Lord Steyn, 'a thread runs through our contract law that effect must be given to the reasonable expectations of honest men'.²⁸⁵ When applied to the law of sale, this means that the purchaser is entitled to goods that are of a good quality because 'the purchaser cannot be supposed to buy goods to lay them on a dunghill'.²⁸⁶ The expectations referred to here are the expectations of the consumers, retailers and producers.²⁸⁷

As Jolowicz points out, 'the public may actually be wiser than the law'.²⁸⁸ He continues to say that '[t]he problem should not be seen any longer in terms of contract and tort ... [but] as a question of the allocation between all the parties concerned in a consumer transaction of the losses to which those transactions are bound from time to time to give rise'.²⁸⁹ This, then, is the basis on which he distinguishes the function of the law in commercial transactions as opposed to consumer transactions, namely that in a commercial setting, the function of the law

²⁸³ Deutch op cit note 104 at 537. See para 2.3.1 for a discussion and critique of the rational choice theory.

²⁸⁴ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 350. Bradgate and Twigg-Flesner elevate avoiding circuitry of actions to an independent criterion. However, it is submitted here that it is simply an example of an inefficiency or irrationality that should be avoided.

²⁸⁵ Johan Steyn 'Contract law: fulfilling the reasonable expectations of honest men' (1997) 113 *Law Quarterly Review* 433 at 433.

²⁸⁶ *Gardiner v Gray* [1815] 4 Camp 144 in Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 351; Bradgate op cit note 229 at 18.

²⁸⁷ *Gardiner v Gray* in Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 346.

²⁸⁸ Jolowicz op cit note 193 at 2.

²⁸⁹ *Ibid* at 6.

is not to allocate the actual losses, ‘but the risk that those losses may occur’.²⁹⁰ The idea is that businessmen will insure against those risks, but also that the more risk the buyer is prepared to accept, the cheaper the goods or services will be.²⁹¹ The same is not true of consumers, because ‘[i]f they think about legal liability at all, they think only in the terms “Who pays if something happens to go wrong?”’.²⁹² The challenge is to give effect

‘to the legitimate expectations of consumers by developing a fair and rational system of liability that would ensure that the party who is actually responsible would ultimately be held liable, whilst ensuring that consumers can obtain a remedy as quickly and efficiently as possible’.²⁹³

A very practical example can be found in the Law Commission of England and Wales and the Scottish Law Commission’s report on consumer remedies for faulty goods, in the context of the retention of a right to reject faulty goods:

‘Our discussions with retailers and manufacturers indicate that the large majority do not seek the abolition of the right to reject faulty goods. Generally, they recognised that consumers expect to be able to obtain refunds for faulty goods, and a mismatch between consumer expectations and the law might lead to disputes.’²⁹⁴

2.5.6. *Does the legislation provide improved consumer redress?*

According to Bradgate and Twigg-Flesner, the main aim of consumer protection law should be to ensure that consumers are provided with effective ways to resolve disputes.²⁹⁵ Devising effective means for improving consumer redress was discussed in para 2.4.8 as a rationale for legislative intervention. This thesis is limited to the review of the scope of the application of the CPA, and does not include the procedural side of consumer protection. However, this does not mean that this criterion is not relevant. The way in which substantive provisions are drafted has important implications for consumer redress, and in a broad sense, all of the rationales for legislative intervention are ultimately aimed at improving consumer redress.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid at 7. The notion that liability should lie with the party who can best avoid it was discussed in para 2.4.6 as a rationale for intervention in consumer sales.

²⁹³ Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 375.

²⁹⁴ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 at para 3.15.

²⁹⁵ Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 351.

Due to the prohibitive cost of litigation, particularly when measured against the relatively small amounts involved in the average consumer transaction, improved legislation or access to justice will probably not increase the number of consumers willing to take suppliers to court. This does not mean that legislation has no place in the protection of consumer interest. It simply means that consumer legislation should be comprehensible to consumers, without them having to rely on the courts. In other words, consumers must be aware of their rights, be able to understand the rights, and be able to use them in negotiations with suppliers.²⁹⁶ However, in order to achieve clarity, flexibility is often sacrificed.²⁹⁷ Given the variety of problems that arise in consumer sales transactions, rigid rules can prejudice the consumer and supplier alike. This means that a balance must be struck between clarity and flexibility.

However, clarity in consumer legislation is so important that it will sometimes even outweigh the disadvantage of a more limited right. For instance, in the context of a fixed 30-day right to reject (as opposed to the right to reject within a reasonable period, which may or may not be longer than 30 days), the Office of Fair Trading said: ‘Although we appreciate that even specification is likely to reduce the period of time in which the right may currently be exercised in some circumstances, the advantages of simplicity outweigh the potential disadvantages in our opinion.’²⁹⁸ In the same context, the British Retail Consortium had this to say: ‘The fewer caveats, uncertainties and opt outs there are, the less will be the room for misunderstandings.’²⁹⁹

2.6. Concluding remarks

This chapter has provided a framework within which suggestions for legislative reform must be developed. First, while the fact that South Africa is a developing country with particularly ‘vulnerable’ consumers was given prominence in the drafting of the CPA, it is acknowledged that all consumers are in a sense vulnerable.

²⁹⁶ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 12.

²⁹⁷ Law Commission & Scottish Law Commission (Law Com No 160 and Scot Law Com No 104) *Sale and Supply of Goods* (1987) para 4.4; Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 13.

²⁹⁸ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 at para 3.57. Ramsay has discussed the ‘norm’ of ‘satisfaction guaranteed or money refunded’ as an example of a clear and straightforward remedy for consumers. See Iain Ramsay ‘Consumers’ access to justice: an introduction’ in Rickett & Telfer (eds) op cit note 68 at 29.

²⁹⁹ Law Commission & Scottish Law Commission *Consumer Remedies for Faulty Goods* op cit note 227 at para 3.67.

Care must be taken to adjust international precedent, where necessary, to accommodate this fact.³⁰⁰

Secondly, legislative reform should take the form of ‘debiasing interventions’ based on the insights on consumer decision-making provided by the rational choice theory, as augmented (and, in some instances, replaced) by the findings of behavioural science.³⁰¹ Specific rationales have been identified that should be taken into account in any recommendations for legislative reform.³⁰²

Lastly, suggestions for legislative reform will be developed based on a comparative study of international precedent, informed by the criteria developed in para 2.5 above.

³⁰⁰ This was discussed in para 2.2.

³⁰¹ This was discussed in para 2.3.

³⁰² See para 2.4.

3. Chapter 3: Application of consumer protection legislation in comparative perspective

3.1. Introduction

Definitions can reveal much about legislative intent. The South African approach in the CPA can generally be described as ‘inclusive’ or ‘broad’. Put differently, the CPA has a wide reach.

This thesis is limited to a discussion of the typical provisions that determine the scope of legislation: the ‘definitions’ and ‘application’ sections. The approach taken by the South African legislature will be analysed in light of the findings and criteria described in the previous chapter, and compared to the approaches taken by the European Union, the United Kingdom, Australia and some international instruments. The aim of the comparative study is to make recommendations on how the relevant provisions of the CPA can be improved and to suggest alternative formulations, which is done in chapter 4.

In this thesis, the scope of application of consumer legislation is discussed (primarily) against the backdrop of problems relating to the quality of goods, as the approach to the consumer contract of sale can be used as a model for the general rules governing consumer law. While there is some discussion of the scope of application of regulations relating to consumer contracts, the question of whether it ought to be regulated separately, and whether the application of such a separate instrument should be different, is not discussed in detail. The thesis also does not address the application of the CPA to services or the combination of goods and services.

The point of departure is that the CPA will apply to all ‘transactions’ taking place within South Africa.³⁰³ ‘Transaction’ is defined in s 1 of the Act and can take the following forms:

- (a) A ‘transaction’ can refer to ‘an agreement’ between a person acting in the ordinary course of business ‘for the supply or potential supply of any goods or services in exchange for consideration’, and ‘one or more other persons’.

³⁰³ Section 5(1)(a).

- (b) It can also refer to ‘the supply by that person of any goods to or at the direction of a consumer for consideration’.
- (c) ‘[T]he performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration’ can also be a transaction.³⁰⁴
- (d) The ‘supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity’ in terms of s 5(6)(a) is another form of transaction.
- (e) The solicitation of offers to enter into a franchise agreement, the actual offer and agreement, and the supply of goods or services in terms of a franchise agreement will also be considered transactions in terms of the Act.³⁰⁵

Certain general requirements can be discerned from the definition of ‘transaction’.³⁰⁶ These requirements must always be met for an activity to fall within the definition and, consequently, within the scope of the Act:

- (a) The transaction must be between one or more ‘persons’. This will be discussed in the paragraphs devoted to the definition of ‘consumer’, exploring the questions of whether juristic persons should be protected, whether the purpose of the goods should play a role in determining whether the CPA applies, whether there should be any other limitations on the scope of the legislation, and who should bear the onus of proving whether a person is a consumer.³⁰⁷
- (b) The transaction must take place in the ordinary course of the supplier’s business.
- (c) The transaction must be for ‘consideration’. Requirements (b) and (c) will be discussed in the paragraph on the definition of ‘supplier’,³⁰⁸ paying particular attention to the suitability of the ‘ordinary course of business’ and

³⁰⁴ Paragraph (a)(i) to (iii) of the definition of ‘transaction’ in s 1.

³⁰⁵ Section 5(6)(b) to (e).

³⁰⁶ Elizabeth de Stadler ‘Section 5’ in Naudé & Eiselen op cit note 4 para 7.

³⁰⁷ Paragraphs 3.3 to 3.5.

³⁰⁸ Paragraph 3.6.

‘consideration’ requirements, and the extension of a direct claim against all the members of the supply chain.

- (d) The transaction must be for the supply of goods. This will be discussed in the paragraph on the definition of ‘goods’.³⁰⁹

Before these issues can be discussed, the definition of ‘consumer’ in terms of the CPA will be explored.

3.2. Definition of ‘consumer’ in terms of the CPA

Section 1 of the CPA defines ‘consumer’ as

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

Paragraph (b) of the definition simply repeats that a consumer is a person who enters into a transaction, as long as that transaction is not exempt from the application of the Act. Paragraph (a) extends the definition to a person to whom goods or services are promoted or supplied (in other words, ‘marketed’), with the implication that the provisions of the CPA relating to marketing apply irrespective of whether a transaction is ultimately concluded. Paragraph (c) of the definition of ‘consumer’ includes persons who are the users or beneficiaries of goods or services, but who did not transact with the supplier directly. Paragraph (d) confirms that franchisees will also be considered consumers for purposes of the CPA.

For purposes of this discussion, the definition of ‘person’ is significant, as it includes a ‘juristic person’. This means that the CPA will also apply to transactions

³⁰⁹ Paragraph 3.7.

with ‘juristic persons’, which in turn include a body corporate, a partnership or association, or a trust as defined in the Trust Property Control Act 57 of 1988.³¹⁰ Another way of arriving at the conclusion that the Act protects juristic persons also is by considering the definition of ‘consumer’, which again refers to ‘persons’.

Interestingly, the threshold determination is irrelevant when a juristic person wants to rely on either s 60 or s 61 of the CPA.³¹¹ In other words, a customer who is a juristic person may be able to rely on ss 60 or 61 (which respectively regulate safety monitoring and recall, and product liability claims) even if its asset value or annual turnover equals or exceeds the threshold. This is relevant for the discussion of the direct claim against the supply chain, and the rights of redress between the members of that supply chain.³¹²

However, it was always the legislature’s intention that this protection would extend to small businesses only.³¹³ This is achieved by making the protection of juristic persons subject to s 5(2)(b). Transactions that involve juristic persons as consumers and have an asset value or annual turnover equal to or exceeding a threshold value to be determined by the Minister of Trade and Industry in terms of s 6 are excluded from the application of the Act. The current threshold is R2 million.³¹⁴

Note the use of the conjunction ‘or’ in the phrase ‘asset value *or* annual turnover’ in s 5(2)(b). It means that the juristic person will not be regarded a consumer if either its asset value or its annual turnover equals or exceeds the threshold. It is not necessary for both of these values to exceed the threshold — if one exceeds the threshold, the value of the other is irrelevant.

³¹⁰ See the definition of ‘juristic persons’ in s 1.

³¹¹ Section 5(5).

³¹² The position in terms of the CPA is discussed in paragraph 3.6 and is compared to the approach in other jurisdictions in paragraph 3.6.2.

³¹³ See for instance paragraph 3.2 of the Memorandum on the Objects of the Consumer Protection Bill (Consumer Protection Bill [B19—2008] at 80), which states that ‘[t]he use of a threshold will mean that the protection of the Bill will extend to small shop-keepers and other business’. See Van Eeden *A Guide to the Consumer Protection Act* (2009) 42; Van Eeden *Consumer Protection Law* op cit note 271 at 44.

³¹⁴ GN 294 in GG 34181 of 1 April 2011. See the discussion of s 5(2)(b) read with s 6. This notice also contains a schedule in which the ‘method of calculation’ is set out. Submissions were made that the threshold should be in line with that in the National Credit Act 34 of 2005, which is R1 million. See Parliamentary Research Unit *Synopsis of Submissions issued by the Parliamentary Research Unit to the Select Committee to Economic and Foreign Affairs* (23 June 2008) at 5.

The Minister has published a method to calculate the asset value or annual turnover of a juristic person.³¹⁵ The calculation method creates two problems:

- (a) The juristic person's audited financial statements must be used in the calculation. If the juristic person does not have audited financials, the statements must be prepared in accordance with South African generally accepted accounting standards.³¹⁶ It seems unrealistic, unduly burdensome and even impractical for both parties to suggest that this investigation must be conducted even in cases where the transaction may be small or transaction volumes may be high. The operational costs created by this burden may not be justified in those cases. It also does not cater for cases where the consumer does not provide the information, provides inaccurate information, or where the information is not available.³¹⁷ In short, this method of defining the juristic person consumer is not fair, clear or efficient.³¹⁸ The National Credit Act³¹⁹ is also limited to juristic persons whose asset value or annual turnover at the time of entering into the credit agreement is below a threshold determined by the Minister.³²⁰ However, that act mitigates the adverse effect of this provision by providing that 'the asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by the juristic person at the time it applies for or enters into that agreement'.³²¹ It is unfortunate that a similar approach was not adopted in the CPA.³²²
- (b) Given that asset value and annual turnover will have different values at different times, it was necessary to pin down the moment at which the calculation is to be made. Section 5(2)(b) provides that the valuation must be made at the time of the transaction. However, this has created even more uncertainty, as 'transaction' is defined as the conclusion of an agreement or the actual supply of the goods or services. The asset value or annual

³¹⁵ It was published in a schedule to GN 294 in GG 34181 of 1 April 2011. The Minister published another version of the method of calculation for public comment in GN 898 in GG 33621 of 11 October 2010.

³¹⁶ Item 4(a).

³¹⁷ Elizabeth de Stadler 'Section 5' in Naudé & Eiselen op cit note 4 para 85.

³¹⁸ These criteria were discussed in paragraph 2.5.

³¹⁹ Act 34 of 2005. That limit is currently R1 million.

³²⁰ Section 4(1)(a)(i).

³²¹ Section 4(2)(a).

³²² Elizabeth de Stadler 'Section 5' in Naudé & Eiselen op cit note 4 para 86.

turnover of the business may vary at these different moments during the transaction. It is also not clear what will happen in cases where the transaction is for the ongoing supply of goods and services. Must the determination be made each time goods or services are supplied? If that is the case, it creates the difficulty that the buyer can qualify as a consumer at certain times, and not qualify at others. This is referred to as the ‘pendulum effect’.³²³ This effect can also be caused by frequent changes to the threshold. The CPA provides that the threshold must be reviewed every five years. The first deadline has passed without any change to the threshold.

The determination of the threshold should have an internal logic, failing which it may lose its value as a true indicator of vulnerability.³²⁴ It can be argued that a one-size-fits-all approach would not be a true indicator of vulnerability, as the definition of what may constitute a small enterprise in one industry may not necessarily hold true in another. There is South African precedent for a combined approach using the number of employees, turnover and asset value: the National Small Business Act.³²⁵ The aim of this act is ‘[t]o provide for the establishment of the Advisory Body and the Small Enterprise Development Agency; to provide guidelines for organs of state in order to promote small business in the Republic; and to provide for matters incidental thereto’.³²⁶ One of the specific objectives of the Small Enterprise Development Agency is to ‘generally, strengthen the capacity of— (i) service providers to support small enterprises; and (ii) small enterprises to compete successfully domestically and internationally’.³²⁷ The protection of small enterprises as consumers in terms of the CPA would certainly be in keeping with this objective.

Whether an enterprise is considered small is determined by thresholds for the number of ‘total full-time equivalent of paid employees’, the total turnover and the

³²³ Parliamentary Research Unit op cit note 314 at 6.

³²⁴ Of course, this concern is present in the determination of any threshold value, whether it relates to the size of the juristic person or the transaction value.

³²⁵ Act 102 of 1996.

³²⁶ See the preamble to the National Small Business Act. This intention to protect small to medium-sized businesses was also communicated in paragraph 3.2 of the Memorandum on the Objects of the Consumer Protection Bill (Consumer Protection Bill [B19—2008] at 80).

³²⁷ Section 9A(c)(i) and (ii).

gross asset value (excluding fixed property). The thresholds are set per industry,³²⁸ as the following excerpt shows:

Sector or subsector in accordance with the Standard Industrial Classification	Size of class	The total full-time equivalent of paid employees	Total turnover	Total gross asset value (fixed property excluded)
Agriculture	Medium	100	R 5 m	R 5 m
	Small	50	R 3 m	R 3 m
	Very small	10	R 0.50 m	R 0.50 m
	Micro	5	R 0.20 m	R 0.10 m
Manufacturing	Medium	200	R 51 m	R 19 m
	Small	50	R 13 m	R 5 m
	Very small	20	R 5 m	R 2 m
	Micro	5	R 0.20 m	R 0.10 m
Retail and Motor Trade and Repair Services	Medium	200	R 39 m	R 6 m
	Small	50	R 19 m	R 3 m
	Very small	20	R 4 m	R 0.60 m
	Micro	5	R 0.20 m	R 0.10 m
Wholesale Trade, Commercial Agents and Allied Services	Medium	200	R 64 m	R 10 m
	Small	50	R 32 m	R 5 m
	Very small	20	R 6 m	R 0.60 m
	Micro	5	R 0.20 m	R 0.10 m
Transport,	Medium	200	R 26 m	R 6 m

³²⁸ Schedule to the National Small Business Act.

Storage and Communications	Small	50	R 13 m	R 3 m
	Very small	20	R 3 m	R 0.60 m
	Micro	5	R 0.20 m	R 0.10 m
Finance and Business Services	Medium	200	R 26 m	R 5 m
	Small	50	R 13 m	R 3 m
	Very small	20	R 3 m	R 0.50 m
	Micro	5	R 0.20 m	R 0.10 m

All four class sizes are considered ‘small enterprises’.³²⁹ When the entire table is considered, it becomes clear that the R2 million annual turnover or asset value provided for in the CPA is at the low end of the spectrum. What is also of interest is the substantial difference between the industries. While following this more nuanced approach would probably result in a more accurate barometer for vulnerability, the approach is impractical and will lead to a high level of uncertainty for suppliers as well as consumers, and increased transaction costs.

On the other hand, there is also a precedent for the limitation of the application of consumer legislation to natural persons who do not use the goods for business purposes. The definition of ‘consumer’ in s 1 of the Electronic Communications and Transactions Act is limited to natural persons who are the end-users of the goods supplied.³³⁰

This also raises the question whether the nature of the goods should play a role in determining whether a particular transaction is governed by the CPA? This is referred to as the ‘functional-occupation limitation’. In terms of the CPA, it is irrelevant whether or not the consumer acts for purposes related to his trade, business

³²⁹ See the definition of ‘small enterprise’ in s 1 of the National Small Business Act. However, it is not clear what the position will be if a business falls in different categories depending on the criteria used. The definition of ‘small enterprise’ simply states that a business is classified as a small enterprise ‘by satisfying the criteria mentioned in columns 3, 4 and 5 of the Schedule’. The use of ‘and’ suggests that the requirements must all be satisfied, but as there are three criteria and four possible categories per industry, it is entirely possible for a business to fall in more than one category.

³³⁰ Act 25 of 2002.

or profession.³³¹ Put differently, the goods or services do not have to be acquired for personal or household purposes for the Act to apply; the Act also applies to ‘business-to-business dealings’.³³² This is in keeping with the fact that the Act extends protection to small businesses also.

In the following section, the question of whether juristic persons should be included in the definition of a ‘consumer’ will be discussed. This will be followed by a comparative analysis of the following methods of limiting consumer protection legislation: the functional-occupation limitation, limiting the definition of ‘consumer’ to the end-user of the product (the ‘commercialisation limitation’), limiting the size of consumer transactions, and limiting the size of consumers who are also juristic persons.

3.3. Should the definition of consumer be extended to juristic persons?

In Europe, the definition of consumers is typically limited to natural persons.³³³ By contrast, the CPA also protects ‘small’ juristic persons identified by the size of their annual turnover or asset value, without any further limitation. This section will explore the question whether juristic persons should be protected at all. The following section will then be devoted to a discussion on whether any further limitations should be imposed on the scope of the application of the CPA.

Extending consumer protection to juristic persons is not unheard of, but it is not usually done without limitation. Examples of these limitations will be discussed below. Juristic persons are protected to some degree in the United Kingdom (in respect of unfair contract terms), Austria, Belgium, the Czech Republic, Denmark,

³³¹ This restriction is found in other consumer protection instruments, such as the Consumer Rights Directive and the Consumer Sales Directive. It will be discussed in paragraph 3.2.

³³² Robert Sharrock *Business Transactions Law* 8 ed (2011) 578; Van Eeden *Consumer Protection Law* op cit note 271 at 44.

³³³ There is no uniform definition for ‘consumer’ across the European Union, but in general, the definitions are limited to individuals buying goods for private use. See Bridge, M (ed) *Benjamin’s Sale of Goods* 9 ed (2014) 882; Reich, Micklitz & Rott op cit note 39 at 50; Angus Johnston ‘Seeking the EU “consumer” in services of general economic interest’ in Dorota Leczykiewicz & Stephen Weatherill (eds) *The Images of the Consumer EU Law: Legislation, Free Movement and Competition Law* (2016) 93; Evelyne Terryn, Gert Straetmans & Veerle Colaert (eds) *Landmark Cases of EU Consumer Law* (2013) 59. This approach is also followed in Sweden, Germany, Cyprus, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Slovenia. See Schulte-Nölke, Hans (ed) *EC Consumer Law Compendium* (2008) 460.

France, Greece, Hungary, Slovakia and Australia.³³⁴ Interestingly, the protection of juristic persons is common in South America. ‘Persona natural o juridica’ (or variations of this) are protected in El Salvador, Chile, Panama, Peru, Guatemala, Argentina, Costa Rica and Mexico.³³⁵ The Model Law for Consumer Protection in Africa also extends protection to juristic persons.³³⁶

While the Consumer Rights Directive still limits the definition of consumer to natural persons, recital 13 allows for the possibility that member states could ‘decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises’. That there may be policy reasons for extending protection to these entities was also acknowledged in the Green Paper on the Review of the Consumer Acquis:³³⁷

‘Several Member States have granted natural persons acting for purposes which fall primarily outside their trade, business or profession the same protection as consumers. In addition, some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services which raises the questions whether they should benefit to a certain extent from the same protection provided for to consumers. During the review the widening of the definition to cover transaction for mixed purposes should be considered.’

This is referred to as a ‘transactional consumer notion’ — the weaker contract party is protected, regardless of whether it is a natural or juristic person.³³⁸

The DCFR also limits the notion of consumer to natural persons.³³⁹ However, it is pointed out that

‘[w]hether the notion of the consumer is necessarily the best way of identifying those in need of special protection is a question which has been raised and will

³³⁴ Schulte-Nölke (ed) op cit note 333 at 461.

³³⁵ See Consumers International op cit note 9 at 4.

³³⁶ Definition of ‘person’ in para 2 of part 2 — ‘Application of law and interpretation’ in Consumers International *Model Law for Consumer Protection in Africa* (1996) available at <http://www.consumersinternational.org/news-and-media/resource-zone/the-model-law-for-africa-protecting-the-african-consumer/>, accessed on 10 April 2016.

³³⁷ Op cit note 17 at 15.

³³⁸ Terry, Straetmans & Colaert op cit note 333 at 60. Some even argue that it has become a companion to the paradigm of freedom of contract (Hondius ‘The protection of the weak party’ op cit note 214 at 246). Also see Vincenzo Roppo ‘From consumer contracts to asymmetric contracts: A trend in European Contract Law?’ (2009) 5(3) *European Review of Contract Law* 304 at 311–13. He refers to a policy shift ‘from consumer protection to customer protection’ (at 317).

³³⁹ Article I.1:105(1). See Von Bar, Clive & Schulte-Nölke *DCFR Full Edition* op cit note 265 at 69.

no doubt be raised again. Some argue that small businesses or “non-repeat players” of any kind may be equally in need of protection’.³⁴⁰

The application of the United Kingdom Consumer Rights Act is limited to individuals.³⁴¹ The Department for Business, Innovation and Skills Select Committee recommended that the government consider the ‘case for small business to be treated as consumers’, and provide ‘a substantive response to the research commissioned by the Federation of Small Businesses on small business as consumers’.³⁴² The government responded as follows:

‘The Government has considered the case for small businesses to be treated as consumers, consulting on this question in 2008 and 2012. As the committee acknowledges, all business groups that responded to the Government’s 2008 Consumer Law Review preferred to retain the clarity of the current distinction between business and consumer and this position was supported by the majority of responses to the 2012 consultation.’³⁴³

It would therefore seem that the main motivation for confining the definition of ‘consumer’ to natural persons is clarity — it is easier for a supplier to know whether it is dealing with a consumer if the legislation applies to natural persons only. Clarity (and, by extension, legal certainty) is an important criterion in evaluating the merit of a particular drafting choice.³⁴⁴ As was demonstrated in paragraph 3.2, the current inclusion in the CPA of juristic persons with an asset value or annual turnover under a certain threshold leads to considerable uncertainty as to who is protected by the CPA and who is not. In addition to being unclear, this fails to improve consumer redress.³⁴⁵ Specifically, it increases the supplier’s ‘search costs’ to comply with the legislation because it increases the complexity of the legislation. Suppliers are rarely aware of the size of their customers (particularly in industries with a high transaction

³⁴⁰ Ibid at 70.

³⁴¹ Section 2(3).

³⁴² UK Government *Consumer Rights Bill: Statement on policy reform and responses to pre-legislative scrutiny* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274912/bis-14-566-consumer-rights-bill-statement-on-policy-reform-and-responses-to-pre-legislative-scrutiny.pdf, accessed on 1 May 2014.

³⁴³ Ibid. This report has now been published and the findings and recommendations will be discussed below. See Amelia Fletcher, Antony Karatzas and Antje Kreutzmann-Gallasch *Small Businesses as Consumers: Are They Sufficiently Well Protected? A Report for the Federation of Small Businesses* (January 2014) available at http://www.fsb.org.uk/policy/assets/fsb%20project_small_businesses_as_consumers.pdf, accessed on 1 May 2014. Ostensibly, another reason for the choice not to extend protection to small businesses was that business groups were opposed to the idea (Department for Business, Innovation & Skills *Enhancing Consumer Confidence by Clarifying Consumer Law: Consultation on the Supply of Goods, Services and Digital Content* (2012) 27).

³⁴⁴ Clarity as a criterion for evaluating legislation is discussed in chapter 2, paragraph 2.5.3.

³⁴⁵ See chapter 2, paragraph 2.4.8.

volume), and it would be expensive for them to investigate.³⁴⁶ Over and above that, this complexity will also have an adverse effect on consumer confidence, as it will be difficult for this class of consumer to assess whether they ‘qualify’ as a consumer at any given time.³⁴⁷ These criticisms do not relate to the fact that small juristic persons should be protected, but rather to how they are defined. This will be discussed in paragraph 3.4. Lastly, it has been argued that the approach ‘would increase the risks of dealing with a small business and would therefore operate against their interests’.³⁴⁸

The report prepared by the Federation of Small Businesses in the UK criticises the exclusion of small businesses from the definition of ‘consumer’. Their criticism hinges on the

‘increasing recognition ... that smaller business customers, and in particular sole traders and micro businesses, are likely to face many of the same problems as individual consumers when making purchasing decisions, especially when buying products or services that are not directly related to their particular line of business’.³⁴⁹

According to Schüller, ‘consumers are the weaker party, not because they are natural persons, but because consumers do not have the resources to analyse and overcome their biases’.³⁵⁰ Put differently, behavioural science defines consumers according to what they can or cannot do, versus who they are. In addition, ‘[t]he act of buying is always in fact done by a natural person (physical entity) even in the case of a legal person’.³⁵¹

Certainly, small business tends to have individualistic characteristics (compared to large business).³⁵² First, despite their separate legal personality, these businesses are often hard to distinguish from their owner(s). Secondly, there is no reason to

³⁴⁶ Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 15.

³⁴⁷ See chapter 2, paragraph 2.4.7.

³⁴⁸ The Confederation of Business Industry in Law Commission and Scottish Law Commission (Law Com No 292 and Scot Law Com No 199) *Unfair Terms in Contracts* (2005) para 5.23.

³⁴⁹ Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 3. The Law Commission and Scottish Law Commission, writing in the context of the reform of unfair contract terms legislation, made the case for the extension of protection to ‘small business contracts’ because they are also affected by unfair terms in standard contracts, ‘even when the contracts under which they obtain goods or services are in what might be called their area of expertise’ (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.6).

³⁵⁰ Schüller ‘op cit note 83 at 141.

³⁵¹ *Ibid* at 130.

³⁵² Green Paper on the Review of the Consumer Acquis op cit note 17 at 15.

believe that small businesses have any more knowledge about products than individuals.³⁵³ In this sense, virtually all customers are at a disadvantage. Thirdly, the ‘opportunity cost of decision-making’ is just as high, if not higher, as the small business has to focus on its core activity in order to stay afloat and does not have the resources to dedicate to finding information and making careful decisions. Fourthly, small businesses will be reluctant to spend time evaluating decisions, as the (real or perceived) benefits derived from the time spent will be low, given that smaller businesses have a smaller need for non-core products (in other words, products not used to fulfil the businesses’ core function) relative to bigger businesses. Lastly, small businesses are also hamstrung by their relatively weak bargaining power.³⁵⁴ The ‘small business manufacturing a single product which has a major multinational as its sole or dominant purchaser’ is an (albeit extreme) example of a scenario where the small business will have no power to dictate the terms of the contract.³⁵⁵ The Law Commission of England and Wales and the Scottish Law Commission used the example of

‘terms that prevent a small retailer which has incurred liability when it resells defective goods from passing that liability “back up the chain” to its supplier. The retailer is in effect “squeezed” between consumers, on the one hand, and the supplier or manufacturer, on the other. This can happen where a relatively small number of large suppliers dominate the supply of goods to the retail sector. It can also occur in an entirely competitive retail environment: a retailer that faces a “brand-specific” demand from its consumers cannot afford *not* to do business with a particular supplier. So, for the benefit of the consumer, a retailer may have to replace the manufacturer’s faulty goods with the new goods yet be unable to obtain compensation or replacement stock from the manufacturer because of clauses allowing the manufacturer to observe lower standards in its dealing with the retailer’.³⁵⁶

In Australia, the Trade Practices Act Review Committee also pointed out that juristic persons can be affected by ‘inequalities in the technical expertise required to recognise, and the bargaining power to negotiate, a fair bargain’.³⁵⁷ This particular

³⁵³ Roppo op cit note 338 at 315. This is less severe where the transaction takes place within the juristic person’s ‘area of expertise’ as opposed to once-off contracts. See Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.19.

³⁵⁴ Fletcher, Karatzas & Kreuzmann-Gallasch op cit note 343 at 7; Richard Stone & James Devenney *The Modern Law of Contract* 11 ed (2015) at 18.

³⁵⁵ Fletcher, Karatzas & Kreuzmann-Gallasch op cit note 343 at 7.

³⁵⁶ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.7.

³⁵⁷ See Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* (1976) para 9.40.

vulnerability can also be alleviated by providing that the parties to the supply chain have an unalienable right of redress in respect of consumer claims.³⁵⁸

If it is not consumers' status as individuals that triggers protection, but rather their vulnerability, the protection of businesses with the same vulnerabilities seems rational. Once this is accepted, the argument for the protection of small businesses becomes an argument for 'normative coherence', or 'treating like cases alike'.³⁵⁹ As Fletcher and colleagues point out:

'If small businesses behave more like consumers than they behave like big businesses, then it would be coherent to treat them the same under the law.'³⁶⁰

Protecting small businesses as consumers also acknowledges their role in establishing a healthy, competitive market. This is beneficial to consumers from both a price and quality perspective,³⁶¹ and is referred to as the 'virtuous cycle' of competition.

When looking at the 'quality' of goods in particular,

'[t]here is no obvious policy reason for insisting that a microwave sold to a consumer be of acceptable quality, while a microwave sold to a business need not be. A business may not necessarily be in any better position to assess whether a microwave was of acceptable quality, pre-sale, than is a consumer'.³⁶²

However, just as with individual consumers, not all juristic persons are in fact vulnerable. The question then becomes how the application of consumer protection measures to juristic persons should be limited.³⁶³ As Hondius puts it:

'The difficulty is where to draw the line. Time and again, legislators have tried – and failed – to draw a precise line between small and big.'³⁶⁴

The challenge has been described as seemingly 'insurmountable' in the comments to art IV.A. – 1:204 of the DCFR, which provides that 'a consumer contract for sale

³⁵⁸ This will be discussed in paragraph 3.6.3.3.

³⁵⁹ This touches on the criterion of rationality discussed in chapter 2, paragraph 2.5.2.

³⁶⁰ Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 14.

³⁶¹ Ibid; Von Bar, Clive & Schulte-Nölke *DCFR Full Edition* op cit note 265 at 76.

³⁶² Commonwealth Consumer Affairs Advisory Council op cit note 35 at 46.

³⁶³ Limiting the scope of application of consumer protection to individuals is slightly less contentious, as their vulnerability is more universal. However, the option of limiting the application of consumer protection based on the purpose for which goods were bought will be discussed above in paragraph 3.4.1.

³⁶⁴ Hondius 'The notion of consumer' op cit note 44 at 96.

is a contract for sale in which the seller is a business and the buyer is a consumer'. It is pointed out that '[e]ach possible solution will seem more or less arbitrary, where it is very difficult to provide convincing reasons for the substantive rules chosen'. This, then, was why special protection for small businesses was not included.³⁶⁵ This is one extreme. On the other end of this spectrum are proposals in which the vulnerability of customers is taken as universal, and unqualified protection is suggested, or at least protection with the possibility that the parties to a contract can agree to exclude the protections.³⁶⁶

It will never be efficient or fair to require suppliers to investigate the actual vulnerability of each and every buyer who is a juristic person. The cost of such a legislative intervention will far outweigh its utility. A definition of a vulnerable juristic person will have to utilise factual indicators of vulnerability that are easily discernible. Some of the methods of limiting the application of consumer protection legislation will be discussed below.

However, even applying and verifying these indicators may place an unfair burden on suppliers, particularly in businesses where a high volume of smaller transactions are concluded. Another method of alleviating this burden is to allow suppliers to accept any statements made by consumers on face value, without further verification (much like a warranty), or by regulating the onus of proof. This will be discussed in paragraph 3.5.

It is recommended that small juristic persons ought to be protected. However, the burden on suppliers must be alleviated by carefully considering the way in which 'juristic person' is defined, and the allocation of the burden of proof. These aspects will be discussed below.

³⁶⁵ See Von Bar, Clive & Schulte-Nölke *DCFR Full Edition* op cit note 265 at 1244.

³⁶⁶ Roppo op cit note 338 at 315; Justin Malbon & Luke Nottage *Consumer Law and Policy in Australia and New Zealand* (2013) 46.

3.4. Methods of limiting the application of consumer protection legislation

3.4.1. *Approaches to the functional-occupation limitation*

The CPA places no constraints on the purpose for which the goods or services must have been supplied, with one exception. The application of the ‘list of contract terms which are presumed not to be fair and reasonable’ in reg 44 applies only to a natural person who enters into an agreement ‘for purposes wholly or mainly unrelated to his or her business or profession’.³⁶⁷ Therefore, consumers who acquire goods or services in the course of their business or for their profession are also protected by the Act, as long as they are not excluded on any other basis, such as their size, annual turnover or asset value (in the case of juristic persons).³⁶⁸ In contrast, the approach generally taken in EC law is ‘functional-occupation related’, and ‘activities which relate to a business, to a profession or to work are excluded even if the acting party as such is not experienced in legal matters’.³⁶⁹

In a survey done by Consumers International, it was found that ‘[i]n the majority of countries, the legal definition of the consumer clearly defines consumption as only relating to the supply and household use of goods and services’.³⁷⁰ The Consumer Sales Directive provides that a person will only be considered a consumer if he ‘is acting for purposes which are not related to his trade, business or profession’.³⁷¹ The original draft of the Consumer Sales Directive³⁷² required a more direct connection between the consumer and his business before he would be disqualified from being protected as a consumer (the first draft, therefore, had a broader definition of consumer).³⁷³ It read: ‘... which are not *directly* related to his trade, business or profession ...’. This means that so-called dual-purpose goods or mixed contracts would also have been subject to the Consumer Sales Directive had this formulation been adopted. Dual-purpose goods are goods procured partly for personal use and

³⁶⁷ Regulation 44(1) GN 293 GG 34180 of 1 April 2011.

³⁶⁸ The question of whether juristic persons must at all be included in the definition of ‘consumer’ is discussed in section 3.3.

³⁶⁹ Bridge op cit note 333 at 882; Reich, Micklitz & Rott op cit note 39 at 50; Johnston op cit note 333.

³⁷⁰ Consumers International op cit note 9 at 4. Sixty countries were surveyed.

³⁷¹ Article 1(2)(a).

³⁷² Article 1(2)(a) of the Proposal for a Consumer Sales Directive.

³⁷³ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 20; Staudenmayer op cit note 23 at 549.

partly for uses connected to the consumer's business or profession. Examples of a mixed contract are 'when a doctor buys a car and occasionally uses it to visit his patients'³⁷⁴ or when 'a freelancer buys a computer for personal use as well'.³⁷⁵

The European Court of Justice has not ruled on the interpretation of the definition of consumer under the Consumer Sales Directive, but did rule on arts 13 to 15 of the Brussels Convention.³⁷⁶ Article 15 provides that consumers are defined as a person contracting 'for a purpose which can be regarded as being outside his trade or profession'. In a case involving the purchase of tiles by a farmer for roofing on a farm building used partly to house his family, the court held that arts 13 to 15 do not apply to

'a contract for goods intended for purposes which are in part within and in part outside his trade or profession ... unless the trade or profession purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect'.³⁷⁷

This approach is considered very restrictive. This is the case because the case dealt with procedural law (the determination of jurisdiction).³⁷⁸ It has been argued that determining the 'predominant use' of the goods is the appropriate criterion.³⁷⁹ This position is controversial — there are scholars who argue that it is not certain enough.³⁸⁰

One option suggested in the Green Paper on the Review of the Consumer Acquis was to widen the definition of consumer to include 'natural persons acting for purposes falling *primarily* outside ... their trade, business and profession'.³⁸¹ This

³⁷⁴ Green Paper on the Review of the Consumer Acquis op cit note 17 at 15.

³⁷⁵ Björn Sandrik 'The battle for the consumer: On the relation between the UN Convention on Contracts for the International Sale of Goods and the EU Directives on Consumer Sales' (2012) 20(4) *European Review of Private Law* 1097 at 1100.

³⁷⁶ Originally, the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 1968. It is now called the Brussels I Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (2001) *Official Journal* L 16/1.

³⁷⁷ *Johann Gruber v Bay Wa AG* (2005) European Court of Justice, case 464/01 at para 54.

³⁷⁸ See Terryn, Straetmans & Colaert op cit note 333 at 68.

³⁷⁹ Sandrik believes that the 'predominant use' criterion is also in line with the Consumer Rights Directive. Sandrik op cit note 375 at 1101; Reich, Micklitz & Rott op cit note 39 at 51.

³⁸⁰ Terryn, Straetmans & Colaert op cit note 333 at 69.

³⁸¹ Green Paper on the Review of the Consumer Acquis op cit note 17 at 16. In Sweden, a consumer is defined as 'a natural person who trades primarily for use outside of the course of business operation (*sic*)' (§1 of the Consumer Sales Act (SFS 1990:932) translated by Randy G Sklaver & Michael G Lindner (2007 *Norstedts Juridik*)). Sivesand translates the definition as 'any natural person who is

approach was not adopted in the Consumer Rights Directive, despite the fact that recital 17 of the Consumer Rights Directive provides that

‘in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered a consumer’.

The actual definition of consumer in the Consumer Rights Directive refers to ‘any natural person who ... is acting for purposes which are outside his trade, business, craft or profession’.³⁸² This definition does not accurately reflect the principle contained in recital 17. This has resulted in considerable discussions regarding the status of a recital in the preamble of a directive. Article 296 of the Treaty on the Functioning of the European Union provides that ‘[l]egal acts shall state the reasons on which they are based’.³⁸³ This has been interpreted as follows:

‘It is part of the legal act. It offers an appropriate guideline for the correct interpretation of the Directive, since the recitals of the preamble, even if they are not repeated in the article of the directive itself, “reflect the will and intention of the legislature and therefore shed light to a significant extent both on the motives that led to the adoption of the directive and on the objectives pursued by it.”’³⁸⁴

A better example of the ‘predominant use’ formulation is contained in art I-1:105(1) of the Draft Common Frame of Reference,³⁸⁵ which provides that consumer ‘means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession’.³⁸⁶ In the comments on the definition, the application of the DCFR is explained through illustrations in which the business and non-business uses are expressed in percentages. Whichever is the highest determines whether the DCFR applies or not, even if the division is as evenly spread as 60/40.

acting for purposes, which are not directly related to his trade, business or profession’ (Sivesand op cit note 195 at 19). In the Finnish Consumer Protection Act (38/1978), the adverb ‘primarily’ is used.

³⁸² Article 2(1). The same definition is used in art 2(f) of the CESL. Sandrik argues that because the Consumer Rights Directives also applies to certain aspects of the sale of goods, the definition of the Consumer Sales Directive should be interpreted in the same way so as to prevent the ‘highly peculiar results’ that would occur ‘if the notion of consumer would have a different meaning in these matters compared to the aspects of consumer sales that are regulated by the CSD’. See Sandrik op cit note 375 at 1102.

³⁸³ Consolidated version of the Treaty on the Functioning of the European Union *Official Journal L 326/47, 26/10/2012*.

³⁸⁴ Terryn, Straetmans & Colaert op cit note 333 at 70, and the cases cited there.

³⁸⁵ Von Bar, Clive & Schulte-Nölke *DCFR Full Edition* op cit note 265 at 1241.

³⁸⁶ *Ibid*.

This is a broader definition than that contained in the Consumer Rights Directive when the recital is not considered.³⁸⁷

The Unfair Contract Terms Directive and Unfair Commercial Practices Directive also define the consumer as a person who ‘is acting for purposes which are *outside* his trade, business or profession’.³⁸⁸ According to Bradgate and Twigg-Flesner, this requires a closer connection than under the Consumer Sales Directive before a person can be excluded. As they put it, ‘a person may be acting for purposes which are outside, but still related to, his business’.³⁸⁹

The definition in the Unfair Contract Terms Directives was also adopted in the United Kingdom Sale and Supply of Goods to Consumers Regulations 2002, which transposed the Consumer Sales Directive.³⁹⁰ However, the United Kingdom Consumer Rights Act now defines consumer as ‘an individual acting for purposes that are *wholly or mainly* outside that individual’s trade, business, craft or profession’.³⁹¹ This has amended both the UK SoGA and the Unfair Contract Terms Act.³⁹² According to the Explanatory Notes to the Consumer Rights Act, ‘[t]his means, for example, that a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer. Conversely, a sole trader that operates from a private dwelling who

³⁸⁷ Martijn W. Hesselink ‘Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the Consumer Rights Directive’ (January 2010) No. 2009/06 *Centre for the Study of European Contract Law Working Paper Series* 1 at 14.

³⁸⁸ Article 2(b) of the Unfair Contract Terms Directive and art 2(a) of the Unfair Commercial Practices Directive.

³⁸⁹ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 20. The fact that the two Directives have not been aligned has been described as unfortunate.

³⁹⁰ SI 2002/3045.

³⁹¹ Section 2(3).

³⁹² The UK SoGA has mainly been replaced by the Consumer Rights Act, ‘but some provisions of [the SoGA] will still apply, for example, rules which are applicable to all contracts of sale of goods (as defined by that Act – essentially these are sales of goods for money), regarding matters such as when property in goods passes. [The SoGA] will still apply to business to business contracts and to consumer to consumer contracts’. In the case of the Unfair Contract Terms Act, the Consumer Rights Act replaces the provisions relating to business-to-consumer contracts, and ‘[t]he UCTA will be amended so that it covers business to business and consumer to consumer contracts only’. See UK Government *Consumer Rights Act 2015 (c. 15): Explanatory Notes* available at <http://www.legislation.gov.uk/ukpga/2015/15/notes/contents>, accessed on 24 April 2016 at 7; Stone & Devenney op cit note 354 at 226. The case law under the previous formulation of the Unfair Contract Terms Act (e.g. *R & B Custom Brokers Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321) will be discussed in the context of juristic persons in paragraph 3.4.2.

buys a printer of which 95% of the use is for the purposes of the business, is not likely to be held to be a consumer'.³⁹³

In Australia, the traditional functional-occupation limitation is used in respect of transactions where the price of the goods exceeds a prescribed threshold (currently AUD 40 000).³⁹⁴ If the transaction value is below AUD 40 000, the limitation does not apply. The limitation is formulated differently from the formulations discussed above. It provides that 'a person is taken to have acquired particular goods as a consumer if, and only if ... (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption'.³⁹⁵ The test here can be distinguished from the European approach in that it focuses on the nature of the goods rather than the intention of the buyer.³⁹⁶

The Australian courts have given this requirement a wide interpretation to 'include transactions between companies involving goods or services which households might commonly acquire'.³⁹⁷ The test is objective and aimed at 'determining what the goods and services are ordinarily used for rather than looking at what they are actually used for'.³⁹⁸ It does not matter that the goods in question are often bought for commercial purposes,³⁹⁹ or that the goods will in fact be used by a business.⁴⁰⁰

Problems arise in borderline cases where goods are ordinarily used for both domestic and commercial purposes. In such cases, '[d]etermining whether goods or services are ordinarily acquired for personal, domestic or household purposes is a question of fact and will depend on the type or class of the goods or services and

³⁹³ 'Consumer Rights Act 2015 (c. 15): Explanatory Notes' op cit note 392 at 10.

³⁹⁴ Section 3(1)(a) of schedule 2, chapter 1, of the the Australian Competition and Consumer Act provides that any transaction with a price of less than AUD 40 000 is subject to the act, regardless of the purpose for which the goods were bought. See Russell V Miller *Miller's Annotated Trade Practices Act: Australian Competition and Consumer Law* 27 ed (2006) 82. The use of thresholds to 'cap' consumer protection will be discussed in para 3.4.4.

³⁹⁵ Section 3(1)(b).

³⁹⁶ Malbon & Nottage op cit note 366 at 44.

³⁹⁷ Holding Redlich 'The application of the Australian Consumer Law to B2B transactions' available at <http://www.holdingredlich.com.au/assets/docs/The%20application%20of%20the%20australian%2028%20march.2.pdf>, accessed on 9 June 2016 at 2.

³⁹⁸ Ibid; Stephen Corones & Philip H Clarke *Australian Consumer Law: Commentary and Materials* (2015) 446. Cf Malbon & Nottage op cit note 366 at 48. The authors point out that 'the definition's apparent objectivity is deceptive: it is underpinned by subjective analysis'.

³⁹⁹ Miller op cit note 394 at 82.

⁴⁰⁰ Corones & Clarke op cit note 398 at 446. This is subject to the 'commercialisation limitation', which will be discussed in the next section.

how the goods or services are actually used'.⁴⁰¹ What is evident is that the application of the test can be very complicated, and the results artificial and inconsistent. For instance, in *Carpet Call Pty Ltd v Chan*,⁴⁰² [c]arpet was found to be goods ordinarily acquired for domestic consumption and did not lose that description because it was of commercial quality or had some other quality which made it last longer than carpet normally supplied for domestic use'.⁴⁰³ On the other hand, air-conditioning units purchased for a motel business was subject to the Competition and Consumer Act because it was held by the court that 'they were of a kind ordinarily acquired for personal or domestic use'.⁴⁰⁴ In *Bunnings Pty Ltd v Laminex Group Limited*,⁴⁰⁵ the buyer was a home hardware retailer who bought insulation for use in the construction of its warehouses. It was held that this was goods 'ordinarily acquired for personal or domestic use'.

The Australian definition of 'consumer' has been described as 'positively generous in comparison to the interpretation of "consumer" in relation to the relevant EU Directives and the interpretation of the term by the European Court of Justice'.⁴⁰⁶ This conclusion is by and large based on the fact that the Australian definition allows for the protection of juristic persons.

The 'functional-occupation related' approach to defining 'consumer' has been criticised, as it 'creates a number of arbitrary delimitations and excludes persons who are also in need of protection'.⁴⁰⁷ Micklitz, Reich and Rott point out that it has to be remembered that 'this narrow definition was first developed in matters of jurisdiction where, according to the European Court of Justice, not only questions of consumer protection, but also of legal and procedural certainty concerning the place where a case is to be heard must be taken into account'.⁴⁰⁸ They refer to the consumer as the 'non-professional market participant' in 'all transactions which are pre-determined by the marketing strategies of business (including use of pre-formulated terms) where the receiving party (the consumer or user) is usually in a "take it or leave it"

⁴⁰¹ Holding Redlich op cit note 397 at 2.

⁴⁰² (1987) ATPR (Digest) 46-025.

⁴⁰³ Miller op cit note 394 at 82.

⁴⁰⁴ *Cinema Center Services Pty Ltd v Eastaway Air Conditioning Pty Ltd* (1999) ASAL 55-034.

⁴⁰⁵ (2006) 153 FCR 479.

⁴⁰⁶ Malbon & Nottage op cit note 366 at 49.

⁴⁰⁷ Hans-W Micklitz, Norbert Reich & Peter Rott *Understanding EU Consumer Law* (2009) 49.

⁴⁰⁸ *Ibid.* This refers to the decision in *Johann Gruber* supra note 377 para 43.

situation’.⁴⁰⁹ The authors conclude that the focus should not be on the purpose of the transaction

‘but rather with the *position of the person in the marketplace*. Consumer in this sense is the “passive market citizen” ... who is entering into transactions to satisfy his needs without producing the product or service himself’.⁴¹⁰

Put differently, consumer protection should be ‘user protection’. The ‘professional expertise of the provider’ is more pertinent than the ‘non-professional activity of the user’ when determining the scope of consumer protection.⁴¹¹

In addition, and importantly for South Africa, it is noted in the Consumers International report that

‘[t]he strict separation of business from personal life is a product of the 19th and 20th Century industrial revolutions and is not found to the same extent in emerging and developing countries, especially in rural area. Where consumers are, for example, engaged in small-scale production and live and work in the same place (“above the shop”, as it were), it becomes almost impossible to draw a clear distinction between purchases of goods and services for business or for personal use’.⁴¹²

The functional-occupation limitation is contrary to the policy position taken by the South African legislature, which is specifically (and explicitly) aimed at protecting small businesses (whether they are juristic persons or sole proprietors).⁴¹³ It has been criticised on this basis alone.⁴¹⁴ There are also authors who believe that consumer protection is not only meant to protect ‘orphans and widows’. This was discussed in chapter 2, paragraph 2.2, in the context of conceptualising ‘vulnerability’. In addition, the fact that juristic persons share a lot of the vulnerabilities of individuals was discussed in paragraph 3.3. By contrast, the functional-occupation limitation assumes that buyers who intend to use the goods for commercial purposes are either less vulnerable⁴¹⁵ or can, and should, protect themselves.

⁴⁰⁹ Micklitz, Reich & Rott op cit note 407 at 50.

⁴¹⁰ Reich, Micklitz & Rott op cit note 39 at 53.

⁴¹¹ Ibid 39 at 54.

⁴¹² See Consumers International op cit note 9 at 4.

⁴¹³ The application of the test to juristic persons is discussed in paragraph 3.4.2 below.

⁴¹⁴ Malbon & Nottage op cit note 366 at 44.

⁴¹⁵ For instance, it is apparently assumed that a consumer who purchases goods for purposes of his core business (e.g. manufacture or resale) will be more knowledgeable about the products or will have more resources to overcome any information asymmetry that exists.

It is clear from the discussion above that the inclusion of the ‘functional-occupational’ limitation is not without interpretive problems. First, any formulation will be open to some conflicting interpretation when it comes to dual-purpose contracts. Secondly, making the extension of protection dependent on the intention of one of the parties at the time of the transaction leads to uncertainty, as it is difficult to ascertain, and may not be fair to a supplier faced with a high volume of transactions and/or transactions of relatively low value.⁴¹⁶ As Nottage points out:

‘Clearly, suppliers need to know which of their transactions should be considered consumer orientated, as the allocation of cost and risk is dependent on this knowledge. Consumers also require this knowledge in order to possess an awareness of their rights... . The interests of both parties demand more clarity.’⁴¹⁷

On these grounds, there are no cogent policy reasons to incorporate this requirement into the CPA.

3.4.2. *Atypical contracts, or the end-user of the product (the commercialisation limitation)*

Another way of limiting the application of consumer protection legislation is to require that the consumer must be the end-user or ‘final addressee’, or that, in the case of a business, the contract must be atypical. This is essentially a more curtailed version of the functional-occupational limitation in that the goods in question must be purchased for commercialisation. It will by and large fulfil the function of limiting the application of consumer legislation to juristic persons. However, it could also apply to individuals who run a business in their own name. For purposes of this section, the question is whether it should be applied to both individuals and juristic persons.

Whether the product was intended for resale was included in one of the initial drafts of the CPA, which provided that the Act would not apply to a juristic person if the value of the transaction exceeded a certain threshold *and*

‘the goods or services are supplied to a person in the supply chain who in the ordinary course of business—

⁴¹⁶ The possible alleviation of this concern by imposing an onus on the consumer is discussed in paragraph 3.5.

⁴¹⁷ Malbon & Nottage op cit note 366 at 49.

- (aa) markets those goods for resale, irrespective whether to other persons in the supply chain or directly to consumers; or
- (bb) applies or utilises those goods or services in the production of other goods or services, or in the marketing of any goods or services, irrespective whether to other persons in the supply chain or directly to consumers'.⁴¹⁸

The underlying premise is that if goods are intended for resale or other forms of commercialisation, the consumer is less vulnerable.

This approach has been adopted in varied forms in France, Poland, Latvia and Luxembourg, and was previously employed in the UK Unfair Contract Terms Act.⁴¹⁹ In France, protection is extended to a legal person 'concluding contracts which are not directly related ... with [its] profession'.⁴²⁰ This formulation is identical to the functional-occupation limitation. When the French courts applied this section to an estate agent who had bought a defective alarm system, the estate agency was protected 'because the subject matter of the contract did not bear any direct relation to the substance of the business activity and because the technical expertise of an estate agency did not encompass the technology of alarm systems, by reason of which the buyer must be treated just as any other consumer'.⁴²¹ However, in later decisions, the courts pointed out that the enquiry should not be into the technical competencies of the individual, but rather whether the 'contract is directly related to the business activity'.⁴²² Be that as it may, the decisions seem to be based on the underlying premise that a business can also experience inequality of economic power and information asymmetry.

Other examples where juristic persons are also considered to be consumers when concluding 'atypical contracts' can be found in Poland, Latvia⁴²³ and, before it was amended by the Consumer Rights Act in 2015, under s 12(1) of the Unfair Contract Terms Act in the United Kingdom. Previously under the Unfair Contract Terms Act, UK consumers were always protected, and juristic persons were protected if the

⁴¹⁸ Section 5(2)(b)(i) and (ii) of the Consumer Protection Bill B 19B—2008.

⁴¹⁹ Schulte-Nölke (ed) op cit note 333 at 459.

⁴²⁰ Schulte-Nölke (ed) op cit note 333 at 458; Micklitz, Stuyck & Terryn op cit note 49 at 33. Also see Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 18; Hesselink op cit note 387 at 14.

⁴²¹ Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 *Juris-classeur periodique*) as discussed in Schulte-Nölke (ed) op cit note 333 at 458.

⁴²² Cass. Civ. of 24 January 1995 (*Recueil Dalloz Sirey* 1995) as discussed in Schulte-Nölke (ed) op cit note 333 at 459.

⁴²³ Schulte-Nölke (ed) op cit note 333 at 459.

goods were ‘of a type ordinarily supplied for private use or consumption’.⁴²⁴ In *R & B Custom Brokers Ltd v United Dominions Trust Ltd*,⁴²⁵ the buyer was a shipping brokerage who bought a motor vehicle for the business and private use of its directors. This was not the only time that the business had purchased motor vehicles. In this case, it was found that the purchase was only incidental to the business (the degree of regularity was not such that it could be said that it was an integral part of the business), and that the buyer was therefore ‘dealing as a consumer’ — in other words, it was protected by the Unfair Contract Terms Act. Although the judgment was a useful guide to the interpretation of the ‘non-commercial use’ requirement, the application of this judgment was not extended to UK consumer protection law generally.⁴²⁶ The decision has also been reversed by the Consumer Rights Act.

It is submitted that this limitation is too narrow, even in the context of juristic persons. This conclusion is based on the considerations set out in paragraph 3.4.1 above.

Another way of framing the commercialisation limitation is to limit the application of consumer protection laws to the ‘final addressee’ or ‘end-user’ of goods or services. This definition is used in Spain, with the addition that the consumer must not have ‘the aim of integrating [the goods] in production, transformation, commercialisation processes’.⁴²⁷ Article 1(4)(a) of the Greek Consumer Protection Act defines consumer as a ‘natural or legal person, at whom products or services on a market are aimed and who makes use of such products and services, so long as the person is the end recipient’.⁴²⁸ This is a more inclusive limitation (and will make it easier for a business to be a consumer) than the

⁴²⁴ Section 12. Now, juristic persons will only be protected where the attempt to exclude or limit liability is unreasonable (s 11). See Stone & Devenney op cit note 392 at 273.

⁴²⁵ [1988] 1 WLR 321.

⁴²⁶ So, for instance, the same interpretation is not given to ‘in the course of a business’ as used in s 14(2) of the UK SoGA, which is aimed at establishing whether that act should apply to a particular supplier (*Stevenson v Rogers* 1999 QB 1028 from 1040; Schulte-Nölke (ed) op cit note 333 at 459; H G Beale (General Ed) *Chitty on Contracts* 31 ed (2012) 1487; Stone & Devenney op cit note 392 at 253).

⁴²⁷ Article 1(2) and (3) of the Law 26/1984 of July 19 on Consumer Protection. See Schulte-Nölke (ed) op cit note 333 at 458.

⁴²⁸ Law 2251/1994. Other countries who employ the notion of the final addressee or end-user are Hungary and Luxembourg. See Schulte-Nölke (ed) op cit note 333 at 458.

functional-occupation or atypical-contract limitations, as a business can be the end-user of goods or services, while still using them for commercial purposes.

Australia has adopted a limitation that is slightly narrower than the end-user limitation, but not as wide as the functional-occupation or atypical-contract formulation. The Australian Competition and Consumer Act defines a ‘consumer’ as a person (including juristic persons) who paid less than AUD 40 000 for the goods *or* bought goods ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’, regardless of whether the goods were bought by a natural or juristic person, as long as the consumer

‘did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land’.⁴²⁹

Corones and Clarke use the following table to explain the operation of the limitation (in conjunction with the other requirements in the definition):⁴³⁰

Examples of consumers	Examples of non-consumers
1. The purchaser of a \$10,000 second-hand car	1. The purchaser of a \$10,000 second-hand car acquired as part of a hobby of restoring and selling of old cars
2. A printing company that leased a commercial printer for \$35,000	2. The purchaser of a new \$2,000 television set who acquired it to lease to a friend

⁴²⁹ Section 3(1) and (2) of schedule 2, chapter 1, of the Competition and Consumer Act, read with the definition of ‘person’ in s 22(a) of the Acts Interpretation Act, 1901, which provides that ‘person’ includes ‘body politic or commercial as well as an individual’; Luke Nottage ‘The government’s proposed review of Australia’s contract law: An interim positive response’ in Mary Keyes & Therese Wilson (eds) *Codifying Contract Law: International and Consumer Law Perspectives* (2014) 138; Luke Nottage ‘Consumer law reform in Australia: Contemporary and comparative constructive criticism’ (2009) 9(2) *Queensland University of Technology Law & Justice Journal* 111 at 122; Australian Competitor & Consumer Commission ‘Business rights’ available at <http://www.accc.gov.au/business/business-rights-protections/business-rights>, accessed on 7 June 2016. However, note that the sections on unfair contract terms are limited to consumer contracts, which are restricted to contracts with individuals for goods ‘wholly or predominantly for personal, domestic or household use’ (s 23(3)). See Jeannie Paterson *Unfair Contract Terms in Australia* (2012) 58; Standing Committee of Officials of Consumer Affairs *An Australian Consumer Law: Fair Markets — Confident Consumers* (2009) available at http://archive.treasury.gov.au/documents/1484/PDF/An_Australian_Consumer_Law.pdf, accessed on 7 June 2016 at 32; Commonwealth Treasury *The Australian Consumer Law: Consultation on Draft Provisions on Unfair Contract Terms* (2009), available at <http://archive.treasury.gov.au/contentitem.asp?ContentID=1537>, accessed on 7 June 2016 at 8.

⁴³⁰ Corones & Clarke op cit note 398 at 450.

3. A company that purchased a \$300,000 car for an executive	3. A small farmer who purchased a second hand tractor for \$50,000
4. A furniture removal company that purchased a new vehicle for its business	4. A commercial furniture maker who purchased timber for \$20,000 to be used in its business
5. A farmer who purchased a stud ram for \$40,000	5. A farmer who purchased a stud ram for \$41,000
6. The ACCC when it purchases toilet rolls	6. A school child who purchased lemons for \$30 to make drinks to sell at a school fete

In short,

‘[t]he person remains a consumer even though goods are required for the purpose of using them up unless the goods are used up, relevantly, “in the course of repairing or treating other goods” or “in the course of the process of repairing or treating other goods”’.⁴³¹

Despite the conclusion in paragraph 3.4.1 that there are no cogent policy reasons to incorporate the ‘occupational-functional’ limitation, it is nonetheless recommended that the ‘commercialisation limitation’ be included, for the following reasons:

- a) It has been argued that the similarities between juristic persons and consumers are less pronounced when the product in question is ‘directly related to their [the small business’] particular line of business’.⁴³² When goods are resold or used in the production process, they directly relate to the core business of the supplier. The rationale would be that one can expect that a juristic person would act diligently when it comes to such transactions.
- b) In terms of the quality of the goods, manufacturers, distributors and retailers (in other words, the entire supply chain) are liable to the consumer in terms of the CPA.⁴³³ In order to avoid the risk of liability, a buyer could be

⁴³¹ *Lewis v GWS Machinery Pty Ltd* (2007) NSWSC 316 para 142.

⁴³² See Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 4.

⁴³³ Sections 56 and 61 are discussed in paragraph 3.6.3 below.

expected to make inquiries into the quality of the products that are bought for resale or as components of the buyer's own product, and/or to insure against liability when something does go wrong.⁴³⁴

- c) It will be easier to establish that goods are intended for resale or production purposes without too much investigation on the part of the supplier. Several characteristics of the transaction could indicate that the small business purchases the goods for resale or production purposes. These are the nature and purpose of the goods, the nature of the buyer's business (what they sell), the quantity of goods purchased, and whether the transaction repeats (whether there is a supply agreement). This means that the criticism that the 'occupational-functional' limitation is difficult for suppliers to apply does not hold equally true here. Put differently, this limitation is less likely to operate unfairly towards suppliers. Any residual unfairness that remains can be resolved by adjusting the burden of proof. This is discussed in paragraph 3.5.

This raises the question whether the 'commercialisation' limitation recommended in respect of small juristic persons should be extended to sole proprietors too. Although there has been extensive argument about the fact that small juristic persons have the same vulnerabilities as individuals, individuals are undeniably more exposed when things do go wrong.⁴³⁵ This is for the simple reason that a juristic person has an economic and legal identity that is deliberately distinguishable from the individuals who run and own the business. For a sole proprietor, the exposure to potential loss is very personal. So, the first rationale for unlimited protection for sole proprietors (versus incorporated small entities) is that they are more exposed. The second rationale is one of practicality and certainty. Distinguishing a sole proprietor from other individuals is not as easy as identifying an incorporated entity (where it is reflected in the name). It would require the introduction of an investigation akin to that required for implementing the occupational-functional limitation (expecting the supplier to ask: 'Will you be using this in your business or profession?'). It would be

⁴³⁴ It will be argued in paragraph 3.6.3.3 below that retailers should have a right of redress against their suppliers where the retailer is held responsible by a consumer for a post-purchase quality problem. This redress does not have to (nor should it) be achieved by including the retailer in the definition of 'consumer'.

⁴³⁵ Fletcher and colleagues refer specifically to the vulnerability of 'sole traders and micro businesses'. See Fletcher, Karatzas & Kreutzmann-Gallasch *op cit* note 343 at 3.

preferable to accept that not being incorporated is a sufficient indicator of vulnerability, and leave it at that.

3.4.3. *The size of the juristic person*

The size of the juristic person can also be a delineating factor. The rationale is that smaller juristic persons will not have the resources in order to overcome their vulnerabilities (e.g. their weak bargaining power and information asymmetry). This is the approach ultimately taken in the CPA.⁴³⁶

If one were to assume that the size of the juristic person ought to be a factor, it raises the question as to how size should be quantified and what the thresholds should be. In South Africa, the application of the CPA depends on the asset value or annual turnover of the juristic person at the time of the transaction. If, at the time of the transaction, either of these values exceeds the threshold determined by the Minister, the buyer will not be considered a consumer. As pointed out in paragraph 3.2, there are several difficulties with this test that undermine its fairness and practicality.

In the EU, micro, small and medium enterprises are defined according to their number of employees and their annual turnover and/or balance sheet.⁴³⁷ In the case of a micro enterprise, the thresholds are ten employees *and* an annual turnover *and/or* annual balance sheet of less than €2 million.⁴³⁸ In the UK, a threshold of nine employees has been suggested.⁴³⁹ The UK Financial Conduct Authority also uses an annual turnover threshold of £1 million to classify ‘small businesses’.⁴⁴⁰ The application of the CESL to business-to-business contracts would have been limited

⁴³⁶ The current threshold is R2 million. See the discussion and criticism in paragraph 3.2.

⁴³⁷ Article 2(3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises *Official Journal L 124, 20/05/2003* (Commission Recommendation concerning the definition of micro, small and medium-sized enterprises). Small enterprises employ fewer than 50 persons and have an annual turnover and/or annual balance sheets of less than €10 million. Medium enterprises employ fewer than 250 persons and have an annual turnover of less than €50 million and an annual balance sheet of less than €43 million. This approach is also used in the telecommunications industry in the United Kingdom. See Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 15.

⁴³⁸ Commission Recommendation on the definition of micro, small and medium-sized enterprises op cit note 438 art 2(3).

⁴³⁹ The Law Commission and Scottish Law Commission have referred to this as the ‘primary aspect’ of the definition of small business (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.34; Commission Recommendation concerning the definition of micro, small and medium-sized enterprises op cit note 438 recital 4).

⁴⁴⁰ Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 15.

to contracts where at least one of the traders is a small or medium-sized enterprise (SME).⁴⁴¹ An SME was defined as ‘a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million’.⁴⁴²

Using the number of employees as a threshold is not without its challenges. First, the supplier will depend on the consumer to ascertain the number. Secondly, it is not a static criterion, but will fluctuate over time, which increases search costs, as it has to be done for every transaction. Thirdly, it can be an artificial indicator of size. By their very nature, some industries are more labour-intensive than others. It is therefore not a standardised measuring tool.⁴⁴³ Lastly, the definition of employee will be crucial. Many large businesses (such as Über) make significant use of independent contractors who do not fall within the definition of employee under labour law.⁴⁴⁴

Turnover as a threshold value has been criticised on the grounds that it will be difficult and impractical for the trader to assess the financial statements of the other party.⁴⁴⁵ Secondly, it is not an accurate indicator of the size or vulnerability of the business, as some industries ‘have a small profit to turnover ratio because there is considerable outlay involved in reaching the finished saleable product’.⁴⁴⁶ These businesses may be less sophisticated than businesses in the service industry, where the profit-to-turnover ratio is larger. In addition, businesses in the retail and distribution sectors may have larger turnovers than their manufacturers.⁴⁴⁷ Thirdly,

⁴⁴¹ Article 7.

⁴⁴² This is much higher than the threshold suggested by the Law Commission and Scottish Law Commission. They recommend that protection should be extended to the most vulnerable businesses only, i.e. micro businesses (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.35).

⁴⁴³ This is evident from the schedule to the National Small Enterprise Act 102 of 1996, in which this indicator is used with varying thresholds depending on the sector.

⁴⁴⁴ The Law Commission and Scottish Law Commission recommended that the definition of ‘employee’ should not only include employment contracts, but also contracts for services (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.41).

⁴⁴⁵ Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner & Reinhard Zimmermann ‘The proposal for a regulation on a Common European Sales Law: Deficits of the most recent textual layer of European contract law’ (2012) 16(3) *The Edinburgh Law Review* 301 at 304. This was discussed in paragraph 3.2 in the context of the threshold used in the CPA. In some instances, it will even be difficult for the consumer to ascertain the value of the business at any given time.

⁴⁴⁶ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.36.

⁴⁴⁷ Recital 4 of the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises op cit note 438.

‘key elements in the rules must be certainty, accessibility and predictability for persons acting in the market. Turnover is rarely accurately ascertainable on the “face” of the business. It will be easier for the other party to determine whether it is dealing with a small business if the criterion is simply one of employee numbers. A turnover criterion may be suitable for administrative regimes setting tax exemptions or subsidy levels where it would be used as a threshold criterion which, once satisfied, would entitle a business to membership of a certain class for a period of time. It is more difficult to see how it would work in regard to transactions. The fact that the size of the business must be reassessed with each transaction means that the inherent variability of a turnover criterion would be likely to cause problems for a business of marginal size’.⁴⁴⁸

Lastly, in some instances, disclosing turnover will reveal sensitive information, such as the pricing used by the consumer. This will be the case where the small business relies on a small number of key contracts. This will ‘place the [supplier] in a strong position to exact stricter terms from the small business’.

Annual turnover, asset value and number of employees are all fluctuating values. This raises a further concern: Must these values be determined at the time of each transaction (assuming multiple transactions with the same consumer)? Determining these values afresh at the time of each transaction does not seem practical. Article 4(1) of the European Commission Recommendation concerning the definition of micro, small and medium-sized enterprises provides that the data and financial amounts that must be used ‘are those relating to the latest approved accounting period and calculated on an annual basis’. If an enterprise exceeds the threshold for two consecutive accounting periods, it will lose its status as micro, small or medium-sized enterprise.⁴⁴⁹ In the case of new businesses, the determination will be made using ‘a bona fide estimate made in the course of the financial year’.⁴⁵⁰ The Law Commission of England and Wales and the Scottish Law Commission recommended that the ‘size of a business should be calculated by averaging the number of persons employed by that business or by it and any associated business over the preceding year’.⁴⁵¹

Some small businesses may be less vulnerable because they operate within a larger group. This is taken into account in the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, which

⁴⁴⁸ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.37.

⁴⁴⁹ Op cit note 438 art 4(2).

⁴⁵⁰ Ibid art 4(3).

⁴⁵¹ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.46.

introduces the concept of partner and linked enterprises.⁴⁵² A similar exemption was recommended by the Law Commission of England and Wales and the Scottish Law Commission.⁴⁵³

It has been argued that a measure of consumer protection, subject to the commercialisation limitation, should be extended to ‘small’ juristic persons. This raises the very difficult question of how ‘small’ is small enough. The extent of the challenge posed by this question is evident from the widely divergent approaches outlined above. It seems that the overriding aim must be to find a method of measurement that is easy to ascertain and certain to prevent an escalation in transaction costs. This immediately excludes the annual turnover, asset value or balance sheet of the buyer, as those figures are not always readily available and are fixed in time (in other words, at the company year-end), making measurement ‘at the time of the transaction’ impossible. This means that there are persuasive policy reasons to amend the current formulation of the exclusion in s 5(2)(b) of the CPA.

3.4.4. *The size of the transaction*

During the drafting process, transaction size was contemplated as a limitation on the application of the CPA. In an earlier draft, it provided that if the consumer is a juristic person, the Bill would not apply if ‘the value of the transaction exceeds the threshold value determined by the Minister’.⁴⁵⁴

As discussed above, the Australian Competition and Consumer Act makes use (in part) of a monetary threshold in its definition of ‘consumer’ in s 3(1)(a). This definition is used despite opposition from the Consumer Affairs Advisory Council,

⁴⁵² Commission Recommendation on the definition of micro, small and medium-sized enterprises op cit note 438 art 3. The Law Commission and Scottish Law Commission suggest ‘a provision exempting from the regime those small businesses that are “associated with” larger businesses, for example, where they belong to the same group of companies’ (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.34). Also see Hesselink op cit note 387 at 14.

⁴⁵³ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.54.

⁴⁵⁴ Section 5(2)(b)(ii) of the second discussion draft of the Consumer Protection Bill, 2007, dated 21 September 2006. This was eventually changed after submissions were received expressing a preference for limiting the application of the Act to juristic persons in relation to their size (see Consumer Protection Bill B 19C—2008, as amended by the Portfolio Committee on Trade and Industry; ‘Presentation to the Select Committee on Economic & Foreign Affairs of 16 October 2008’ available at <http://slideplayer.com/slide/9866348/>, accessed on 30 March 2016; Parliamentary Research Unit op cit note 314 at 5; Tjatie Naudé ‘Proposals for amendment of Consumer Protection Bill’ available at www.pmg.org.za/files/docs/080826proftjakiesub.doc, accessed on 27 October 2008).

who supported the removal of the monetary threshold.⁴⁵⁵ Specifically, they were of the view that

‘there is no meaningful distinction to be made between a person who pays \$40 000 for goods or services and a person who pays \$40 001. The focus of the definition should be on the class of person who makes the purchase, or on the kind of goods or services which are purchased’.⁴⁵⁶

A similar approach was taken in its predecessor, the Trade Practices Act of 1974.⁴⁵⁷ At that time already, the approach was criticised as ‘convoluted and seemingly quite arbitrary’.⁴⁵⁸ It has also been said to ‘reveal a distinctive Australian bias favouring the protection of “small business”, which may extend to very large inter-firm deals and which is actually of debatable merit for individual consumers’.⁴⁵⁹ Justice Steven Rares also pointed out that ‘[o]ne wonders why such [large] corporations have any need for the thicket of protection given to a consumer in the *Australian Consumer Law*’.⁴⁶⁰

This criticism was made in the context of s 68A of the Trade Practices Act, which provided that warranty liability could be excluded if it is ‘fair and reasonable’ and the goods are not ordinarily for personal use. The provisions on unfair contract terms now apply to individuals only.⁴⁶¹ The criticism also largely relates to the use of a monetary threshold, and not the commercialisation limitation as such.

By contrast, Fletcher and colleagues point out that the low actual or perceived value of time spent making purchasing decisions as well as the weak bargaining position of smaller businesses is more the result of the size of the transaction than the

⁴⁵⁵ S G Corones *The Australian Consumer Law* (2011) at 85. A second and third edition have been published, the latter in May 2016. I could however not obtain access to the latest edition in time.

⁴⁵⁶ Commonwealth Consumer Affairs Advisory Council op cit note 35; Standing Committee of Officials of Consumer Affairs op cit note 429 at 65. The Standing Committee questioned the use of the monetary threshold and pointed out that if it is retained, the value must be reviewed, since it has been in place, unchanged, since 1995. See the discussion of the legislative history of the threshold in Malbon & Nottage op cit note 366 at 42. The relevance of the monetary threshold is one of the issues which will be debated in the current review of the Australian Consumer Law (see Consumer Affairs Australia and New Zealand op cit note 36 at 11).

⁴⁵⁷ See s 4B(1) of the Trade Practices Act, 1974.

⁴⁵⁸ Nottage ‘Consumer law reform’ op cit note 429 at 122.

⁴⁵⁹ Ibid at 131.

⁴⁶⁰ Rares op cit note 263 para 42.

⁴⁶¹ See the discussion in note 429 above. The fact that there are separate definitions of ‘consumer’ makes for a ‘definitional morass’, which ‘creates practical, commercial and legal problems for someone who deals with more than one of the three different defined classes of “consumer”’. See Rares op cit note 263 para 53; Jacqueline Downes ‘The Australian Consumer law - is it really a new era of consumer protection’ (2011) 19 *AJCCL* 5 at 12.

size of the juristic person.⁴⁶² In other words, when the transaction is small, businesses are less likely to invest time in ensuring that they make the right decision (e.g. do comparative shopping), thoroughly determine the quality of the goods, or negotiate terms. This is reflected in the fact that the procurement procedures (such as getting more than one quote or requiring managerial supervision) of most businesses will also be triggered by the size of the transaction. The Law Commission of England and Wales and the Scottish Law Commission have recommended that juristic persons should not be protected against unfair contract terms in respect of contracts with a value of more than £500 000.⁴⁶³ They admitted that '[t]his transaction limit proposal is likely to present the parties with problems of ascertainability and predictability similar to those presented by the employee numbers test for business size'.⁴⁶⁴ In some cases, the price will not be known in advance, as will often be the case with contracts for services where the price is determined by the ultimate frequency of the use of the services, or for building contracts where the amount of materials will not be known in advance.

However, in most cases, the price will be known. That being said, the determination of a threshold is often arbitrary (as is the case with any threshold) and can lead to illogical results. For example, big businesses concluding small transactions will be protected, while small businesses concluding large transactions will not. A small business buying an expensive product will have no protection, despite the fact that it stands to lose more than would have been the case if the product were inexpensive.

If certainty is the litmus test, however, the value of the transaction seems to be the 'lesser of all evils' because, in most cases, the value of the transaction is known to

⁴⁶² Fletcher, Karatzas & Kreutzmann-Gallasch op cit note 343 at 18; Hesselink op cit note 387 at 8.

⁴⁶³ Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.59. This value is relatively high because it is primarily aimed at ensuring that finance businesses who have relatively few employees, but deal with sophisticated, high-value transactions, are not classified and protected as small businesses (para 5.56). It is also designed to ensure that small businesses that are vulnerable due to the fact that they have only one large customer are still protected (para 5.57). Lastly, it was felt that even small businesses could be expected to seek legal advice in respect of transactions of a value higher than £500 000 (para 5.58).

⁴⁶⁴ *Ibid* at para 5.62.

the parties at the time of conclusion. In practice, suppliers are free not to investigate if it is too expensive or complex, and to treat all their customers as consumers.⁴⁶⁵

3.4.5. *Recommendations regarding imposing limitations on the definition of ‘consumer’*

In summary, it is recommended that:

- a) the CPA should apply to all natural persons, regardless of the purpose for which they buy the goods; and
- b) the CPA should also apply to juristic persons, *except* if the transaction value is above the prescribed threshold *or* the products are bought for resale or for transformation into a product for resale, will be used up or transformed in the course of production or manufacture, or are used up or transformed in the course of repairing or treating other goods or fixtures on land.

This means that individuals will be protected, regardless of the transaction value or the purpose for which the goods were bought. If the buyer is a juristic person, and the transaction value is higher than the threshold value, the buyer will not be protected, regardless of the purpose for which the goods were bought. If the buyer is a juristic person who purchases the goods for commercial reasons, the buyer will not be protected, regardless of the transaction value. The most controversial scenario created by this proposal is that if the transaction value is below the threshold, juristic persons will be protected, regardless of their size; if they buy the goods for commercialisation, however, they will not be protected. It is submitted that the application of the commercialisation limitation mitigates the fact that large juristic persons will also be protected.

It is submitted that the threshold for transaction value should be low in order to minimise the impact of the inclusion of juristic persons in the definition of ‘consumer’. It is suggested that it be set in the region of R15 000. This amount can always be increased over time.

⁴⁶⁵ Due to space constraints, how the transaction value must be calculated has not been discussed.

Admittedly, this solution is not perfect and will not be popular among suppliers, who will have to ascertain the purpose for which the goods are bought in order to escape liability.⁴⁶⁶ It may also be criticised on the ground that it lacks clarity and simplicity. The counterargument is that it is simple when it matters most, namely when the buyer is an individual. The complexity is only introduced in relation to juristic persons where the transaction value is lower than the threshold value.

In the next section, the question of whether the burden on suppliers can be alleviated through an adjustment to the burden of proof will be investigated.

3.5. Who must establish whether the buyer is a consumer?

The adoption of the above recommendations raises an important question: Who must establish whether the buyer is a consumer? Put differently, to what extent should consumers be responsible to identify themselves?⁴⁶⁷ The CPA is silent on the issue. This means that ‘in-court’ ordinary rules regarding onus will apply. In general, this implies that the party who relies on a cause of action must prove it.⁴⁶⁸ In consumer cases in general, therefore, it will be the consumer who must prove that he/she is a consumer. However, the question of how a buyer’s consumer status should be confirmed is not only relevant when a formal complaint is made, but also at the time of the transaction, as this is when the supplier has to determine whether or not the CPA applies to the transaction. Requiring suppliers to establish when consumer protection rules do or do not apply may be unfair, particularly where the qualifying criteria are difficult to ascertain (in other words, where it will take significant effort to gather the information necessary to apply the criteria). The ‘cost of investigation’ (or ‘transaction cost’) may become disproportionate where a supplier deals with a high-transaction volume, yet individual transactions are of a relatively low value (as is often the case with typical consumer goods). The burden on the supplier can be alleviated by creating an assumption that the buyer is a consumer under certain circumstances.

In this context, the National Credit Act contains an interesting provision. In terms of this legislation, its application to juristic persons (this aspect is discussed below)

⁴⁶⁶ The supplier will always know the value of the transaction.

⁴⁶⁷ Hondius ‘The notion of consumer’ op cit note 44 at 95.

⁴⁶⁸ The locus classicus in this regard is *Pillay v Krishna* 1946 AD 946.

is determined by asset value or annual turnover. Requiring that suppliers investigate this in respect of each transaction is a considerable burden. In response to this concern, s 4(2)(a) of the National Credit Act provides that ‘the asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by the juristic person at the time it applies for or enters into that agreement’. This is similar to the position of the European Commission, which recommended that the definition of micro, small and medium-sized enterprises must provide that ‘it is appropriate to allow enterprises to use solemn declarations to certify certain of their characteristics’.⁴⁶⁹ This approach is open to criticism. In this context, it is important to remember that the consumer protection rules suggested by the CPA are mandatory — consumers are not able to waive this protection.⁴⁷⁰ Any solution that would require consumers to identify themselves and that holds them to such a declaration runs the risk of undoing this protection and inviting ‘avoidance behaviour’. For instance, suppliers will be encouraged to include ‘a little box that says, “Tick. I am using this product for resale or manufacture” and that will be open to abuse’.⁴⁷¹

The Law Commission of England and Wales and the Scottish Law Commission state that when a supplier

‘is dealing with a small-medium sized business whose status is in doubt, the other party may require as a term of the contract a “warranty” that the small-medium business is of a particular size. Such a statement provides protection provided the other party has relied upon it when entering the contract. If the other party knew it was incorrect, there would be no protection as that party would not have entered into the contract in reliance on the statement’.⁴⁷²

The Law Commission of England and Wales and the Scottish Law Commission did not comment on why this would be any less open to abuse than an approach allowing binding declarations. Currently, asking buyers to warrant that they are or are not consumers (whatever the definition may be) is tempting, as it creates certainty, but the clause may be classified as a term that ‘directly or indirectly

⁴⁶⁹ Op cit note 438 recital 14 and art 3(5). However, this legislation is not aimed at consumer protection.

⁴⁷⁰ Section 51.

⁴⁷¹ The same argument has been made in the context of the definition of ‘consumer’ in the Australian Consumer Law (Senate Economics Legislation Committee (Australia) *Report on the Trade Practices Amendment (Australian Consumer Law) Bill (No.2)* (2010) at 28). Also see Law Commission & Scottish Law Commission *Unfair Terms* op cit note 347 para 5.48.

⁴⁷² See Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 5.49.

purports to set aside or override the effect' of the Act, rendering it void under s 51. Even if it is not void, it is 'an acknowledgment of fact' for purposes of s 49 and must therefore meet the requirements of s 49(3) to (5). The supplier must also bring the fact, nature and effect of the declaration to the attention of the consumer. In this case, the effect of the clause would be to exclude the application of the Act, and to preclude the juristic person from relying on the fact that the declaration was incorrect — in other words, that the juristic person was in fact a consumer at the time of the transaction.

It is submitted that suppliers should be able to rely on a declaration by a buyer who is a juristic person that it purchased the product for resale or manufacturing purposes. However, this must take the form of a voluntary, positive statement, and not a 'default' statement of fact in the supplier's terms and conditions. It must require the customer to tick a box or make a statement to that effect. The consequences of the statement must also be explained to the customer. Section 49 of the CPA already requires that 'an acknowledgement of any fact by the consumer' must be written in plain language, and that 'the fact, nature and effect of the provision' must be brought to the attention of the consumer.⁴⁷³

What happens in the case of transactions with juristic persons where (for whatever reason) no declaration was made? It is submitted that the onus should be on the juristic person. The reasoning behind this recommendation is to alleviate the compliance burden on the supplier in respect of small, high-volume transactions.

In the case of natural persons, the declaration referred to above should not be valid. In other words, it should not preclude a natural person from later asserting that he or she is a consumer.

Where should the onus lie in the case of natural persons? The United Kingdom Unfair Contract Terms Act (before it was amended by the Consumer Rights Act) provided that 'it is for those claiming that a party does not deal as a consumer to show that he does not'.⁴⁷⁴ Ordinarily, it will be the seller who will attempt to escape liability on this basis. Therefore, it is not surprising that the UK SoGA provides that

⁴⁷³ Section 49(2)(d) read with s 49(3)-(5).

⁴⁷⁴ Section 12(3).

‘the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the seller’.⁴⁷⁵ Similarly, the Consumer Rights Act provides that ‘[a] trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession must prove it’.⁴⁷⁶ In Australia, s 3(10) of the Competition and Consumer Act provides as follows:

‘If it is alleged in any proceeding under this Schedule, or in any other proceeding in respect of a matter arising under this Schedule, that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.’

It is submitted that where the consumer is a natural person, the supplier must bear the onus of proving that the transaction does not fall within the scope of the CPA.

3.6. Definition of ‘supplier’

The definition of supplier also determines the scope of the application of the CPA. At first glance, the definition on its own is unremarkable. It provides that a supplier ‘means a person who markets any goods or services’. ‘Market’ in turn refers to ‘promote’ and ‘supply’, which are also defined. When those definitions are considered, two requirements emerge to qualify as a supplier: The promotion or supply must take place in the ‘ordinary course of business’, and it must be ‘for consideration’.⁴⁷⁷ These two requirements will be discussed in this section. In addition, there are instances in the CPA where liability is not limited to the party who supplied the goods to the ‘consumer’, but when it is extended to the entire supply chain, thereby giving the consumer a direct claim against any member of the supply chain. The considerations for and against allowing a direct claim against the entire supply chain, and the right of redress between the members of the supply chain, will be discussed.

⁴⁷⁵ Section 61(1)(b). Recital 21 of the Unfair Commercial Practices Directive provides that ‘[w]hile it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made’.

⁴⁷⁶ Section 2(4).

⁴⁷⁷ Section 1. The phrase ‘in the ordinary course of business’ appears repeatedly in relation to the application of the Act. It appears not only in the definition of ‘transaction’, but also in the definition of ‘supply’ and ‘promote’, as well as in the definitions of all the different supplier categories (‘producer’, ‘importer’, ‘distributor’ and ‘retailer’).

3.6.1. *Is ‘in the ordinary course of business’ too limited?*

How regularly must a transaction take place before it becomes the supplier’s ‘ordinary business’? Must the supplier in question sell the particular goods or services frequently, or is it enough that the sale was made by a business, even if it was a ‘once-off transaction’?

‘Business’ is defined as ‘the continual marketing of any goods or services’.⁴⁷⁸ This suggests that the transaction in question should take place regularly, and that the Act will not apply to ‘once-off transactions’.⁴⁷⁹ In addition, the Act provides that the supply or promotion must also be in the *ordinary* course of that business, which means that it must be commonplace.⁴⁸⁰ This interpretation is consistent with the dictionary definition of ‘continual’, which is ‘forming a sequence in which the same action or event is repeated frequently’.⁴⁸¹

Other pieces of legislation use similar requirements.⁴⁸² A discussion of these statutes is unnecessary, as their policy underpinnings and purposes are inconsistent with those of the CPA.⁴⁸³ The most analogous is the Motor Vehicle Insurance Act 29 of 1942.⁴⁸⁴ The phrase ‘in the course of the business’ has been interpreted to include ‘even a single, isolated activity, enterprise or pursuit’.⁴⁸⁵ Not surprisingly, the phrase is given as wide an interpretation as possible in order to extend as much protection as possible to the insured. This is reminiscent of s 4(3) of the CPA, which provides that where a section is capable of more than one meaning, the meaning that ‘best promotes the spirit and purposes’ of the Act must be preferred. However, in the case of the Motor Vehicle Insurance Act, this interpretation was made easier by the omission of the qualifier ‘ordinary’. In addition, it will be difficult to extend this

⁴⁷⁸ Section 1. ‘Market’, in turn, is defined as the promotion or supply of any goods or services. Note that ‘promote’ and ‘supply’ are also defined in s 1.

⁴⁷⁹ W Jacobs, P Stoop & R van Niekerk ‘Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis’ (2010) 13(3) *Potchefstroom Electronic LJ* 302 at 312.

⁴⁸⁰ Ordinary is defined as ‘what is commonplace or standard’ (Oxford Dictionaries Online ‘Ordinary’ available at <http://oxforddictionaries.com>, accessed on 12 April 2010).

⁴⁸¹ Oxford Dictionaries Online ‘Continual’ available at <http://oxforddictionaries.com>, accessed on 12 April 2010.

⁴⁸² Section 108(2) of the Income Tax Act 58 of 1962; s 15(6) of the Matrimonial Property Act 88 of 1984; s 34(1) of the Insolvency Act 24 of 1936.

⁴⁸³ For a discussion of these statutes and the case law, see Elizabeth de Stadler ‘Section 5’ in Naudé & Eiselen (eds) *op cit* note 4 para 41.

⁴⁸⁴ Section 11(1).

⁴⁸⁵ *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (A) 739B-C.

interpretation to the CPA, given its definition of ‘business’. The argument has also been raised that if the revenue generated by the activity is taxable, it is in the ordinary course of business’.⁴⁸⁶ If this argument is followed, most, if not all, transactions will be in the ordinary course of business. This argument also ignores the definition of ‘business’.

Thus, while the definition of ‘consumer’ in the CPA is overly broad, it would seem that the definition of ‘supplier’ is too narrow. The scope of this limitation is uncertain, and it is arguably not necessary to go quite this far in excluding suppliers who engage in once-off or ‘atypical contracts’ (contracts concluded outside the supplier’s usual field of business) from the application of the Act. The crux of the problem lies in the fact that the CPA refers to the ‘ordinary course of the supplier’s business’ and defines ‘business’ as ‘the continual marketing of any goods or services’. The inclusion of the word ‘ordinary’, the definition of ‘business’, and the fact that the definition refers to ‘the supplier’s’ business (as opposed to just ‘a’ business)⁴⁸⁷ all support the argument that the transaction must occur with a measure of regularity before it will be in the ordinary course of the supplier’s business.

The implication seems to be that if a supplier does not sell a particular product regularly, the supplier does not benefit from information asymmetry,⁴⁸⁸ cannot increase the quality of the goods,⁴⁸⁹ is not necessarily able to avoid the risk⁴⁹⁰ and is not as dominant as it would normally be.⁴⁹¹ However, a consumer who concludes a transaction with a supplier may not know whether the transaction is in the course of the supplier’s ordinary business and will be no less vulnerable, as many disparities in bargaining power still exist.⁴⁹² In addition, the uncertainty regarding the

⁴⁸⁶ Tjakié Naudé ‘The consumer’s right to safe, good quality goods and the implied warranty of quality under sections 55 and 56 of the Consumer Protection Act 68 of 2008’ (2011) 23(3) *SA Merc LJ* 336 at 338.

⁴⁸⁷ See Christian Twigg-Flesner & Robert Bradgate ‘The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees — all talk and no do?’ (2000) 2 *Web Journal of Current Legal Issues* 1 at 3. They make the argument that the formulation ‘a business’ is wider than saying that the particular transaction must be in the course of the ‘supplier’s business’.

⁴⁸⁸ This was discussed in chapter 2, para 2.4.2.

⁴⁸⁹ This was discussed in chapter 2, para 2.4.3. If the goods are not those usually sold by the supplier, it is unlikely that the supplier would invest in the quality of the goods, as it would not benefit from that investment.

⁴⁹⁰ This was discussed in chapter 2, para 2.4.6.

⁴⁹¹ Inequality of economic power was discussed in chapter 2, para 2.4.1.

⁴⁹² This is particularly true in the case of online shopping on platforms such as eBay or Gumtree. See Chris Monaghan ‘The status of the seller in the age of eBay’ (June 2011) 20(2) *Information &*

interpretation of this limitation is likely to count against consumers, as it will give suppliers a ground on which to escape or, at least, delay liability.

The Consumer Sales Directive applies to a seller or trader who sells consumer goods ‘in the course of his trade, business or profession’.⁴⁹³ Here, the question is asked again: ‘What about a business selling a business asset of a type in which it does not normally deal, such as a solicitor selling off a surplus computer?’⁴⁹⁴ Even here, ‘[i]t is not clear whether “in the course of business” should be given a wide reading to encompass all transactions made by a business or whether this should be interpreted narrowly to require some degree of regularity of similar transactions, or something else’.⁴⁹⁵ According to Twigg-Flesner and Bradgate, the fact that the Directive refers to ‘the course of *his* trade’ as opposed to ‘in the course of *a* business’ means that the interpretation must be relatively narrow.⁴⁹⁶ The solicitor referred to above would for instance not have to comply with the Consumer Sales Directive.

The Unfair Contract Terms Directive and the Consumer Rights Directive apply to a seller who sells consumer goods or ‘for purposes relating to his trade, business, craft or profession’.⁴⁹⁷ According to Bradgate and Twigg-Flesner, it is clear that ‘in the course of’ requires a closer relationship than ‘in relation to’, and that the former requires ‘some close connection between [the transaction and the seller’s business], or some degree of regularity of similar transactions’.⁴⁹⁸

Communications Technology Law 103 at 107. He describes the distinction between business and private sellers as ‘perverse’.

⁴⁹³ Article 1(2)(c) of the Consumer Sales Directive.

⁴⁹⁴ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 20.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ Twigg-Flesner & Bradgate *The E.C. Directive* op cit note 487 at 3.

⁴⁹⁷ Article 2(2) of the Consumer Rights Directive. The Consumer Rights Directive replaced Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises *Official Journal L 372/31, 31/12/1985* (the Distance Selling Directive). In the Distance Selling Directive, ‘trader’ is defined as ‘a natural or legal person who, for the transactions in question, acts in his commercial or professional capacity’ (art 2). This definition is much broader than those discussed above because it is not necessary to show that the transaction relates to the trader’s trade. In the Green Paper on the Review of the Consumer Acquis, two options were suggested in relation to the definition of ‘professional’. Option 1 adopts the ‘for purposes relating to their trade, business and profession’ formulation, while option 2 amends the formulation to include ‘purposes falling *primarily* within their trade, business and profession’ (op cit note 17 at 16). The less strict option 1 was ultimately adopted in the Consumer Rights Directive.

⁴⁹⁸ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 21.

Section 14(2) of the UK SoGA provided that ‘[w]here the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of a satisfactory quality’.⁴⁹⁹ In *Stevenson v Rogers*, it was pointed out that

‘in the field of consumer protection three broad categories have been developed to identify whether a sale is made “in the course of a business,” namely (a) a sale in a once-off venture in the nature of a trade carried through with a view to profit; (b) a sale which is an integral part of the business carried on; (c) a sale which is merely incidental to the business carried on but which is undertaken with a degree of regularity’.⁵⁰⁰

In that case, it was held that ‘only purely private sales outside the confines of a business’ are not made in the course of a business.⁵⁰¹ In other words, ‘habitual dealing in the type of goods is not required’.⁵⁰² Bradgate and Twigg-Flesner reach the same conclusion by arguing that the use of the phrase ‘in the course of a business’ leads to a much wider definition than the phrase ‘in the course of *his* business’. If an attorney sells a computer, it will not be in the course of his business (the business of providing legal advice), but will indeed be in the course of a business.⁵⁰³

In terms of consumer sales, the UK SoGA has now been replaced by the Consumer Rights Act.⁵⁰⁴ This act deals with the concept of a ‘trader’, which it defines as ‘a person acting for purposes relating to that person’s trade, business, craft or profession’.⁵⁰⁵ The wider formulation in the Consumer Rights Directive has therefore been adopted.

This formulation can be criticised on the basis that it unfairly increases the compliance burden on suppliers in respect of sales that are not their core business. The extension of liability is not ‘fair’, as they are not benefiting from information asymmetry or inequality of bargaining power to the same extent as in respect of their

⁴⁹⁹ The phrase ‘in the course of a business’ also appears in s 12 of the Unfair Contract Terms Act.

⁵⁰⁰ *Stevenson v Rogers* supra note 426 at 1033; Bridge op cit note 333 at 568; John De Lacy ‘Selling in the course of a business under the Sale of Goods Act 1979’ (1999) 62(5) *Modern Law Review* 776.

⁵⁰¹ *Stevenson v Rogers* supra note 426 at 1039.

⁵⁰² John N Adams & Hector MacQueen *Atiyah’s Sale of Goods* 12 ed (2010) 160.

⁵⁰³ Bradgate & Twigg-Flesner *Blackstone’s Guide* op cit note 234 at 21; Woodroffe, Geoffrey and Lowe, Robert *Woodroffe and Lowe’s Consumer Law and Practice* 7 ed (2007) 44. Woodroffe and Lowe come to the same conclusion based on the example of a dentist who sells a private car.

⁵⁰⁴ When the sections of the Consumer Rights Act relating to goods apply, the UK SoGA is excluded (see s 14(9) of the UK SoGA, as amended).

⁵⁰⁵ Section 2(2).

core products, nor do they have the same ability to avoid the risk of post-purchase quality issues.⁵⁰⁶ However, placing a limitation on the application of consumer protection legislation based on whether a transaction was ordinary or not, creates more uncertainty than it is worth.⁵⁰⁷ It will give unscrupulous suppliers one more ground on which they can try to avoid or delay liability. In addition, it will not often be easy for consumers to gauge whether a supplier acts in the *ordinary* course of business, or how regularly a business concludes a particular type of transaction.

In other jurisdictions, the requirement is relaxed even further. The Australian Competition and Consumer Act refers to goods that are supplied ‘in trade or commerce’, which is defined as including ‘any business or professional activity (whether or not carried on for profit)’.⁵⁰⁸ There appears to be conflicting interpretations of this requirement. It is described as ‘less onerous’ than the UK SoGA because ‘there is no requirement that the goods sold be of a kind which it was in the course of the seller’s business to supply’.⁵⁰⁹ However, the use of the word ‘*in*’ trade of commerce

‘has been interpreted to mean that the conduct must itself be trading or commercial in nature and that it is not sufficient for it to be merely connected with, or incidental, to trade or commerce. In other words, the trade or commerce requirement is not satisfied merely because the conduct occurred as part of some overall commercial or trading activity; rather, the very conduct itself must be for that character. Although it is easy to state, the courts have acknowledged that drawing this distinction can, in practice, be very difficult and that there may be a “fine line” between conduct that is “in” trade or commerce and that which is merely connected to it’.⁵¹⁰

It is recommended that only truly private sales ought to fall outside the scope of the CPA. In order to achieve this, all references to ‘in the ordinary course of business’ must be replaced with ‘in the course of a business’, and the definition of ‘business’ must be deleted. The result of this reformulation is that only truly ‘private sales’ will be excluded. If this is applied to an attorney who sells a computer for the benefit of his business, the CPA will still apply. If, however, the attorney were to sell

⁵⁰⁶ These rationales for legislative intervention were discussed in chapter 2.

⁵⁰⁷ It is important to remember that these ‘private sales’ by businesses will by definition be few and far between.

⁵⁰⁸ Section 2(1) of schedule 2, chapter 3, part 3-2, of the Competition and Consumer Act.

⁵⁰⁹ *Corones op cit* note 455 at 343; *Corones & Clarke op cit* note 398 at 62.

⁵¹⁰ *Corones & Clarke op cit* note 398 at 55.

his home computer (in other words, a computer not owned by the firm), he would not be considered a supplier.⁵¹¹

3.6.2. *The consideration requirement*

The CPA also requires that the transaction must be for ‘consideration’. The term is defined in extremely broad terms, including ‘anything of value given and accepted in exchange for goods or services’. It includes

‘(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; (b) labour, barter or other goods or services; (c) loyalty credit, coupon or other right to assert a claim; (d) any other thing, undertaking, promise, agreement or assurance’.

This definition extends beyond traditional monetary consideration and barter, to include intangible promises also. It expressly provides that the consideration does not have to be based on the intrinsic value of the goods or services (and can therefore be nominal) and is expressly extended to consideration that is paid indirectly or involves third parties.⁵¹² This definition is so broad that it will be present in most cases, with only pure gratuitous transactions being excluded.

The requirement has its origins in English law and was included in the CPA despite not having been a part of South African law for almost a century.⁵¹³ Ironically, the consideration requirement in English sales law is limited to ‘monetary consideration’.⁵¹⁴ Monetary consideration remains a requirement in terms of the Consumer Rights Act.⁵¹⁵ That act does not apply to ‘gratuitous contract[s]’ in

⁵¹¹ Of course, in the case of unincorporated or sole proprietorship, private and business sales will be harder to distinguish.

⁵¹² Section 1 provides expressly that the consideration’s ‘apparent or intrinsic value’ is irrelevant in determining whether consideration was given. After listing examples of forms of consideration, the section provides that their classification as forms of consideration is not dependent on ‘whether it is transferred directly or indirectly, or involves only the supplier and the consumer or other parties in addition to the supplier and consumer’.

⁵¹³ *Conradie v Rossouw* 1919 AD 279; *McCulloch v Fernwood Estate Ltd* 1920 AD 204; *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A). In *Adams*, the appellate division held that ‘continued reference to the English law can only lead to confusion. We are not encumbered by the technicalities of the doctrine of consideration’ (at 1198H).

⁵¹⁴ Section 2(1) of the UK SoGA. This is narrower than the requirement in English contract law (Monaghan op cit note 492 at 104).

⁵¹⁵ Section 5 defines ‘sales contracts’. A ‘monetary price’ remains a requirement. See ‘Consumer Rights Act 2015 (c. 15): Explanatory Notes’ op cit note 392 at 14.

Scotland.⁵¹⁶ This was included because consideration is not a requirement in Scottish sales law.⁵¹⁷

The ‘consideration’ requirement has no place in South African law, and its inclusion creates too much confusion. Instead, the CPA should include an additional exception that the Act will not apply to gratuitous contracts, as there are obvious policy reasons not to burden charities with compliance. In this context, ‘gratuitous’ is to be given its ordinary meaning, namely ‘given or done free of charge’.⁵¹⁸ In order for the exception to apply, no counter-performance must be required from the consumer. This is not limited to the payment of money. The existing definition of ‘consideration’ in s 1 is sufficiently broad to encompass any form of counter-performance, but it should be renamed ‘counter-performance’, as the mere reference to ‘consideration’ risks creating confusion. However, this exception should not apply in respect of ‘product liability’ claims for harm caused by defective or unsafe goods.⁵¹⁹ Even suppliers in gratuitous contracts should be liable if the goods they supplied caused the consumer harm.

3.6.3. *The extension of liability to the entire supply chain*

3.6.3.1. Direct liability and the right of redress in terms of the CPA

Sections 29 (general standards for marketing of goods or services), 56 (claims for refunds, replacements or repairs in terms of the implied warranty of quality) and 61 (liability for harm caused by goods, or ‘product liability’ claims) refer to ‘the producer *or* importer, the distributor and the retailer’.⁵²⁰ Therefore, liability is

⁵¹⁶ Section 3(3)(e).

⁵¹⁷ ‘Consumer Rights Act 2015 (c. 15): Explanatory Notes’ op cit note 392 at 9.

⁵¹⁸ Oxford Dictionaries Online ‘Gratuitous’ available at <http://www.oxforddictionaries.com/definition/english/gratuitous>, accessed on 9 May 2016.

⁵¹⁹ ‘Product liability’ claims refer to claims for compensation for harm caused by defective or unsafe goods in terms of s 61. This must be distinguished from claims for refunds (in whole or in part), repairs or substitution of the compromised goods in terms of s 56. These rights should not be extended in the case of gratuitous agreements.

⁵²⁰ ‘Supply chain’ is defined in s 1 as ‘the collectivity of all who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as producer, importer, distributor or retailer of goods, or as a service provider’. This phrase is not used anywhere else in the Act, save for s 59, which deals with the disposal of certain types of waste. The terms ‘producer’, ‘importer’, ‘distributor’ and ‘retailer’ are also defined. The ‘producer’ is the ‘person who (a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or (b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has

extended beyond the party who had a direct contractual relationship with the consumer.⁵²¹ While a discussion of liability for ‘services’ is beyond the scope of this thesis, it is worth noting that the activities listed in the definition of ‘services’ are services ‘irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service’.⁵²²

It has been argued that the use of the conjunction ‘or’ between ‘producer’ and ‘importer’ means that either of these parties is liable in terms of the implied warranty of quality, but not both.⁵²³ If there is an ‘importer’, the ‘producer’ will not be a South African company. The inclusion of ‘importer’ is probably aimed at preventing a situation where the consumer has to pursue a claim against a foreign company, along with all the complications that arise in such cases. It is not clear why the conjunction ‘or’ was used, as consumers should still have this right, no matter how difficult, but in principle, it should not preclude them from still pursuing a claim against the

created or established a reasonable expectation that the person is a person contemplated in paragraph (a)’. ‘Importer’ is defined as ‘a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business’. ‘Distributor’ is defined as ‘a person who, in the ordinary course of business (a) is supplied with those goods by a producer, importer or other distributor; and (b) in turn, supplies those goods to either another distributor or to a retailer’. ‘Retailer’ is defined as ‘a person who, in the ordinary course of business, supplies those goods to a consumer’.

⁵²¹ In the bulk of the remainder of the CPA, liability is assumed by the ‘supplier’ of the goods. This is defined as the person who markets the goods or services. The definition of ‘market’ refers to both supply and promote. In relation to goods, supply ‘includes sell, rent, exchange and hire in the ordinary course of business for consideration’. The definition of ‘promote’ also seems to be limited to the person who does the advertising, makes the representations or induces the consumer to buy a product. There are some obligations dealing with the display of goods that refer to the ‘retailer’ specifically (s 23(3) on the obligation to display the price, and s 24(3) on selling goods with misleading trade descriptions).

⁵²² See the definition of services in s 1. This is consistent with the definition of ‘supply’ in the context of services, which provides that supply includes services that are ‘caused to be performed’, and the definition of ‘transaction’, which includes services performed by or ‘at the direction of’ the supplier (para (b) of the definition of ‘supply’ in s 1). The effect is that a person who promotes a service, but does not participate directly in its provision, is still liable as a service provider in terms of the Act. For example, a travel agency that promotes and sells hotel accommodation would be liable as a service provider in respect of that accommodation, even where the actual provision of the hotel room was undertaken by an entirely different entity. This approach is not unheard of. In Europe, the travel industry is regulated by Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314 *Official Journal L 326, 11/12/2015 P. 001 – 033* (‘the Package Travel Directive’). The definition of ‘organiser’ in art 3(8) provides that “‘organiser’ means a trader who combines and sells or offers for sale packages, *either directly or through another trader or together with another trader ...*’ (my emphasis).

⁵²³ Jacobs, Stoop & Van Niekerk op cit note 477 at 371.

importer. It is submitted that the ‘or’ conjunction should be deleted in the event that direct liability in the supply chain is retained.⁵²⁴

Section 61(3) provides that ‘[i]f, in a particular case, more than one person is liable in terms of this section, their liability is joint and several’. There is no equivalent provision in s 29 (liability for misleading marketing) or s 56 (liability for the quality of goods). This means that retailers who are unable to negotiate preferential terms with producers may have to assume responsibility for defective goods, even though it has no control over the manufacturing process and cannot effectively ‘quality-control’ the products.⁵²⁵ This potentially undermines the fairness of the legislation.⁵²⁶

The defences available to the different members of the supply chain are also controversial. If a consumer brings a direct claim against a distributor or producer in terms of the CPA for a refund or the replacement or repair of the defective products, the distributor or producer will be able to escape liability ‘to the extent that goods have been altered contrary to the instructions, or after leaving the control’ of the producer or distributor.⁵²⁷ This gives rise to two potential defences against a claim brought under s 56(1). First, the supplier will not be held liable where the goods were altered by the consumer contrary to instructions given by the supplier. This is another application of the defence that the consumer used the goods in an unusual or unreasonable manner. The second defence is where the consumer or another supplier in the supply chain alters the goods after the goods have left the control of the supplier. Given the use of the adjunct ‘or’ instead of ‘and’, this is interpreted as a second defence, and not simply as a second requirement for the first defence discussed above. This means that the supplier could escape liability even where the alteration was not ‘contrary to instructions’, as long as it took place after the goods left the supplier’s control. The supplier’s liability is only excluded ‘*to the extent that*’ the alterations were done. This means that the supplier’s liability is only excluded insofar as the breach of the implied warranty is attributable to the alterations. If the

⁵²⁴ This is discussed in paragraph 3.6.3.2

⁵²⁵ If the retailer is small enough (having an asset value or annual turnover of less than R2 million), it will qualify as a consumer, and the manufacturer will not be able to contract out of liability. In other instances, the retailer will have a large market share, which will strengthen its bargaining position in relation to the producer (which means that the retailer will be able to dictate terms).

⁵²⁶ This criterion for the evaluation of legislation was discussed in chapter 2, paragraph 2.5.1.

⁵²⁷ Section 56(1).

breach is still attributable to an unaltered characteristic or a defect unrelated to the alterations, a supplier may not escape liability.

Retailers and distributors are given defences against claims brought for harm caused by defective goods in terms of s 61, which are not available when the consumer is demanding a refund or the repair or replacement of the goods. In particular, s 61(4)(c) provides that retailers and distributors will not be liable under that section if ‘it is reasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers’. The defences available in terms of s 61 will not be available to a distributor or producer faced with a direct claim in terms of s 56, unless it is accepted that s 61 also applies to claims in respect of the goods that breach the implied warranty of quality. The relationship between s 56 and s 61 is problematic, as there appears to be some overlap. Loubser and Reid comment that the harm referred to in s 61(5) could also include the defective product itself, which means ‘apparently, that a juristic person which does not qualify as a “consumer”, such as a company operating a large retail chain, will nevertheless be entitled to rely on the strict liability provisions in s 61 to claim compensation from a supplier for defects in the goods themselves’.⁵²⁸ Even if there were no overlap, it is unclear why there should be different defences depending on whether the claim is for harm to the goods themselves or for harm caused by the goods.

Three aspects of this direct liability for members of the supply chain will be discussed: the desirability of direct liability for the entire supply chain, the members of the supply chain’s ability to obtain redress from one another, and whether members in the supply chain ought to have defences against claims from consumers or other members of the supply chain.

3.6.3.2. *‘Direct claim’ against other members of the supply chain*

A full discussion of the theoretical merits of a direct claim in respect of all types of actions is not included in the scope of this thesis.⁵²⁹ However, it is fairly unusual for

⁵²⁸ See Max Loubser & Elspeth Reid *Product Liability in South Africa* (2012) 98.

⁵²⁹ Theories such as ‘network liability’ will for instance not be discussed (Christian Twigg-Flesner ‘Network liability for manufacturers’ guarantees — remedying legislative shortcomings with a legal jigsaw’ 1999 *Journal of Business Law* 568; Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op

a direct claim for a refund or the repair or replacement of defective goods to be extended beyond the seller, and as such, the decision made by the legislature to do so in respect of the CPA merits at least a cursory review against the criteria for the evaluation of legislative interventions developed in chapter 2.⁵³⁰

Article 2(1) of the Consumer Sales Directive provides that it is only the ‘seller’ who must deliver goods that are in conformity with the contract of sale. ‘Seller’ is defined as ‘any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession’. The consumer does not have a direct claim against the other members of the supply chain, including the producer.⁵³¹ The issue of the possible introduction of a ‘direct claim’ into the Consumer Sales Directive was contentious. The European Commission was in favour of the introduction of such a claim (the liability was to be joint and several) even before the Consumer Sales Directive came into effect, and have pointed out that there is no logical reason why the final seller should be the only party who is exposed to claims from consumers.⁵³² The approach was ultimately rejected, but recital 23 states that the producer’s direct liability for defects may be revisited in future. In addition, art 12 provides that the producer’s direct liability was to be reported on by the Commission by 2006. This was done in 2007.⁵³³ Of the

cit note 196 from 366). In addition, this section was drafted predominantly aimed at claims for the defective goods themselves in terms of the implied warranty of quality (claims for refunds, replacements or repairs), although some reference is made to product liability claims.

⁵³⁰ See para 2.5.

⁵³¹ This is referred to as the ‘traditional contract model’. See Martin Ebers, André Janssen & Olaf Meyer (eds) *European Perspectives on Producers’ Liability: Direct Producers’ Liability for Non-conformity and the Sellers’ Right of Redress* (2009) 3. The Product Liability Directive (Directive 1985/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products *Official Journal L 210, 07/08/1985*) establishes liability against the producer and importer (art 3(1) and (2)). What if the consumer cannot identify the producer and approaches the point of sale instead? Article 3(3) provides that ‘[w]here the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product’.

⁵³² The Green Paper on Guarantees for Consumer Goods and After-Sales Services *Official Journal C 338, 15/12/1993* initially proposed joint and several liability between the retailer and the producer. It was not included in the first drafts of the Directive. The only reason offered for this is that it is ‘the traditional solution enshrined in the legal order of the Member States’. See recital 9 of the Consumer Sales Directive. Also see Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 346; Christian Twigg-Flesner ‘The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees’ (1999) 7 *Consumer Law Journal* 177 at 190. The Commission recognised that the extent of the manufacturer’s liability still needed clarification.

⁵³³ Communication from the Commission to the Council and the European Parliament *The implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers’ liability* COM (2007) final.

respondents, Belgium, Finland, Latvia, Portugal, Spain and Sweden have introduced some form of direct producer's liability.⁵³⁴ The Commission observed that

'[a] majority of the Member States and a number of stakeholders consider that the DPL [Direct Producers' Liability] actually or potentially increases consumer protection. In their opinion, the DPL provides redress for the consumer in case the seller is not able (or willing) to resolve consumer complaints. It constitutes an important "safety net" for consumers. Some Member States consider the producer to be often better placed than the seller to bring goods into conformity with the contract. To the contrary, a minority of Member States and stakeholders consider that direct producers' liability would not increase consumer protection but rather cause uncertainty as to the applicable law and delay the resolution of consumer complaints'.⁵³⁵

So-called 'frontline seller liability' (where the seller alone is liable)⁵³⁶ is found in the Consumer Sales Directive and many European jurisdictions.⁵³⁷ The rationale for frontline liability is that

'[t]he seller who supplied the product, traditionally based in the local High Street, will usually be geographically more accessible to the consumer than is the manufacturer. Moreover, the seller is likely to be well equipped to deal with consumer complaints, with staff trained in dealing with customers, and maybe a dedicated customer service team to deal with complaints. Above all, the seller acts as an identifiable conduit by which the complaint, and liability for the defect, can be channelled back up the distribution chain to the ultimate manufacturer or producer'.⁵³⁸

The justification for frontline liability is largely centred on whether the legislative intervention provides improved consumer redress.⁵³⁹ However, the last sentence of the above extract reveals a circuitry of actions; instead of claiming directly against the party who is responsible for the defect, the consumer claims against the retailer, who must then institute another action against his seller, who will in turn do the same,

⁵³⁴ Ibid at 11.

⁵³⁵ Ibid.

⁵³⁶ The term is used by Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 346.

⁵³⁷ See for instance the UK SoGA and Consumer Rights Act, both of which are based on the principle of privity of contract and are thus limited to a claim against the seller. The doctrine of privity was modified by the Contracts (Rights of Third Parties) Act, 1999 (c. 13), but this will rarely cause the consumer to have a claim against any other members of the supply chain (see Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 347). In the context of product liability claims, the UK consumer has a claim against the 'producer' (s 1(2)(b)). The definition of 'seller' (which also limits liability to the direct seller) in the Consumer Sales Directive was adopted in Belgium, Cyprus, Denmark, France, Greece, Ireland, Latvia, Luxembourg, the Netherlands, Spain and Sweden (Schulte-Nölke (ed) op cit note 333 at 416). However, direct claims are allowed in France and Belgium (it was developed by the courts under the Civil Code). The result is that '[a]ll the parties are jointly liable towards the buyer, but there is a possibility for the seller actually sued to seek an indemnity from the party actually responsible for the loss'. See Schulte-Nölke (ed) op cit note 333 at 441.

⁵³⁸ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 351.

⁵³⁹ This is one of the criteria against which legislative measures are measured. This was discussed in chapter 2, paragraph 2.5.6.

until the appropriate party is held responsible.⁵⁴⁰ In addition, ‘in the context of increasing consumer mobility and the growth of distance selling, a system of retailer-only liability may pose practical difficulties for the consumer’. In other words, buyers’ ability to return goods or remember where they bought goods (particularly in the case of e-commerce transactions) mitigates against retailer-only liability.⁵⁴¹ Therefore, the justification for frontline liability is predicated on the traditional sale scenario and cannot keep up with the new challenges relating to access created by e-commerce.⁵⁴²

The introduction of a scheme where the retailer and producer are jointly and severally liable is supported by some authors.⁵⁴³ According to the European Consumer Law Group,⁵⁴⁴

‘any legislative reform must reflect the fundamental changes in manufacturing, distributing and marketing of goods in the modern economy, the radical modification of the roles of the economic actors (manufacturer, distributor, and retailer) and the importance of technological sophistication and the durability of consumer goods. In particular, the predominant role of the manufacturer who designs and manufactures the product, who builds up specific distribution systems and who defines the marketing strategy, and the correspondingly diminished role of the retailer who has become a pure distributor has to be taken into account by the legislator. Legislation that focuses only or mainly on the seller-consumer relationship is a partial answer to the needs of consumers on the market; it is blind to the realities of a modern economic system of production and distribution’.

A direct claim is fairer, because the retailer will often have no control over the quality of the goods or the accuracy of statements made during marketing campaigns and/or will not be able to pass the claim on to the manufacturer if the supply agreement contains an exclusion of liability.⁵⁴⁵ It is rational because it mirrors the

⁵⁴⁰ This is an example of ‘inefficiency’, which is also a criterion discussed in chapter 2, paragraph 2.5.4.

⁵⁴¹ Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 361.

⁵⁴² Ibid at 354.

⁵⁴³ Ibid at 360; Oughton & Willett op cit note 23 at 307.

⁵⁴⁴ European Consumer Law Group ‘Opinion on the proposal for a directive on the sale of goods and associated guarantees’ (1998) 21 *Journal of Consumer Policy* 91 at 92; Bradgate & Twigg-Flesner *Expanding the boundaries* op cit note 196 at 352.

⁵⁴⁵ According to Oughton ‘[t]he producer tends to construct the distribution system and determine the marketing strategy, and it is likely to be the producer on whom the consumer principally relies in choosing products and who the consumer would reasonably expect to be legally responsible if the products are defective.’ See Oughton & Willett op cit note 23 at 307. Also see Bradgate & Twigg-Flesner ‘Expanding the boundaries’ op cit note 196 at 353. It may be that even if a direct claim is made possible, suppliers will still be able to exclude liability. This is discussed in the next section.

manufacturer's liability in the context of product liability.⁵⁴⁶ It conforms to consumer expectations, as it is the 'common understanding' that the manufacturer is responsible for the quality of the goods. This 'common understanding' is 'reinforced in several ways by the facts of contemporary life':⁵⁴⁷ first, by the fact that modern advertising in many cases promotes the manufacturer more so than the particular retail outlet (or, at least, equally so),⁵⁴⁸ secondly, by the fact that the manufacturer will often give an express warranty in relation to the quality of the goods.⁵⁴⁹

However, it is ill-advised to underplay the role of the retailer in all instances. Modern retail outlets can also have a lot of power over manufacturers and control over the product.⁵⁵⁰ This is because of the existence of large retailers who not only control the supply chain, but also the quality of products and apply their brand name to them.⁵⁵¹ When measured in terms of market share, the South African retail sector is dominated by 'major retailers'.⁵⁵² On the opposite side of the spectrum are retailers who are independent (not part of a chain or franchise) and often small to medium-sized businesses who may themselves be consumers, but for the fact that

⁵⁴⁶ If manufacturers are liable for harm caused by a defect, there is no reason why they ought not be liable to return, replace or repair the goods themselves (Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 356).

⁵⁴⁷ Jolowicz (op cit note 193 at 2) asks whether lawyers should not 'open [their] minds to the possibility that the doctrine of privity of contract, so beloved of the common law, is a distorting factor in the law of consumer protection and that the contractual relationship which exists between buyer and seller ... is a less important element than the present structure of the law makes it out to be?' He concludes (at 18) that 'in a field which touches everyone as closely as does consumer law, there is something to be said for a re-examination of the law in the light of what it is popularly, if erroneously, supposed to be'. Also see Oughton & Willett op cit note 23 at 307.

⁵⁴⁸ Jolowicz op cit note 193 at 5. He writes of 'modern advertising' in 1969. It is suggested that in 2016, several permutations are possible: First, there are those instances where a particular type of advertising can be aimed at promoting the retailer exclusively. This is particularly true of advertisements for goods that have been branded by the particular retailer and are sold at lower prices in order to attract consumers. The manufacturer of those goods never becomes known to the audience. Secondly, there are advertisements that promote both the retailer and the manufacturer. Thirdly, there are advertisements that promote a particular manufacturer without even mentioning the retailer.

⁵⁴⁹ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 357.

⁵⁵⁰ Ibid at 353.

⁵⁵¹ In terms of the CPA, such retailers may actually fall within the definition of 'producer'. Paragraph (b) of the definition of 'producer' in s 1 of the CPA includes a person who 'by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a)'. Paragraph (a) provides that a producer is a person who 'grows, nurtures, harvests, minus, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply ...'. What is referred to here is what is often referred to as 'house brands'.

⁵⁵² Gauteng Provincial Treasury Department *The Retail Industry on the Rise in South Africa* (April-June 2012) available at <http://www.treasury.gpg.gov.za/Documents/QB1%20The%20Retail%20Industry%20on%20the%20Rise.pdf>, accessed on 12 May 2016 at 5.

they buy products for resale.⁵⁵³ These retailers are closer to the economically passive and vulnerable retailers referred to in the rest of this section. They will often not be able to pass liability back up the supply chain.

There is no policy reason to deviate from the decision of the South African legislature to extend liability for post-purchase quality problems to the rest of the supply chain. The consumer can always elect to pursue a claim against the retailer, regardless of the retailer's complicity in the defect, and the retailer cannot escape this by referring the consumer to the manufacturer. Put differently, the direct claim is supplemental to instead of a substitute for frontline liability.

In order to ensure that this rule does not operate unfairly against the retailer (particularly small retailers), a strong right of redress should be established. This need becomes even more acute given that the recommendations regarding the formulation of the definition of 'consumer' in paragraph 3.4.5 above exclude juristic persons who acquire goods for resale purposes. This will be discussed in the section following immediately below. There are also instances where the direct claim may operate unfairly against the producer or distributor. This can be remedied by including defences against a direct claim. This will be discussed in paragraph 3.6.3.4.

3.6.3.3. *Right of redress between parties in the supply chain*

The need for a clear right of redress can arise, whether a direct claim is allowed or not. In the case of frontline liability, the retailer may want to pass liability back up the supply chain. However, even where consumers are allowed to claim against the producer directly, they may not necessarily do so. Instead, they will often return to the point of sale.

The CPA contains no express reference to the liability of the members of the supply chain among themselves in respect of claims for the breach of the implied warranty of quality or for misleading marketing, but does provide for it in the

⁵⁵³ See para 3.4.5 above, where it is recommended that 'the CPA should also apply to juristic persons, *except* if the transaction value is above the prescribed threshold *or* the products are bought for resale or for transformation into a product for resale, will be used up or transformed in the course of production or manufacture, or are used up or transformed in the course of repairing or treating other goods or fixtures on land'.

context of product liability claims. It has been argued that s 61 includes claims for harm caused to the products themselves, although that argument is tenuous at best.⁵⁵⁴ This means that it could be argued that all members of the supply chain are jointly and severally liable, even though this right of redress is not referred to in s 56. In addition, s 5(5) extends the application of s 61 to all buyers (even large juristic persons), and it could be argued that, as a result, this right cannot be excluded contractually — thereby creating a right of redress that is inalienable.⁵⁵⁵ Though tenable, this interpretation of s 61 is complicated and may prove to be incorrect. The heart of the matter is that the position under the CPA is at best unclear.

However, retailers will not always have contractual relationships with the producer of the goods; there may be an interceding supplier. According to Bradgate and Twigg-Flesner, the nature of the producer's 'right of indemnity' becomes difficult to conceptualise in cases where there is no direct contractual relationship between the retailer and producer. According to them, 'the problem could be resolved by allowing the producer to claim a contribution or indemnity under relevant procedural rules'. It is not clear from the CPA whether a retailer will be able to jump the queue (assuming there is one) straight to the manufacturer, as the Act is silent on the matter, and the common law provides no certainty.

Article 4 of the Consumer Sales Directive provides (albeit while only allowing a direct claim against the seller) that if a seller is held liable for non-conforming goods, 'the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain' if the lack of conformity is the result of an act or omission of the other party in the supply chain.⁵⁵⁶ This means that the final seller 'shall be entitled to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary for an act or omission resulting in

⁵⁵⁴ This was discussed in para 3.6.3.1. Essentially, the question is whether 'harm' includes the defect in the product, or harm caused to the product by the defect.

⁵⁵⁵ The application of the section looks like this: 'A retailer (as buyer) will have a claim against the distributor (as seller) or the producer and the distributor (as buyer) against the producer.' Section 51(1) provides that a transaction cannot be subject to a contractual term that 'defeat[s] the purposes and policy' of the CPA (sub-s (a)(i)) or 'waive[s] or deprive[s] a consumer of a right' in terms of the CPA. See Elizabeth de Stadler 'Section 5' in Naudé & Eiselen op cit note 4 at para 40. Loubser and Reid believe that a right to relief (in the context of the CPA) can be based on the Apportionment of Damages Act 34 of 1956 (Loubser & Reid op cit note 528 at 121).

⁵⁵⁶ Article 4. Also see Ebers, Janssen & Meyer (eds) op cit note 531 at 6; Staudenmayer op cit note 23 at 559.

the lack of conformity'.⁵⁵⁷ This is different from the current wording of the CPA, which does not require any act or omission — the entire supply chain is 'strictly' liable in terms of the statute.

In addition, recital 9 of the Consumer Sales Directive provides that 'the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement', and that 'this Directive does not affect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary'. This means that the right of redress remains subject to the rules of the law of contract, primarily those relating to business-to-business contracts. Therefore, by way of example, art 4 was transposed in the United Kingdom to mean that the retailer's right to claim up the chain can be limited contractually, as long as the requirement of reasonableness in s 6 of the Unfair Contract Terms Act is adhered to.⁵⁵⁸ In the alternative, art 4 has been interpreted to give the retailer an absolute right to claim against the party responsible for the quality defect, and the retailer would only be able to renounce this right by taking 'active steps' or an 'express renouncement'; a term in the producer's standard terms and conditions would probably not be enough.⁵⁵⁹

Product liability claims are generally brought against the producer or the importer of the goods.⁵⁶⁰ However, '[w]here the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product'.⁵⁶¹

It is recommended that there should be an explicit right of redress for retailers, distributors and importers against the manufacturer of the goods, unless the defect

⁵⁵⁷ Reich, Micklitz & Rott op cit note 39 at 179.

⁵⁵⁸ Act 1977 (c. 50). See Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 358; Reich, Micklitz & Rott op cit note 39 at 180. The Consumer Rights Act has not changed this position in respect of juristic persons.

⁵⁵⁹ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 359; Reich, Micklitz & Rott op cit note 39 at 180. According to Krummel and D'Sa, 'it may well be possible for previous sellers (in the chain) only to sell goods to the (final) seller on the condition that he waives his right of redress against them' (Krummel & D'Sa op cit note 23 at 320).

⁵⁶⁰ Article 3(1) of the Product Liability Directive.

⁵⁶¹ Article 3(2). The UK Consumer Protection Act 1987 (c. 43) contains a similar provision in s 2. Both instruments provide for joint and several liability in the event that more than one party is liable.

was caused by another member of the supply chain (e.g. if the goods were not properly stored). Given that the retailer obtains the goods from the manufacturer for purposes of reselling them, the retailer will not be protected as a consumer.⁵⁶²

In order to ensure that the retailer is not liable for the claim made by the consumer, it is also recommended that producers or importers to the supply chain should be unable to contract out of liability in terms of this right of redress. Put differently, the manufacturer (for instance) should not be able to insert an indemnity against claims from consumers in its contract with the retailer, unless the defect was caused by the retailer (e.g. if the goods were not properly stored). While limiting the freedom of contract in this way will undoubtedly be controversial, this will satisfy the requirements of fairness and rationality, while retaining the better level of redress ensured by allowing consumers to claim directly from any party in the supply chain. In addition, it will protect smaller retailers, who are not in an equal bargaining position, against being burdened with liability. Lastly, it ensures that the manufacturer and, to a lesser extent, the importer remain motivated to ensure that their goods are of a high quality.⁵⁶³

3.6.3.4. *Defences to 'direct claims'*

The last question to be considered relates to what defences, if any, should be available to members of the supply chain. The current position in terms of the CPA was discussed in paragraph 3.6.3.1. A full discussion of the possible defences falls outside the scope of this thesis. The aim of this section is to illustrate that the defences discussed below will protect manufacturers against any unfairness that may ensue as a result of direct liability for the entire supply chain and an inalienable right to obtain redress.

For instance, according to Bradgate and Twigg-Flesner, the producer ought to be able to raise (and prove) the defence that the goods were not defective when they left the producer's control.⁵⁶⁴ That same defence is open to the producer in terms of s 61(4)(b)(i) of the CPA, which provides that '[l]iability of a particular person in

⁵⁶² See the recommendations made in para 3.4.5.

⁵⁶³ The counterargument is that it restricts their ability to freely allocate risk in a commercial transaction.

⁵⁶⁴ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 361.

terms of this section does not arise if ... (b) the alleged unsafe product characteristic, failure, defect or hazard (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable'. This is also the case in terms of s 4 of the UK Consumer Protection Act⁵⁶⁵ and the Product Liability Directive.⁵⁶⁶ Including this defence satisfies the criterion of fairness, as the legal responsibility for the defect follows the actual responsibility. It is submitted that if this defence is available to producers in respect of the harm caused by defective goods, there is no reason why it should not be extended to claims for the replacement, repair or return of the defective product itself.

There is also concern over liability that arises as a result of the content of the dealings between the consumer and the retailer. In other words, the producer should not be held liable in cases where the claim is the result of representations made by the retailer.⁵⁶⁷ Article 2(2) of the Consumer Sales Directive provides that goods must 'show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods'. Article 2(4) provides that the retailer will not be liable for advertising claims made by other parties in the supply chain if he was unaware of the claims. It is suggested that the producer should also have this protection.⁵⁶⁸

The secondary question is whether the other parties in the supply chain should be able to raise these defences directly *against the consumer*, or whether such parties must be held 'strictly liable' towards the consumer, but be able to pass liability on to another member of the supply chain based on these defences. The latter clearly provides stronger consumer protection. According to Bradgate and Twigg-Flesner,

'it should be borne in mind that in our proposed scheme, the producer's liability is supplemental to, rather than a replacement of, that of the retail supplier.'⁵⁶⁹ In addition, the major rationale for the imposition of liability is that the imposition of legal liability should follow the allocation of factual responsibility. There is

⁵⁶⁵ Act 1987 (c. 43).

⁵⁶⁶ Article 7(b). In Portugal, the producer can also be held liable, but the liability is subject to defences that are very similar to those in the Product Liability Directive (Schulte-Nölke (ed) op cit note 333 at 442).

⁵⁶⁷ Bradgate & Twigg-Flesner 'Expanding the boundaries' op cit note 196 at 363.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid at 360. What is meant here is that it is not intended for the system of supplier liability to be replaced with a system of producer-only liability.

therefore a strong case for allowing the producer a defence where it can be shown that the defect did not exist in the goods at the time they left his control'.⁵⁷⁰

The issue of strict liability versus allowing a defence to operate against the consumer directly also arises in the context of non-conformity relating to the description or the fitness of the goods for their purpose. Strict liability in this context would result in the producer being held liable for statements made by the retailer of which the producer had no knowledge. Bradgate and Twigg-Flesner are in favour of allowing producers this defence also.⁵⁷¹

It is submitted that the defence that the goods were not defective or that the retailer made misrepresentations unbeknown to the producer should be available to the producer, but that these defences should only lie against claims from the other parties in the supply chain, and not against the consumer. This will create a clear right for the consumer, which will be easier to enforce. If this is not the case, it will be easier for the party against whom the consumer brings the claim to employ dilatory tactics, such as referring the consumer to another party in the supply chain. Any resultant unfairness for the retailer or producer can be resolved between them and is not a sufficient reason to place the responsibility of finding the liable party on the consumer's shoulders.

3.7. What classes of goods should be included in the CPA?

The application of the CPA is limited to the supply of goods or the performance of services. Both of these terms are defined.⁵⁷² The definitions are very broad and encompass virtually every conceivable good, subject to some exceptions contained in s 5(2).⁵⁷³ For the most part, the definitions are broad yet unremarkable. However,

⁵⁷⁰ Ibid at 362.

⁵⁷¹ Ibid at 363.

⁵⁷² Section 1.

⁵⁷³ Advice and intermediary services rendered in terms of the Financial Advisory and Intermediary Services Act 37 of 2002, as well as services rendered in terms of the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998, were excluded. Other financial services were eventually excluded from the application of the CPA by the Financial Services Laws General Amendment Act 45 of 2013. Section 5(2) of the CPA contains a number of exemptions. First, the CPA does not protect the state as a consumer. Secondly, the Act does not apply to credit agreements (but does apply to the goods and services provided in terms of those agreements). Thirdly, employees are not considered suppliers. Fourthly, services provided in terms of collective bargaining agreements or collective agreements in terms of the Labour Relations Act 66 of 1995 are also excluded.

three classes of goods are controversial: immovable goods, intangible goods and second-hand goods.

Paragraph (d) of the definition of ‘goods’ states that goods include ‘a legal interest in land or any other immovable property, other than an interest that falls within the definition of “service”’. The definition of ‘service’ includes the provision of ‘access to or use of any premises or other property in terms of a rental’,⁵⁷⁴ or any other ‘right of occupancy of, or power or privilege over or in connection with any land or other immovable property’.⁵⁷⁵ Save for a sale of immovable property, it would therefore appear that the supply of all other rights in immovable property will constitute a service rather than a good.⁵⁷⁶

Paragraph (e) of the definition relates to intangible products, along with any licence to use such an intangible product. Literature, music, photographs, motion pictures, games, information, data, software and code are specifically listed. While a discussion of the substantive provisions of the CPA does not fall within the scope of this thesis, it is worth noting that the provisions relating to the quality of goods do not apply to goods bought on auction (regardless of whether the goods are second-hand or new, or whether the consumer had the opportunity to attend the auction).⁵⁷⁷

This departs from current European Community law, where the definition of ‘goods’ for purposes of consumer protection measures is much more limited. The Consumer Rights and Consumer Sales Directives limit the definition of ‘consumer

⁵⁷⁴ Paragraph (e)(v) of the definition of ‘services’ in s 1. Note that ‘rental’ is defined as ‘an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act’.

⁵⁷⁵ Paragraph (f) of the definition of ‘services’ in s 1.

⁵⁷⁶ While it is clear that granting access to immovable property in terms of a ‘rental’ is a service, granting temporary access to movable property through a ‘rental’ is harder to classify. The use of ‘supply’ in relation to goods includes ‘rent’ and ‘hire’, which creates the impression that the ‘renting’ of movable property will be classified as goods, even though it is not referred to directly in the definition of goods. However, the definition of ‘services’ explicitly includes ‘access to or use of any premises or other property in terms of a rental’ (my emphasis). The argument that movable property provided through a rental is a service is marginally stronger, given the reference to ‘other property’ in the definition of ‘services’, whereas the definition of ‘goods’ is silent on the issue. Van Eeden (*Consumer Protection Law* op cit note 271 at 48) also believes that the renting of movable property is a service. However, he does not refer to the confusing definition given to ‘supply’ in the context of goods. This ambiguity should be addressed by the legislature.

⁵⁷⁷ Section 55(1).

goods’ to ‘tangible movable item[s]’,⁵⁷⁸ while the Product Liability Directive is simply limited to ‘all movables’, subject to certain very specific exclusions.⁵⁷⁹ The UK SoGA is also confined to goods that are ‘at once tangible, movable and visible’.⁵⁸⁰ This definition was retained in the Consumer Rights Act.⁵⁸¹ This exclusion is particularly important given the prolific and increasing rate at which digital products such as software, music and literature are consumed.

This is not to say that digital content is not regulated in the EU. The Consumer Rights Directive contains some regulations that are applicable to digital content products.⁵⁸² This is also true of the CESL. The distinction between tangible and intangible goods for purposes of delineating the scope of consumer protection has become increasingly strained and ‘is riddled with potential anomalies’, as it largely depends on how the goods are supplied. For example, if software is delivered on a compact disc, it is considered a good, but not if it is downloaded via the internet.⁵⁸³ That the CPA includes intangible goods is commendable, but it is likely that the substantive regulations will have to evolve over time to address the unique problems related to, in particular, digital products.

Should immovable property be included in consumer protection legislation? On face value, one feels that the answer should be ‘yes’ because the price of these goods makes consumers more vulnerable. On the other hand, it can be argued that the price of the goods justifies placing a bigger responsibility on consumers to protect themselves. The problem with immovable goods is that the remedies of which consumers must avail themselves in cases of non-conformity (for instance) are more limited, since immovable goods cannot easily be replaced, and the return of the goods is not easy due to the manner in which ownership is passed and the fact that the transactions are generally financed. However, this is not significant enough to

⁵⁷⁸ Article 1(2) in both Directives.

⁵⁷⁹ Article 2.

⁵⁸⁰ Section 61(1). Bridge op cit note 333 at 69; Adams & MacQueen op cit note 502 at 74.

⁵⁸¹ Section 2(8).

⁵⁸² Article 2(11) of the Consumer Rights Directive defines ‘digital content’ as ‘data which are produced and supplied in digital form’. European Commission ‘Better protection for EU consumers downloading games, e-books, videos and music’ available at http://europa.eu/rapid/press-release_IP-13-937_en.htm, accessed on 20 October 2013.

⁵⁸³ Bradgate op cit note 229 at 14; Adams & MacQueen op cit note 502 at 77. Adams and MacQueen reject the approach that makes the classification of goods dependent on the medium by which they are conveyed. Instead, lawmakers should consider what remedies they want to impose on the makers of the product (e.g. whether they should be strictly liable for defects, or whether negligence should be required).

restrict the scope of the CPA. In any event, remedies such as repairing the goods or reducing the purchase price do not present the same challenges.

The definition of ‘goods’ makes no mention of second-hand goods, but given the wide definition, they are included. The UK Consumer Rights Act excludes second-hand goods bought at an auction that the consumer had the opportunity to attend.⁵⁸⁴ In the case of the Consumer Sales Directive, member states were given the option to exclude this class of good from the definition of ‘consumer goods’.⁵⁸⁵ It was also acknowledged in the recital to the Consumer Sales Directive that second-hand goods would present different substantive problems than new goods — in particular, it was pointed out that second-hand goods could not be replaced, and that there should be a shortened period of liability.⁵⁸⁶

It is submitted that the difficulties described above in respect of second-hand and immovable property are not severe enough to merit depriving consumers of the protection provided by the CPA. The limitations placed on the definition of ‘consumer’ and ‘supplier’ are sufficient to preserve the fairness of the legislation.⁵⁸⁷

3.8. Summary of recommendations made in this chapter

The recommendations made in this chapter can be summarised as follows:

- a) The definition of ‘consumer’ should include both natural and juristic persons.⁵⁸⁸
- b) The protection of juristic persons should not be unqualified. They should not be protected if the value of the transaction exceeds the prescribed threshold of R15 000 *or* if the goods are bought for resale or for transformation into a product for resale, will be used up or transformed in the course of production

⁵⁸⁴ Section 2(5). This was also the case in the Consumer Sales Directive (art 1(3)) and the previous definition of ‘dealing as a consumer’ in the Unfair Contract Terms Act (s 12(2)). The Law Commission and Scottish Law Commission recommended the retention of the exception (Law Commission & Scottish Law Commission *Unfair Terms* op cit note 348 para 3.29). Section 55(1) of the CPA does exclude goods bought at an auction from the ‘good quality’ requirement.

⁵⁸⁵ Article 1(3).

⁵⁸⁶ Recital 16 of the Consumer Sales Directive.

⁵⁸⁷ For instance, the fact that the CPA will not apply to juristic persons who purchase goods for commercial reasons, or to private sales.

⁵⁸⁸ Paragraph 3.3.

or manufacture, or are used up or transformed in the course of repairing or treating other goods or fixtures on land.⁵⁸⁹

- c) A supplier should be able to rely on a positive, voluntary and clear declaration by a buyer who is a juristic person that the goods are bought for commercial purposes. The effect of the statement should be explained in plain language.⁵⁹⁰ Any such declaration made by a natural person will not have any force.
- d) Where no such declaration is made and the consumer is a juristic person, the onus of proving that the buyer is not a consumer should be on the juristic person.⁵⁹¹
- e) Only truly private sales ought to fall outside the scope of the CPA. In order to achieve this, all references to ‘in the ordinary course of business’ must be replaced with ‘in the course of a business’, and the definition of ‘business’ must be deleted. The result of this reformulation is that only truly ‘private sales’ will be excluded.⁵⁹²
- f) The ‘consideration’ requirement also has no place in South African law, and its inclusion creates too much confusion. Instead, the CPA should include an additional exception that the Act (with the exception of s 61 on product liability) will not apply to gratuitous contracts, as there are obvious policy reasons not to burden charities with compliance.⁵⁹³
- g) There is no policy reason to deviate from the decision of the South African legislature to extend liability for post-purchase quality problems to the rest of the supply chain. The consumer can always elect to pursue a claim against the retailer, regardless of the retailer’s complicity in the defect, and the retailer cannot escape this by referring the consumer to the manufacturer. Put

⁵⁸⁹ Paragraph 3.4.5.

⁵⁹⁰ Paragraph 3.5.

⁵⁹¹ Ibid.

⁵⁹² Paragraph 3.6.1.

⁵⁹³ Paragraph 3.6.2.

differently, the direct claim is supplemental to instead of a substitute for frontline liability.⁵⁹⁴

- h) There should be an explicit right of redress for retailers, distributors and importers against the producer of the goods, unless the defect was caused by another member of the supply chain (e.g. if the goods were not properly stored). Given that the retailer obtains the goods from the manufacturer for purposes of reselling them, the retailer will not be protected as a consumer. In order to ensure that the retailer is not rendered liable for the claim made by the consumer, it is also recommended that parties to the producer should be unable to contract out of liability for defective goods in relation to one another. Put differently, the manufacturer (for instance) should not be able to insert an indemnity against claims from consumers in its contract with the retailer.⁵⁹⁵
- i) The defence that the goods were not defective or that the retailer made misrepresentations unbeknown to the producer should be available to the producer, but these defences should only lie against claims from the other parties in the supply chain, and not against the consumer. This will create a clear right for the consumer, which will be easier to enforce. If this is not the case, it will be easier for the party against whom the consumer brings the claim to employ dilatory tactics, such as referring the consumer to another party in the supply chain. Any resultant unfairness for the retailer or producer can be resolved between them and is not a sufficient reason to place the responsibility of finding the liable party on the consumer's shoulders.⁵⁹⁶
- j) The difficulties described above in respect of second-hand and immovable property are not severe enough to merit depriving consumers of the protection provided by the CPA. The limitations placed on the definition of 'consumer' and 'supplier' are sufficient to preserve the fairness of the legislation.⁵⁹⁷

⁵⁹⁴ Paragraph 3.6.3.2.

⁵⁹⁵ Paragraph 3.6.3.3.

⁵⁹⁶ Paragraph 3.6.3.4.

⁵⁹⁷ Paragraph 3.7.

The changes to the wording of the CPA required to effect these recommendations will be discussed in the final chapter.

4. Chapter 4: Conclusion and suggested wording

4.1. The issues addressed in this thesis

The current formulation of the definition sections as well as ss 5 and 56 of the CPA gave rise to the following questions:

- a) The definition of ‘consumer’ in the CPA includes small ‘juristic persons’. Should juristic persons be protected? If so, should the protection be extended to all juristic persons or only small juristic persona, and how should size be determined?
- b) The CPA does not exclude transactions concluded for business purposes. This relates to the fact that ‘juristic persons’ are also protected. Should the CPA apply to transactions taking place for business purposes?
- c) A complex definition of ‘consumer’ creates questions regarding the onus of proof. Who will be burdened with proving whether a customer is a consumer?
- d) The definition of ‘supplier’ is limited to suppliers acting in the ‘ordinary course of business’. Does this mean that suppliers are not responsible for ‘atypical’ transactions that do not form part of their core business? If so, should that be the case?
- e) The CPA requires that a transaction must be ‘for consideration’. Should this requirement be introduced into South African law?
- f) Liability flows up the supply chain in many instances. Are the definitions establishing this clear enough? Does this impose unreasonable liability on suppliers?
- g) Should all goods be included in the scope of the legislation? The inclusion of immovable, second-hand and intangible goods has been particularly controversial.

These questions were addressed in chapter 3 by comparing the regime created by the CPA to consumer protection legislation in the European Union, the United Kingdom and Australia. This was done against the backdrop of the discussion of theoretic underpinnings and rationales for consumer protection in chapter 2. The existing protection was evaluated and recommendations were made by applying the criteria of fairness, rationality, clarity, efficiency, the reasonable expectations of honest men, and the improvement of consumer redress.

The remainder of this chapter will be devoted to suggesting alternative formulations based on the recommendations made in chapter 3.

4.2. The definition of ‘consumer’

It has been recommended that the CPA should apply to all natural persons, regardless of the purpose for which they buy the goods.⁵⁹⁸ Where the buyer is a juristic person, the CPA should only apply if the goods will not be commercialised and the transaction value is below the prescribed threshold.

Implementing this recommendation will require an amendment to s 5(2)(b). The subsection should be replaced with the following:

- ‘(2) This Act does not apply to any transaction—
- (a) ...
 - (b) in terms of which the consumer is a juristic person—
 - (i) if the amount paid or payable for the goods exceeds a threshold value determined by the Minister; *or*
 - (ii) if the goods are bought for resale or for transformation into a product for resale, or will be used up or transformed in the course of production or manufacture; *or*
 - (iii) if the goods are used up or transformed in the course of repairing or treating other goods or fixtures on land.’

A threshold value of R15 000 has been recommended.⁵⁹⁹ This amount is relatively low so as to limit the impact of the extension of protection to juristic persons.

⁵⁹⁸ This was discussed in chapter 3, paragraph 3.2.

⁵⁹⁹ Paragraph 3.4.5.

Of course, this raises the question of whether this definition of ‘consumer’ should apply to all parts of the CPA. As things stand, the definition of ‘consumer’ is different in respect of product liability claims (all juristic persons are consumers),⁶⁰⁰ fixed-term contracts (the CPA only applies to transactions between juristic persons and individuals),⁶⁰¹ and the list of contract terms presumed to be fair and reasonable (it only applies to ‘a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession’).⁶⁰² Considering specific departures from the general definition is beyond the scope of this thesis. However, it is submitted that the rules relating to the right to return, repair or replace defective goods, and the claim for harm caused by defective goods, should be the same. In order to achieve this, s 5(5) should be deleted, as it extends the right to claim for harm caused by defective goods to all juristic persons.

4.3. The onus of proving that the buyer is a consumer

It has been recommended that there should be a distinction between juristic and natural persons for purposes of allocating the onus of proof.⁶⁰³ If the buyer is a juristic person, the onus of proving that a particular transaction falls within the scope of the CPA will be on the buyer. In addition, the supplier will be entitled to ask the juristic person to declare whether the goods are bought for commercialisation, as long as the request for the declaration complies with the provisions of s 49. If the buyer is a natural person, the onus of proving that a particular transaction does not fall within the scope of the CPA will be on the supplier.

This can be achieved by including the following subsection in s 5:

- ‘(9) In respect of transactions between suppliers and juristic persons—
 - (a) a supplier may rely on a declaration that the goods are bought for resale or for transformation into a product for resale, will be used up or transformed in the course of production or manufacture, or are used up or transformed in the course of repairing or treating other goods or fixtures on land, as long as

⁶⁰⁰ Section 5(5).

⁶⁰¹ Section 14(1).

⁶⁰² Regulation 44(1).

⁶⁰³ Paragraph 3.5.

the request for such a declaration complies with the requirements in section 49(3) to (5); or

- (b) the onus of proving that this Act applies to the transaction shall be on the juristic person in the absence of a declaration in terms of subsection (a)ʹ.

4.4. The ‘definition’ of supplier

4.4.1. *The ‘ordinary course of business’ requirement*

It has been recommended that only truly private sales should be excluded from the scope of the Act. To achieve this, all references to ‘in the ordinary course of business’ should be replaced with ‘in the course of a business’. In addition, the definition of ‘business’ should be deleted.

4.4.2. *The consideration requirement*

All references to the ‘consideration’ requirement should be removed, as this has no place in South African law. Gratuitous contracts should be excluded in s 5(2) by adding that the CPA does not apply to any transaction

- ‘(h) in terms of which goods or services are provided free of charge or other forms of counter-performance, with the exception of section 61’.

The inclusion of the phrase ‘or other forms of counter-performance’ is intended to prevent suppliers from circumventing the CPA by requiring other forms of counter-performance. The current definition in s 1 is sufficiently broad to prevent abuse, but the term ‘consideration’ should be substituted with ‘counter-performance’.

While there are obvious policy reasons why charities that provide goods for free ought not to be burdened with compliance, consumers of these goods should have the right to claim for harm caused should those goods be defective or unsafe. To be clear, the consumer will not have a claim for a refund or for the repair or replacement of the goods themselves.

4.4.3. *Direct claim against all members of the supply chain*

Sections 29 (general standards for marketing of goods or services), 56 (claims for refunds, replacements or repairs) and 61 (liability for harm caused by goods, or ‘product liability’ claims) provide that ‘the producer *or* importer, the distributor and

the retailer' are liable in terms of these sections. The 'or' conjunction in these sections should be deleted to ensure that the consumer has the unfettered discretion to select against whom to bring the claim.

There is no policy reason to deviate from the decision of the South African legislature to extend liability for post-purchase quality problems to the rest of the supply chain.

It is recommended that there should be an explicit right of redress for retailers, distributors and importers against the producer of the goods, unless the defect was caused by another member of the supply chain (e.g. if the goods were not properly stored), and that this liability must be joint and several. This can be achieved by adding the following clause to ss 29, 56 and s 61:

‘Retailers, distributors and importers have a right of redress against the producer of the goods in the event that the retailer, distributor or importer is held liable by a consumer in terms of this section.’

It is also recommended that parties to the producer or importer should be unable to contract out of liability in relation to the rest of the supply chain for claims brought in terms of ss 29, 56 or 61 of the CPA. This can be achieved by adding the following subsection after s 51(1):

‘(2) A producer or importer must not make a supply agreement with another member of the supply chain subject to an exclusion of liability for claims brought by consumers in terms of section 29, section 56 or section 61.’

It is submitted that the defence that the goods were not defective when it left the producer's control or that the retailer made misrepresentations unbeknown to the producer should be available to the producer, but that these defences should only lie against claims from the other parties in the supply chain, and not against the consumer.

The first defence already exists in respect of s 61(4)(b)(i), which provides that

‘[l]iability of a particular person in terms of this section does not arise if—

- (a)
- (b) the alleged unsafe product characteristic, failure, defect or hazard—

- (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable’.

This defence should be added to s 56, with the omission of references to ‘unsafe product characteristic’, ‘failure’ and ‘hazard’.

In addition, members of the supply chain should not be held liable for statements made by other members of the supply chain. This should be included in ss 29, 56 and 61:

‘The supplier shall not be bound by public statements made by other members of the supply chain if the supplier—

- (a) was not, and could not reasonably have been, aware of the statements in question;
- (b) shows that the statement had been corrected by the time the transaction was concluded;
- (c) shows that the decision to buy the consumer goods could not have been influenced by the statement.’

4.5. The classes of goods that should be included in the CPA

There are no convincing policy considerations in favour of excluding intangible, immovable and second-hand goods from the application of the CPA.

4.6. Conclusion

In the context of comparing the application of the CPA with the general approach to limiting consumer protection in the European Union and Australia, some have argued that the South African approach is ‘groundbreaking’.⁶⁰⁴ Despite the criticism levelled at the application sections of the CPA in this thesis, this praise is not entirely unjustified. In particular, the attempt at also protecting juristic persons is progressive and laudable. The recommendations made for reform reflect that, on a principled level, the CPA is a step in the right direction, even though the execution has at times been lacking when measured against the criteria of fairness, rationality, clarity, coherence, improved consumer redress, and reflecting the expectations of reasonable men.

⁶⁰⁴ Malbon & Nottage op cit note 366 at 49.

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⁶⁰⁵ S G Corones *The Australian Consumer Law* (2011) at 85. A second and third edition have been published, the latter in May 2016. I could however not obtain access to the latest edition in time.

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