

THE EFFECT OF THE CONSUMER PROTECTION ACT ON FRANCHISE AGREEMENTS

by

Burnadene du Plessis

Submitted in partial fulfilment of the requirements for the
degree

Master of Law

In the Faculty of Law,
University of Pretoria

2013 October

Supervisor : Prof DJ Lötze

Declaration of Candidate

I, Burnadene du Plessis, hereby declare that the contents of this dissertation represent my own unaided work and the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinions and not necessarily those of the University of Pretoria.

Opsomming

Die doel van hierdie verhandeling is om die uitwerking van die Verbruikers Beskermings Wet, 68 van 2008, die “VBW”, op konsessie ooreenkomste te bespreek. Die studie bevind dat die VBW die uitwerking mag hê dat die ongelyke magsposisie wat voorheen deur ‘n konsessiegewer gehou was, uitgefasseer word deur die bepalings in die VBW wat voorsiening maak teen onbillike bedinge in ‘n ooreenkoms. Die regsbasis van ‘n konsessie ooreenkoms word geag ‘n blote kommersiële verhouding te wees. Die konsessie verhouding is egter ver verwyderd van ‘n eenvoudige kontrak; dit is ook ‘n regulerende struktuur. Die konsessiegewer skep ‘n raamwerk waarvolgens die konsessiehouer beheer kan word. Hierdie het tot gevolg dat ‘n konsessiegewer inherent ‘n magsvoordeel het en soms die posisie misbruik. Die VBW voorsien aan elke verbruiker, wat nou ook ‘n konsessiehouer insluit, ‘n samevatting van regte wat die aanspreeklikheid van verskaffers voorskryf en beheer. Gevolglik, word daar ‘n gelyke vlak bewerkstellig tussen die konsessiehouer-En -gewer wat die bedryf meer regulerend en billik sal maak. Die studie bevind dat die vorige ongelyke situasie in die Suid-Afrikaanse reg vir die regulering van konsessies deur die VBW verminder word en bied die stabiliteit vir toekomstige konsessie verhoudinge. Hierdie studie verwelkom die voorskrifte van die VBW en meen dat dit ‘n positiewe uitwerking op die land se ekonomie in geheel behoort te hê.

Summary

This dissertation discusses the influence of the Consumer Protection Act No 68 of 2008, the “CPA”, on franchise arguments. It is argued that the provisions of the CPA will lead to the consequences of restoring equality between a franchisee and a franchisor. A franchise agreement is viewed as an ordinary commercial contract, governed by the same legal principles as any other contract. In reality franchising is in fact far beyond a simple contract; it is also used as a governing system. The franchisors create structures whereby their franchisees can be controlled. In order to manage franchisee opportunism such as the unauthorized use of intellectual property and addressing under-performance, an inherent power imbalance was present in favour of franchisors. The CPA introduced certain provisions that address the relationship between franchisors and franchisees by prescribing and controlling the rights and obligations of the parties. As a result, a fair structure is created to regulate the franchise relationship between the parties. The promulgation of the CPA is welcomed by this study and it is submitted that the country’s economy as a whole can only benefit from it.

Acknowledgements

I wish to thank:

- My supervisor, Prof. D.J. Lötze, for his guidance, encouragement and support;
- My parents for their unconditional love and support throughout my studies.



Table of Contents

Declaration of Candidate	i
Opsomming	ii
Summary	iii
Acknowledgements.....	iv
1. Introduction and methodology	1
1.1 Introduction.....	1
1.2 Methodology	4
2. Background to franchising	5
2.1 Introduction.....	5
2.2 The origins of franchising	5
2.3 Franchising in South Africa.....	7
2.4 The introduction of the Consumer Protection Act	8
2.5 A brief comparative view	9
3. General application of the Consumer Protection Act.....	12
3.1 Introduction.....	12
3.2 Interpretation of the CPA	12
3.3 Scope of the CPA	14
3.4 Exclusions from the CPA.....	15
4. Applicability of the Consumer Protection Act on franchise agreements	19
4.1 Introduction.....	19
4.2 Franchises and the CPA.....	19
4.3 Disclosure of information	21
4.4 Requirements for franchise agreements.....	24
5. Fundamental rights in terms of the Consumer Protection Act and franchise agreements.....	28
5.1 Introduction.....	28
5.2 The right to equality in the consumer market.....	29
5.3 The right to choose	30
5.4 The right to disclosure and information.....	32
5.5 The right to fair and responsible marketing	35

5.6	The right to fair and honest dealing	36
5.7	The right to fair, just and reasonable terms and conditions	37
5.8	The right to fair value, good quality and safety	41
5.9	Sections of the CPA that do not apply to franchises.....	43
6.	Remedies	45
6.1	Introduction.....	45
6.2	Governing bodies	46
6.3	Enforcement	50
7.	Conclusion	52
8.	Bibliography	55

Chapter 1: Introduction and Methodology

1.1	Introduction.....	1
1.2	Methodology.....	4

1.1 Introduction

Franchising, in business language is a strategy for enlarging a business or a method of marketing goods and services.¹ People think of fast food restaurants like McDonald's, Kentucky Fried Chicken or Spur when they think of franchising. It is a corporate structure in terms of which the franchisor holds certain property rights over a marketing system, business service or product.² The franchisor enters into an agreement with a franchisee which permits the franchisee the right to make use of the business name or trademarks and the right to manufacture or distribute the franchisor's' product or services.³ In modern times, the words 'franchise' or 'franchising' may be used to refer to a business, a specific kind of business or even the entire trade.

Franchising is a growing industry with more investors each year at a rate of 13% annually. Currently, South Africa has over 400 franchise systems and 23 000 franchise outlets.⁴ This concept is not unique to South Africa, in the United States for instance, every 8 minutes a new franchise opens up.⁵

Although the nature of the relationship between the franchisor and franchisee appears to be relatively straightforward, the complexity of it all has the tendency to frequently be misunderstood.⁶ Franchising has been portrayed as an 'odd shaped beast' which

¹ Woker "Franchising and Restraints of Trade" (2005) *Obiter* 1.

² Woker "Understanding the Relationship Between Franchising and the Law of Competition" (2006) *SA Merc LJ* 107.

³ Woker "Franchising – The Need for Legislation" (2005) *SAMercLJ* 50.

⁴ www.franchisedirect.co.za (accessed 18 August 2013).

⁵ www.thefranchisefactor.com (accessed 13 September 2013).

⁶ Woker "Franchising and Restraints of Trade" (2005) *Obiter* 1.

intertwines numerous areas of the law.⁷ This business relationship is distinctive as it does not fit into the more established classifications such as agencies, employer-employee contracts or partnerships. However it contains characteristics of these relationships.⁸ In a matter before the Competition Tribunal, *Cancun Trading v Seven-Eleven Corporation*,⁹ the Tribunal explained the versatile concept:

“[A] franchise agreement is neither an employment relationship nor an independent contracting relationship. It rather combines elements of integration and delegation, control and independence and it is thus a multifaceted vertical structure that paves the way for endless relational and commitment problems.”

The legal basis of the franchise relationship is of a contractual nature and this relationship is treated as a normal commercial relationship.¹⁰ But franchising is in fact far beyond a simple contract; it is also used as a governing system. The franchisors create structures whereby their franchisees can be controlled.¹¹ In order to manage franchisee opportunism such as ‘free-riding’, the unauthorised use of intellectual property and under-performance, creates an inherent power imbalance in favour of franchisors.¹² This however, may lead to opportunistic behaviour and abuse of power on the part of franchisors including termination of contracts at will, unilateral variations to the agreement and non-renewal of franchise agreements.¹³

This power inequality in the relationship means that disputes between franchisors and franchisees are inevitable.¹⁴ Therefore, a need for the relationship to be properly regulated seems to be established.¹⁵ Because relationships are treated as a normal

⁷ Hadfield “ Problematic Relations: Franchising and the Law of Incomplete Contracts” (1990) *Stanford Law Review* 928.

⁸ *Supra*.

⁹ *Cancun Trading No 24 CC v Seven-Eleven Corporation SA (Pty) Ltd* (unreported, case no 18/IR/Dec 99).

¹⁰ Woker (2005) *Obiter* 1.

¹¹ Woker (2005) *Obiter* 3.

¹² *Supra* 10.

¹³ Woker 3.

¹⁴ *Supra* 12.

¹⁵ Woker (2005) *SA Merc LJ* 49.

commercial contract entered between two equal parties by courts,¹⁶ it creates difficulty to deal with problems that may arise in the franchise contract. In South Africa and many other jurisdictions, the law of contract is supplemented to accordance franchising with self-regulatory bodies by means of codes of conduct.¹⁷ However a sense of inadequacy is expressed towards these self-regulatory bodies.¹⁸

In the past, South African franchise agreements have not been subject to specific regulation. The only framework used to regulate franchise matters comprised of the common law principles of the law of contract, complemented by self-regulation, the *Franchise Code of Ethics and Business Practice*¹⁹ and certain statutes such as the Competition Act.²⁰ The Consumer Protection Act²¹, which came into effect on 1 April 2011,²² influenced existing and new franchise agreements and therefore will have an important impact on the franchise industry.

National and global franchise chains are considered as a viable opportunity to establish profitable start-up businesses by entrepreneurs.²³ Up until 1 April 2011, the franchisor had conventionally held the bargaining power when negotiating franchise agreements and could sometimes unjustly define the terms and conditions of the agreement.²⁴ Imbalances of this nature are now regulated through the CPA. This CPA expressly recognizes franchisees as consumers because of the consumer-like role they play and vulnerability within the franchise relationship.²⁵ Franchisors, on the other hand, are regarded within the CPA as 'suppliers' to their franchisees. It is expected that the CPA

¹⁶ Woker (2005) *Obiter* 3.

¹⁷ In South Africa the Franchise Association of South Africa (FASA) administers the *Code of Ethics and Business Practices* (FASA Code).

¹⁸ Woker (2005) *SA Merc LJ* 49.

¹⁹ *Supra* 16.

²⁰ 89 of 1998.

²¹ Hereinafter referred to as the CPA.

²² Although the Act was signed on 25 October 2009, it only came into effect several months later.

²³ Smit "Die Bydrae van die Franchisebedryf tot die Suid- Afrikaanse Ekonomie en die Faktore wat die Waarde van 'n Franchisebedryf Beïnvloed" (2007) *Tydskrif vir Geesteswetenskappe* 183.

²⁴ Woker (2005) *SA Merc LJ* 51.

²⁵ s 1 (definition of consumer) read with section 5(6)(b)-(e).

will have a fundamental impact on the development of franchising as a business model in time to come.²⁶

The CPA dedicates several sections in the Act to the rights and duties of franchisors and franchisees, the prescribed content for franchise agreements and the inclusion of international best practice standards which demand proper disclosure to franchisees. The CPA is in the nature of a consumer bill of rights and include, amongst other key concepts, the right to equality,²⁷ choice²⁸ and disclosure and information.²⁹ The goal is to provide security for the vulnerable consumer, the franchisee.

For years, the need for franchise-specific protection existed. With the implementation of the CPA, consumer rights are now anticipated to be improved. In the franchising industry a similar protection is now guaranteed with the inclusion of franchisors and franchisees within the ambit of the CPA.

1.2 Methodology

This dissertation will start with a brief explanation of the history on franchising including a brief overview of franchise arrangements in the world. It will continue with a discussion of the application of the CPA and the application of the CPA on franchises followed by an outline of the remedies as set out in the CPA. Lastly it will present suggestions on how franchising legislation can be advanced in the future.

²⁶ Woker 4.

²⁷ s 8-10.

²⁸ s13.

²⁹ s 22.

Chapter 2: Background to franchising

2.1	Introduction.....	5
2.2	The origins of franchising	5
2.3	Franchising in South Africa.....	7
2.4	The introduction of the Consumer Protection Act	8
2.5	A brief comparative view	9

2.1. Introduction

This chapter commences with the history of franchising. Franchises are not a new concept and have been used for years before in trading. This discussion will explain the legal position of franchise agreements before the enactment of the CPA. The previous position should be understood in order to comprehend the influences the CPA now has. This chapter together with Chapter Two will give an overview of where franchising fits into the South African law.

2.2. The origins of franchising

Although the United States of America is usually thought of as the center of franchising,³⁰ it has been suggested that it dated even earlier than what is known in the USA.³¹ Many believe that Albert Singer, creator of the Singer sewing machine, was the inventor of franchising. He was in fact the first person acknowledged by most as being associated with franchising. However, the concept of franchising was created long before his lifetime.

³⁰ Woker *The Franchise Relationship Under South African Law* (2012) 10.

³¹ Franchise.about.com/od/franchisebasics/a/history.htm (assessed 10 August 2013)

The term 'franchising' derived from ancient French, bears the meaning as holding certain rights or privileges.³² Back in the middle ages, local sovereign governing bodies or lords would designate privileges to ordinary citizens. Some of these rights included running markets, to operate the local ferry or to hunt on the designated land.³³ The franchising idea was then passed onto the practice of kings granting rights of activities such as beer brewing or building of roads. In addition, the development of the church is also known as a method of franchising.³⁴

During the 1840's, several German ale-brewers contracted selling rights to certain taverns to market their ale. This was the start of the modern concept of franchising as it is known today. Franchising then migrated from European brewers into the United States. Peddlers in early American history vending items from town to town, were also considered a form of franchising.

Albert Singer became known in 1851 with the pioneering Singer Sewing Machine Company. Singer distributed his machines over a large geographic area by use of franchising. He was the first actual name familiar as an early franchisor.³⁵ Furthermore, Singer was the first to make use of franchise contracts. These contracts then grew into the basis for the modern form of franchise agreements.

The modern form of franchising, known as 'business format franchising',³⁶ became popular after World War II. At that time, those who were serving in the war returned home and there was a demand for the distribution of many products and services.³⁷

Franchising grew swiftly in the 1960's and 1970's in the United States, and also brought a large amount of domineering activity to compete with. Several companies however

³² Laffontaine and Blair "The Evolution of Franchising and Franchise Contracts: Evidence from the United States" (2008) *Entrepreneurial Bus LJ* 381.

³³ *Ibid.*

³⁴ Hall and Dixon *Franchising* (1988) 10.

³⁵ Cherasky *The Franchising Handbook* (1993) 3.

³⁶ Business format franchising is defined as a distribution network operating under the shared trademark or trade name with franchisees paying the franchisors for the right to do business under that name for a specified period of time.

³⁷ Mendelsohn *The Guide to Franchising* (1992) 19.

were financially weak and management was below par with the consequences of going bankrupt and leaving its franchisees in a worse position. More upsetting were the fraudulent businesses of some franchisors who took people's money for nothing in return.

As the amount of franchised businesses increased, the need for legislation and consumer protection followed. These events led to the formation of the International Franchise Association (IFA), in order to regulate the franchising industry. The IFA later adopted a Code of Ethics to establish a framework for the implementation of best practices in the franchise relationship of IFA members. The code represents the ideals to which all IFA members agree to subscribe in their franchise relationship. In the USA, the IFA works closely with the US congress and the Federal Trade Commission on refining how the industry relates to the franchisees and has been instrumental to the enlargement of franchising around the globe.

2.3. Franchising in South Africa

The first time franchising was introduced in South Africa was when the motor manufacturing industry and oil companies began distributing their products through independent outlets in 1924.³⁸ Soon thereafter Coca-Cola was also established in South Africa in 1937 as a franchise followed by Pepsi in 1948.

In the 1960's, South Africa was just starting to experiment with the idea of franchising. The USA, on the other hand, had already formed their Franchise Association to conduct many franchised concepts into a formal business sector. A franchise hamburger dealership from America called 'Wimpy', founded by Ed Gold, was introduced to South Africa by JH Lyons. The first Wimpy to open in Durban was found to be an enormous success. Other franchise dealerships started to takeoff in South Africa and in 1979 a

³⁸ Donner *An Overview of Franchising* (1978) 30 quoted by Woker *The Franchise Relationship Under South African Law* (2012) 12.

group of franchise companies,³⁹ including Wimpy, decided to lay down a foundation of ethical guidelines which finally lead to the formulation of a franchise association.

This association became known as the 'Franchise Association of South Africa' (FASA). FASA represents franchisors, franchisees and are currently the only professional organization that advises the franchise industry. FASA's intent is to ensure that its members comply with ethical franchising and by doing so continue to expand and evolve the corporate environment for franchising in South Africa.

After the end of the Apartheid era, a renewed interest in franchising was shown when a number of citizens who suffered due to discrimination found an opportunity in franchising to empower themselves again.⁴⁰ In the late 1990's, the RSA government proposed to use the franchising industry as a way to develop work opportunities for the previously disadvantaged citizens.⁴¹ In 2005, the FASA guidelines for Black Economic Empowerment (BEE) followed.⁴² This was done to assist the industry to comply with the requirements and obligations as set out in the Broad-based Economic Empowerment Act.⁴³

2.4. The introduction of the Consumer Protection Act

The CPA was the outcome of the Department of Trade and Industry's goal to "create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities".⁴⁴ The department of trade and industry originally commissioned a research project for recommendations to a new consumer protection regime for South Africa.⁴⁵ This project also included consultations with various

³⁹ Amongst them Mend-a-Bath, Steers, Milky-Lane, Juicy Lucy, Mike's Kitchen and King Midas.

⁴⁰ Woker "Franchising and Restraints of Trade – Restraining Ex-franchisees From Competing With the v Franchise Network" (2005) *Obiter* 2.

⁴¹ Woker (2005) *Obiter* 3.

⁴² Guidelines are available at <http://www.fasa.co.za>

⁴³ Act 53 of 2003.

⁴⁴ Explanatory Memorandum on the Objects of the Consumer Protection Bill 2008 at p 80 of the bill.

⁴⁵ Du Preez "The Consumer Protection Bill: a Few Preliminary Comments" (2009) *TSAR* 59.

stakeholders and parties with interests and gave rise to the National Consumer Survey and a draft green paper on the Consumer Policy Framework. The recommendations were then presented to the parliamentary portfolio committee on trade and industry and tabled at the National Economic Development and Labour Council (NEDLAC). An experimental regulatory assessment of the policy and the impact thereof was conducted. In 2006 the department of trade and industry issued the first draft of the Consumer Protection Bill available for public comment. The first and second drafts of the bill have since been amended noticeably after complaints and comments were received and the CPA was finally promulgated on 21 April 2011.

2.5. A brief comparative view

The United States of America

Franchising is regulated in the USA by the U.S Federal Trade Commission (FTC) and by numerous state agencies. The provisions of the FTC apply nationally in the United States. Individual federal state laws concerning franchising will only apply when:

- the offer of sale of a franchise is made in that state; or
- the franchised business will be located within that state; or
- the franchisee resides in that particular state.⁴⁶

Although federal states have adopted legislation that regulates the franchise relationships, no direct intervention has been promulgated by the central government themselves in enforcing laws against abuses by franchisors.⁴⁷

The provisions of the FTC oblige franchisors to provide any potential franchisee with a disclosure document in the early stages of the offer to buy a franchise. The franchisor is also responsible for providing the prospective franchisee with a complete copy of the

⁴⁶ Grueneberg and Solish "Franchising 101"(2010) *Business Law Today* - 11.

⁴⁷ Giles and Barkoff "Australian Franchise Law: How to Avoid Being a Shrimp on the Australian Franchising Barbecue" (2009) *Franchise Law Journal* 166.

franchise agreement at least five business days before the parties sign the franchise agreement.⁴⁸

In some federal states, legislation requires that all franchisor advertising material for the sale of a franchise, must be filed with the federal agencies before they are published.⁴⁹ These laws in the federal states normally also limit the content of what may be published in the advertisements. These restrictions generally forbid characterizing the franchise as a 'safe investment' urging potential franchisees to rather invest in that particular franchise.⁵⁰

Sanctions for non-compliance with franchising rules includes fines, permanent bans from franchising, freezing of assets, damages claims and even a jail sentences.⁵¹ These fines can be levied against the franchisor, its officers, directors or managers who directed and controlled the franchisor's business operations.⁵²

Australia

Australia adopted a mandatory 'Franchise Code of Conduct' (FCC) on July 1, 1998. On June 28 2011, the Australian government amended this Code of Conduct by bringing in further regulations that came into force in October 2011.⁵³

However, the franchising industry in Australia never experienced the same level of exploitation as seen in the United States.⁵⁴ Franchising in Australia is general subject to a regulatory framework as set out in the FCC which is specifically dedicated to franchising, and a lot more simplified than the position of the United States.

The Australian FCC also contains a cooling-off period for franchisees in which they may terminate the agreement within seven notice days after concluding the agreement to

⁴⁸ Grueneberg and Solish (2010) *Business Law Today* 11.

⁴⁹ These states include: California, Indiana, Maryland, Minnesota, New York and Washington.

⁵⁰ Curran "Understanding Franchise Law" (2009) *Young Law* 1.

⁵¹ Buckberg and Suwanski "Disclosure Law Violations: Understanding the Penalties" (2008) *Franchising World* 67.

⁵² *Ibid.*

⁵³ Asbill and Goldman *Fundamentals of International Franchising* (2001) 185.

⁵⁴ Giles and Barkoff (2009) *Franchise Law Journal* 167.

purchase a franchise. They are then entitled to a refund of all the money paid, less the reasonable expenses of the franchisor. This provision is very similar to the cooling-off period which is provided to franchisees under the CPA.⁵⁵

The Australian FCC and franchise legislation are backed by the various remedies available under the Australian Trade Practice Act (TPA) and the association of the Australian Competition and Consumer Commission (ACCC). A breach of the Australian FCC is regarded as a breach of the TPA and compensation may be granted to franchisees that may have suffered losses. It also enables Australian courts to grant injunctions, order specific performance, declare the whole or part of the agreement void and make such other orders as a court thinks appropriate.⁵⁶

⁵⁵ Discussed in chapter 4.

⁵⁶ Giles and Barkoff (2009) *Franchise Law Journal* 167.

Chapter 3: General application of the Consumer Protection Act

3.1	Introduction.....	12
3.2	Interpretation of the CPA.....	12
3.3	Scope of the CPA.....	14
3.4	Exclusions from the CPA.....	15

3.1 Introduction

Until recently in South Africa, there was no comprehensive legislation dealing with consumer protection. However, governments around the world have been encouraged by the United Nations to adapt general consumer protection laws.

Initially, many organizations were of the view that the enactment of the CPA would not have a substantial effect on their trade activities. This was because they did not function in a consumer orientated trade and therefore did not need to comply with the CPA. On a first reading of the CPA, it also seemed that organizations would mostly comply with many of the provisions of the CPA due to similar common law, statutory or self-regulatory provisions.

This chapter will therefore focus specifically on the interpretation of the Act on application in general. There are also certain instances where certain transactions fall outside the ambit of the Act. A brief overview will be given regarding these exclusions.

3.2 Interpretation of the CPA

Section 2 of the CPA provides that the interpretation of the CPA must be effected in a manner that gives effect to the purposes of the Act, which is primarily the protection of consumers against exploitation and unfair marketing practices and also to empower

consumers to make informed purchasing.⁵⁷ The purposes of the CPA are set out in section 3 of the Act and are as follows:

1. To establish a legal framework for a consumer market that is fair, accessible, efficient, sustainable and responsible;
2. To promote fair business practices;
3. To protect consumers from unfair, unreasonable or other improper trade practices and also to protect the consumer from deceptive, misleading or other fraudulent conduct;
4. To promote social, economic and environmental responsibility in consumer markets;
5. To improve consumer awareness and information and to encourage responsible and informed consumer choice and behaviour;
6. To promote consumer confidence and empowerment and develop a culture of consumer responsibility through individual and group education, vigilance, advocacy and activism;
7. To provide a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions;
8. To provide an accessible, consistent, harmonized, effective and efficient system of redress for consumers;
9. To replace provisions from previous legislation in a new and simplified manner.⁵⁸

Furthermore, section 2 of the CPA specifically protects the public by introducing the use of purposive reading or interpretation of franchise agreements.⁵⁹ It also allows the

⁵⁷ Botha “Caveat Vendor: The Consumer Protection and typical property transactions” (2009) *PLD* 3. Barnard *The Influence of the Influence of the Consumer Protection Act 68 of 2008 on Common Law of Sale* (LLD dissertation 2013 UP) 25.

⁵⁸ Amendments are made to Consumer Affairs Act (1988); Trade Practices Act (1976); Sale and Services Matters Act (1964); Business Names Act (1960); Business Act (1991); Price Control Act (1964); s 2 -13 and s 16-17 of the Merchandise Act (1941) and s 54 of the Lotteries Act (1997).

⁵⁹ Du Preez “The Consumer Protection Bill: a Few Preliminary Comments” (2009) *TSAR* 65.

courts to consider appropriate foreign and international law, protocols and any decision of a consumer court or arbitrator when interpreting the CPA.⁶⁰

Of particular interest are the guidelines which apply when the provisions of the CPA conflict with other existing legislation. The CPA provides that if there is any inconsistency between a provision of chapter 5 of the Act (dealing with national consumer protection institutions) and a provision of the Public Finance Management Act⁶¹ or the Public Service Act,⁶² the latter two acts will prevail.⁶³ If the provisions of the CPA conflict with any other legislation, both such statutes should be applied concurrently to the extent possible.⁶⁴ If this is not possible, *“the provision that extends the greater protection to a consumer prevails over the alternative position”*.⁶⁵ In making use of the standard of “greater protection to a consumer”, the legislature created a subjective standard that can introduce a somewhat unpredictable outcome.⁶⁶ This could be problematic in practice as no fixed and objective standard is set.

3.3 Scope of the CPA

The CPA applies to most transactions in the normal course of business between parties within the Republic of South Africa including the promotion of goods and services that could lead to such transactions and to the goods and services themselves after the completion of transaction. This includes franchise transactions or agreements as defined in section 5(6) of the CPA.⁶⁷ The CPA also applies to goods and services marketed by a non-profit entity, a profitable corporation, the State or to - extended entities contracted by the state to an extent.

⁶⁰ s 2(2).

⁶¹ 1 of 1999.

⁶² Proclamation 103 of 1994.

⁶³ Barnard 27.

⁶⁴ s 2(9)(a).

⁶⁵ s 2(9)(b).

⁶⁶ Du Preez (2009) *TSAR* 66.

⁶⁷ As discussed in chapter 4.

The CPA identifies the following elements that make a transaction a 'consumer transaction' and consequently within the ambit of the Act:

- (a) If it is an interaction or agreement to interact between a consumer and supplier in the ordinary course of the supplier's business, including in terms of any public regulation;
- (b) If there is an exchange of consideration;
- (c) If the interaction concerns the supply or potential supply of goods or services to or at the direction of the consumer.

The definition of a 'consumer' is also important in order to apply certain rights and obligations. The definition is extended to persons that are using the goods or services, regardless of the person who may have conducted the transaction or paid for the goods or services. Thus, depending on the context, a consumer means:⁶⁸

- a. a person to whom goods or services are marketed in the ordinary course of business;
- b. a person who has entered into an agreement or transaction with a supplier;
- c. a user of the goods or a recipient or beneficiary of the service; or
- d. a franchisee in terms of a franchise agreement.

When the CPA came into effect certain exclusions were introduced from the Act. These exclusions entail that the protection of the CPA will extend to certain smaller businesses in transactions made in their normal course of business. The CPA also provides a list of consumers that will not be protected as consumers. Despite these exemptions, section 60 and section 61 of the CPA, pertaining to unsafe goods, will apply to all goods presented to the market, even if they were subject to an exempted transaction.

⁶⁸ s 1. See Van Eeden *Guide to the Consumer Protection Act* (2009) 44.

3.4 Exclusions from the CPA

The application of the CPA does not apply to everyone and everything. Those entities and transactions that are not considered by the CPA to be consumers are dealt with below. The consequences are that these entities mentioned do not enjoy the rights of a consumer, though they may still be bound legally by the obligations that apply to suppliers. It must be borne in mind that any transaction that does not specifically fall within the ambit of the CPA, continues to be governed by the common law in their entirety. Transactions excluded by the CPA are as follows:

*Goods or services supplied to the State*⁶⁹

While the government, its agencies and the larger municipalities are regarded as suppliers under the CPA and are consequently bound by its requirements regarding the manner in which consumers are dealt with, they are not treated as consumers under it. In other words, those businesses that supply goods or services to the State are not obliged to conform to the requirements of the CPA in their dealings with the State.

*Big businesses*⁷⁰

In terms of section 5(2)(b) of the CPA, the Act does not apply to any transaction whereas the consumer is a juristic person whose asset value or annual turnover at the time of the transaction is equal or more than the threshold value as determined by the Minister.⁷¹ Despite the provisions of section 5(2)(b) of the CPA, the Act applies to any transaction pertaining to franchises irrespective whether value of that transaction falls above or below the threshold of the CPA. The idea behind this exclusion is therefore to protect the 'small business man'.⁷²

⁶⁹ s 5(2)(a). See Melville *The Consumer Protection Act Made Easy* (2011) 12.

⁷⁰ s 5(2)(b).

⁷¹ At the moment the monetary threshold applicable to the size of the juristic person is determined as R2 000 000.00 (two million Rand).

⁷² Otto "Verborge gebreke, Voetstootsverkope, die Consumer Protection Act en die National Credit Act" (2011) *THRHR* 353.

*Credit agreements*⁷³

Section 5(2)(d) of the CPA provides that the Act does not apply to any transaction that constitutes a credit agreement under the National Credit Act (NCA).⁷⁴ However, the goods or services that are subject to the credit agreement are not excluded from the ambit of the CPA.⁷⁵ In order for a transaction to be excluded from the CPA by way of section 5(2)(d), such transaction purposes of the NCA must firstly comply with the definition of a transaction in terms of the CPA, and only then constitute a credit agreement in terms of the NCA.⁷⁶

*Employment services*⁷⁷

As contracts of employment and services thereof are regulated under the Labour Relations Act⁷⁸ (LRA) and other employment legislation,⁷⁹ these transactions are excluded from the CPA.

*Collective bargaining agreements*⁸⁰

Any transaction giving effect to a collective agreement⁸¹ within the meaning of section 23 of the Constitution⁸² and the Labour Relations Act⁸³ will not be subject to the CPA.

⁷³ s 5(2)(d). See Melville 12.

⁷⁴ 34 of 2005. Hereinafter called the 'NCA'.

⁷⁵ Melville and Palmer "The Applicability of the Consumer Protection Act 2008 to Credit Agreements" (2010) *SA Merc LJ* 275.

⁷⁶ Van Eeden *Consumer Protection Law in South Africa* (2013) 52.

⁷⁷ s 5(2)(e).

⁷⁸ 66 of 1995.

⁷⁹ Such as the Basic Conditions of Employment Act 75 of 1997 and Employment Equity Act 97 of 1998.

⁸⁰ s 5(2)(f).

⁸¹ 'Collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand one or more employers; one or more registered employers' organizations; -

⁸² Constitution of the Republic of South Africa, 108 of 1996.

⁸³ 66 of 1995.

*Exemptions by Minister*⁸⁴

A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the CPA. An example of this is banks, which are exempted from the provisions of section 14 of the CPA.

Even if the Minister grants full exemption from the CPA, importers or producers, distributors and retailers of goods, must still comply with the requirements of section 60 and section 61 of the CPA.⁸⁵ Section 60 of the CPA deals with the safety, monitoring and recall of goods that are found to be defective and hazardous and section 61 of the CPA deals with the liability of these goods.

⁸⁴ s 5(2)(c), s 5(3)(a) and s 5(4).

⁸⁵ Stassen "New Legislation: Selected Aspects of Consumer Protection" (2009) *De Rebus* 43.

Chapter 4: Application of the CPA on franchise agreements

4.1	Introduction.....	19
4.2	Franchises and the CPA.....	19
4.3	Disclosure of information	21
4.4	Requirements for franchise agreements.....	24

4.1. Introduction

The CPA is the first statute to specifically regulate franchise agreements by name. As will be dealt with later it contains various specific provisions in relation to franchise agreements. As a result thereof it appears that franchisees are now adequately protected.⁸⁶ Franchisees and prospective franchisees may have a perception that, as franchisees, they are independent business owners of their own businesses. Consequently they tend to invest more time, money and effort into building the franchisor's brand than an ordinary employee would.⁸⁷ This is clearly an interest that must be protected, not only as mere business assets of the franchisee but also in respect of the goodwill of the franchise obtained in the process.

This chapter examines the legal standards set for the franchise trade with the promulgation of the CPA and the requirement of disclosure of information required in the franchise practice. In order to constitute a legitimate franchise agreement, the legal requirements of these documents are also examined.

4.2. Franchises and the CPA

A 'consumer' *in respect of any particular goods or services means a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e) of the*

⁸⁶ Du Preez "The Consumer Protection Bill: a Few Preliminary Comments" (2009) *TSAR* 76.

⁸⁷ Van Eeden *Consumer Protection Law in South Africa* (2013) 217.

CPA.⁸⁸ When the Legislature included a franchisee in the definition of a consumer, the franchisee became entitled to the rights as entrenched by the CPA. This means the CPA will be applicable to any transaction regarding:

- any invitation to enter into a franchise agreement;
- an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- any existing franchise agreement or an agreement supplementary to a franchise agreement; and
- the supply of any goods or services to a franchisee in terms of a franchise agreement.

The CPA's definition of a franchise agreement is an agreement between two parties, being the franchisor and franchisee in terms of which:

- the franchisee pays the franchisor for the right to carry on business within all or a specific part of the Republic of South Africa under a system or marketing plan developed and controlled by the franchisor;
- the operation of the business of the franchisee is closely associated with the advertising or trade marks, branding, etc, of the franchisor; and
- the business relationship between the franchisor and the franchisee is governed by the franchise agreement.

When considering existing and future franchise arrangements, it should be borne in mind that because of the express provision of section 5(7) of the CPA, the general exclusions by section 5(2)(b) of the Act does not apply to franchise agreements. This means, as mentioned in chapter 3, that the CPA will apply to all franchise agreements regardless of the turnover of the franchisee. One of the reasons why a franchisee is

⁸⁸ s 1. See Van Eeden 44.

treated as a consumer is that a franchisee has much less bargaining power than franchisors and they are therefore (like consumers) vulnerable to abuse.⁸⁹

Existing franchise agreements which do not meet the requirements of the CPA, must now include an addendum to that franchise agreement to address any shortcomings with the CPA. If the franchisee elects to do so, a new franchise agreement can be concluded which complies with all the requirements as set out in the CPA. Existing franchise agreements that were renewed after March 2011 are regarded as new franchise agreements and must comply with the requirements of the CPA.

4.3. Disclosure of information⁹⁰

When evaluating a potential franchise agreement, prospective franchisees tend to find it difficult to interpret the detailed responsibilities therein. As a result, some franchisees have made losses and were bound into contracts that could not commercially be successful. This is a result of either prospective franchisees failing to do their homework properly regarding the investment or risk involved or because of misrepresentation or overselling by the franchisor.

When these problems were identified, the Franchise Association of South Africa (FASA) acknowledged as early as 1994 that there was a demand for extensive and reliable information about the franchise to prospective franchisees and their advisors in order to make an informed decision. Since 1994, FASA has made it mandatory for any of its members to provide a prospective franchisee with a disclosure document before the franchise agreement will be concluded.⁹¹

⁸⁹ Melville *The Consumer Protection Act Made Easy* (2011) 111.

⁹⁰ See Government Gazette No 34180 1 April 2011 Regulation 3.

⁹¹ Woker *The Franchise Relationship Under the South African Law* (2012) 98.

This aforesaid documentation gives prospective franchisees wide-ranging information about the franchisor and the franchise network and is intended to ensure that franchisees make an informed decision before concluding the agreement.⁹²

The CPA introduced similar provisions concerning the disclosure of documents and additional legal requirements. Regulation 3 of the Regulations promulgated in terms of the CPA states that a franchisor must provide a franchisee with a disclosure document at least fourteen days prior to signing the franchise agreement. This document must be signed by an authorized officer of the franchisor and must contain the following information:

- (a) the number of individual outlets franchised by the franchisor;
- (b) the growth of the franchisor's turnover, net profit and the number of individual outlets if any, franchised by the franchisor for the financial year prior to the date on which the prospective franchisee received a copy of the disclosure document;
- (c) a statement confirming that there have been no significant or material changes in the company's or franchisor's financial position since the date of the last accounting officer or auditor's certificate or certificate by a similar reviewer of the company or franchisor;
- (d) that the company or franchisor has reasonable grounds to believe that it will be able to pay its debts as and when they fall due; and
- (e) written projections in respect of levels of potential sales, income, gross and net profits or other financial projections for the franchised business or franchises of a similar nature with particulars of the assumption upon which these representations are made.

The disclosure document must be accompanied by a certificate on an official letterhead from a person eligible in law to be registered as the accounting officer of a close corporation or an auditor of a company, as the case may be, certifying that-

- (a) the business of the franchisor is a going concern;

⁹² Louw "The CPA and Franchise Agreements" (2011) *Without Prejudice* 32.

- (b) to the best of his or her knowledge the franchisor is able to meet its current and contingent liabilities;
- (c) the franchisor is capable of meeting all of its financial commitments in the ordinary course of business as they fall due; and
- (d) the franchisor's audited annual financial statements for the most recently expired financial year have been drawn up-
 - (i) in accordance with South African generally accepted accounting standards;
 - (ii) except to the extent stated therein, on the basis of accounting policies consistent with prior years;
 - (iii) in accordance with the provisions of the Companies Act and all other applicable laws; and
 - (iv) fairly reflecting the financial position, affairs, operations and results of the franchisor at that date and for the period to which they relate.⁹³

The disclosure document must be accompanied by a list of current franchisees, if any, and outlets owned by the franchisor stating, in respect of any franchisee-

- (i) the name under which it carries on business;
- (ii) the name of its representative;
- (iii) its physical address; and
- (iv) its e-mail and office telephone number, together with a clear statement that the prospective franchisee is entitled to contact any of the franchisees listed, or alternatively to visit any outlets operated by a current franchisee to assess the information disclosed by the franchisor and the proposed franchise opportunity offered to the franchisee.⁹⁴

⁹³ Regulation 3(3).

⁹⁴ Regulation 3(4)(a).

The disclosure document must also contain an organogram portraying the support system in place for the franchisee.⁹⁵

4.4. Requirements for franchise agreements

The franchise contract is an agreement established between the franchisor and franchisee in which the terms and conditions of the relationship are contained together with the obligations of both parties towards one another respectively. This agreement may not be altered unless the parties agree to it and will continue in effect for the period of the franchise relationship.⁹⁶ The CPA requires that franchise agreements must be in writing, provide franchisees with a ten day cooling off period in which they can cancel the franchise agreement and sets out a list of information that must be contained in a franchise agreement. These formalities will now be examined hereinafter.

Agreement In writing

The franchise agreement must be in writing and it must be signed by the franchisee.⁹⁷ The agreement must also include any prescribed information or address any prescribed categories of information.⁹⁸ A further prerequisite in terms of this requirement is that the franchise agreement must comply with section 22 of the CPA, which is the right to information in plain and understandable language to enable the franchisee to comprehend the content of the agreement.⁹⁹

Cooling off period

In terms of section 7(2) of the CPA, franchisees have the right to cancel their franchise agreements within ten business days of signing. This right is commonly known as a 'cooling off period' and gives franchisees a chance to rethink their commitment once

⁹⁵ Regulation 3(4)(b).

⁹⁶ Woker 93.

⁹⁷ s 7(1)(a). See Melville 111.

⁹⁸ s 7(1)(b).

⁹⁹ This requirement is discussed in chapter 5 with regard to understandable language.

they have signed a franchise agreement. The franchisor may not impose cost and penalties to the franchisees when the latter decide to cancel the agreement in terms of this provision. The cancellation of the franchise agreement itself by franchisee must also be given to the franchisor in writing.

Contents of the franchise agreement

The CPA stipulates the minimum content that must be included in the franchise agreement. This list is quite extensive and requires some attention. The applicable regulation provides as follows:¹⁰⁰

- (1) A franchise agreement must have a statement at the commencement the first page that draws the franchisee's attention to the cooling off period as provided by section 7(2) of the CPA.
- (2) A franchise agreement must contain provisions which prevent
 - unreasonable or overvaluation of fees, prices or amounts.
 - conduct which is unnecessary or unreasonable in relation to the risks to be incurred by one party; and
 - conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.
- (3) A franchise agreement must contain a clause in terms of which the franchisor is not entitled to any undisclosed direct or indirect benefit or compensation, unless this is disclosed in writing, together with an explanation thereof.
- (4) A franchise agreement must contain the following information:
 - (a) the name and description of the goods and/or services which the franchisee is entitled to provide, produce, render or sell;
 - (b) the obligations of the franchisor;
 - (c) the obligations of the franchisee;
 - (d) a description of the applicable franchise business system;

¹⁰⁰ Regulation 2. See Van Eeden 219.

- (e) the direct or indirect consideration payable by the franchisee to the franchisor;
- (f) the territorial rights if any, granted to the franchisee;
- (g) a description of the site or premises and location from which the franchisee is to conduct the franchise;
- (h) the conditions under which the franchisee may transfer or assign the rights and obligations under the franchise;
- (i) a description of the trade mark or any other intellectual property owned by the franchisor or otherwise licenced to the franchisor which is, or will be used in the franchise and the conditions under which they may so be used;
- (j) if the agreement is related to a master franchise, the master franchisor's identity;
- (k) particulars of the initial and ongoing training and assistance provided by the franchisor and if the franchisor provides ongoing training for the duration of the franchise agreement as well as a statement that the particulars of such training and assistance will be provided to the franchisee as and when necessary;
- (l) the duration of the agreement and the terms of the renewal thereof provided that such terms and conditions are not inconsistent with the purpose and policy of the CPA;
- (m) where the franchise agreement provides that a franchisee must directly or indirectly contribute to an advertising, marketing or other similar fund, the franchise agreement must contain clauses informing the franchisee the particulars thereof;¹⁰¹
- (n) the effect of the termination or expiration of the franchise;
- (o) extension or renewal terms, or whether there is no option to renew or extend the agreement;

¹⁰¹ Particulars are contained in regulation 2(3)(m)(i)-(ix).

- (p) a written explanation of any terms and conditions not fully understood by the prospective franchisee if so requested by the prospective franchisee in writing;
- (q) the franchisor's legal name, trading name, registered office and franchise business office, street address, postal address, e-mail address, telephone number and fax number;
- (r) the name, identity number, town of residence, job titles and qualifications of the franchisor's directors or equivalent officers;
- (s) except where the franchisor is a company listed on a stock exchange, details of any proprietor, member or shareholder if they are different from the persons referred to in paragraph (r);
- (t) particulars of any restrictions imposed on the franchisee;
- (u) the nature and extent of the franchisor's involvement or approval in the process of site selection;
- (v) the terms and conditions relating to termination, renewal, goodwill and assignment of the franchise;
- (w) the main obligations of the franchisor in respect of initial and ongoing training to be provided;
- (x) confirmation that any deposits paid by the prospective franchisee will be deposited into a separate bank account and a description of how these deposits will be dealt with;
- (y) full particulars of the financial obligations of the franchisee in terms of the franchise agreement or otherwise related to the franchised business.

It should be borne in mind that a franchise agreement which is renewed after the general effective date is regarded as a 'new franchise agreement' in terms of regulation 2 and 3 of the Regulations of the CPA and must evenly comply in all respects with these regulations.¹⁰²

¹⁰² Van Eeden *Guide to the Consumer Protection Act* (2009) 230.

Chapter 5: Fundamental rights in terms of the Consumer Protection Act and franchise agreements

5.1	Introduction.....	28
5.2	The right to equality in the consumer market.....	29
5.3	The right to choose.....	30
5.4	The right to disclosure and information.....	32
5.5	The right to fair and responsible marketing	35
5.6	The right to fair and honest dealing	36
5.7	The right to fair, just and reasonable terms and conditions	37
5.8	The right to fair value, good quality and safety	41
5.9	Sections of the CPA that do not apply to franchises.....	43

5.1 Introduction

The first piece of legislation in South Africa to specifically regulate the law on franchises is the CPA. As mentioned earlier,¹⁰³ the CPA introduced various measurements to safeguard franchisees as ‘consumers’. Franchisors are considered as suppliers to their franchisees. In Chapter 2 of the CPA, the ‘Bill of Rights for Consumers’ provides certain remedies and ways of redress which in terms of the common law would not normally be available to aggrieved consumers.

Franchisees are now specifically included as ‘consumers’ in the CPA and it also entitle them to the rights as set out in Chapter 2 of the CPA. This chapter sets out a list of fundamental consumer rights, enforceable against a supplier. It should be noted that these rights are normally similar to those found in ordinary commercial agreements which involve for instance, sale of household appliances and the booking of holidays, rather than a business transaction.¹⁰⁴ As the CPA now applies specifically to franchises, and it is important to identify those particular sections in the CPA which apply to a

¹⁰³ As discussed in chapter 4.

¹⁰⁴ Woker *The Franchise Relationship Under the South African Law* (2012) 73.

franchise agreement, whilst certain other sections of the CPA do not apply to a franchise agreement.

It is also necessary to identify those agreements who are excluded from the definition of a 'consumer agreement'. These are 'agreements between a supplier and a consumer other than a franchise agreement'.¹⁰⁵ Unless specifically excluded, it must be accepted in general that the CPA will be applicable to all franchise relationships. Franchisees can therefore demand that franchisors abide by the applicable provisions of the CPA. An interesting remark made by Woker, is that franchisees are themselves suppliers, so although they are entitled to make certain demands of their franchisors, they are equally obliged to respect those rights of their consumers.¹⁰⁶

5.2 The right to equality in the consumer market

When acquiring goods and services from franchisors, franchisees have the right not to be unfairly discriminated against. The fundamental standard is that all franchisees should be treated equal, regardless of gender, race, socio economic status or culture.¹⁰⁷ Franchisors may not unfairly restrict or exclusively grant access to goods and services to a franchisee or a group of franchisees based on these aforesaid grounds.¹⁰⁸ Franchisors may not unfairly discriminate by prioritizing any franchisee or franchisee group over others when providing goods or services.¹⁰⁹ Franchisees have the right to quality goods and services and franchisors may not vary the quality of their goods and services to different franchisees in a biased fashion.¹¹⁰ Franchisees also have the right to the fair pricing of goods and services. This means that a franchisor cannot unfairly

¹⁰⁵ s 14, for instance, which deals with the expiry and renewal of fixed-term agreements that only applies to consumer agreements; accordingly it does not apply to franchise agreements.

¹⁰⁶ Woker 74.

¹⁰⁷ Factors of 'unfair discrimination' are set out in section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 and Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁰⁸ s 8(1)(a) & (b). See Melville *The Consumer Protection Act Made Easy* (2011) 35.

¹⁰⁹ s 8(1)(c).

¹¹⁰ s 8(1)(d).

charge different prices for the same goods and services to different franchisees based on any arbitrarily ground.¹¹¹

5.3 The right to choose

This right is particularly relevant to franchisees and include the following:

- the right to select suppliers;¹¹² and
- the right to choose and examine goods.¹¹³

The right to select suppliers

One of the principal objectives of the CPA is “to improve consumer awareness and information and encourage responsible and informed consumer choice and behaviour”.¹¹⁴ The right of the consumer to make an informed choice transforms a duty on the supplier to provide the consumer with choices that are meaningful concerning the supply of goods or services. The choices given by the supplier must comply with the provisions of the CPA.

Similarly section 13(1)(a) to (c) of the CPA determines that a franchisor may not offer the supply of goods or services conditional on the franchisee. This refers to:

- purchasing any other particular goods or services from that supplier;
- entering into an additional agreement or transaction with that same supplier or a designated third party; or
- agreeing to purchase any particular goods or services from another designated third party.

¹¹¹ s 8(1)(e).

¹¹² s 13. See Melville 113.

¹¹³ s 18 and 20. It is important to note that section 19, which relates to the delivery of goods and supply of services, specifically states that it does not apply to the supply of goods and services to franchisees. s 18 and 20 do not contain a similar exclusion therefore it must be assumed that these sections do apply to franchise agreements.

¹¹⁴ s 3(1)(e).

The practice by franchisors that, as part of their merchandising structure to compel franchisees to buy stock solely from them, or their designated suppliers in a bundling arrangement is prohibited.¹¹⁵ Section 13 of the CPA forbids bundling, unless the franchisor can show that:

- the convenience of the franchisee in having those goods or services bundled outweighs the limitation of the franchisee's right to choose;
- the bundling results in an economic benefit for the franchisee; or
- the bundled goods or services are offered separately and at individual prices.¹¹⁶

An additional exclusion for franchisors is if they require franchisees to buy goods or services from them on condition that such goods or services are reasonably associated to the branded products or services that are subject to the franchise agreement. These measures may be required when there is a need for quality control and uniformity of products and services or where franchisors are protecting their trademarks and goodwill.¹¹⁷ In most jurisdictions these arrangements are viewed as acceptable on the basis that they serve important business considerations.

The right to choose and examine goods

A franchisee may cancel a sale and return goods to the supplier and collect a full refund if the franchisee did not have an opportunity to inspect the goods before delivery or if the franchisee is not satisfied that the goods are of a type and quality that were agreed upon.¹¹⁸ These rights are not a substitution, but an addition to the rights which franchisees have concerning unsafe or defective goods or any other legal rights which they may have (such as the deviation of terms as agreed between parties in an agreement).¹¹⁹ Franchisees cannot, however, return goods if they have been partially or

¹¹⁵ Bundling entails selling, in a single transaction, two or more goods or services that could conceivably be sold separately.

¹¹⁶ s 13(1)(c). See Melville 92.

¹¹⁷ Woker 76.

¹¹⁸ Barnard The Influence of the Consumer Protection Act 68 of 2008 on Common Law of Sale (LLD dissertation 2013 UP) 76.

¹¹⁹ s 20(1).

entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.¹²⁰

The refund made by the franchisors to the franchisees is the price paid for the goods less any amount which may be charged because the goods were partially consumed or used. Franchisors may only charge a reasonable sum for use or partial consumption of the goods.¹²¹

In the event that franchisors deliver goods to franchisees which the franchisees have not ordered or if they deliver a larger quantity than requested, these goods are considered as 'unsolicited goods' and franchisees may keep the goods without payment. This will not apply in situations where the franchisor has made an honest mistake and attempts to recover such goods. In such an event franchisees may also not prevent franchisors from recovering these goods.¹²²

In terms of section 21 of the CPA, when the goods are supplied by the franchisor to the franchisee it constitute unsolicited goods, franchisors may not request payment from the franchisee for such goods.¹²³

5.4 The right to disclosure and information

Franchisees have the right to:

- Information in plain and understandable language;¹²⁴
- disclosure of prices of goods and services;¹²⁵
- correct product labelling and trade descriptions;
- be informed if goods are reconditioned or are grey market goods; and

¹²⁰ s 20(3)(b).

¹²¹ s 20(6).

¹²² Barnard 79.

¹²³ Woker 78.

¹²⁴ s 22.

¹²⁵ s 23. See Melville 42.

- be provided with sales records for each transaction setting out the information prescribed by the CPA.

Plain and understandable language

Franchise agreements must be reduced to writing and they must be in plain and understandable language.¹²⁶ In other words, a franchisee with no or little experience in the franchise trade must be able to comprehend the content, terms and consequences of the agreement. As a result hereof consumers are therefore placed in a better position.¹²⁷ According to Gouws “plain language” is described as ‘language that is direct and straightforward, designed to deliver its message to its intended readers clearly and avoids convoluted sentence construction, and uses only as many words as are necessary. It is understood by the audience the first time they read or hear it’.¹²⁸ Plain language has many benefits. It can increase transparency, openness, disclosure and contribute to higher levels of procedural fairness.¹²⁹ The requirement of plain language may have the consequences of striking out phrases such as ‘domicilium citandi et executandi’, ‘herewith’, ‘forthwith’ and ‘whereas’.¹³⁰ This will also entail the avoidance of ‘small print’ in agreements.¹³¹ Section 22(2) of the CPA contains a list of factors to be taken into consideration when determining whether a franchise agreement complies with this requirement of plain and simple language. These factors are for example:¹³²

- the context, comprehensiveness and consistency of the document;
- the organization, form and style of the document;
- the vocabulary, usage and sentence structure of the document; and

¹²⁶ s 7(1)(a) read with section 22.

¹²⁷ Stoop “Plain Language and Assessment of Plain Language” (2011) *Int J. Private Law* 329. On the other hand, some criticism has been raised. See Barnard 178.

¹²⁸ Gouws “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provision of the Consumer Protection Act” (2010) *SA Merc LJ* 81..

¹²⁹ Stoop (2011) *Int J. Private Law* 339.

¹³⁰ Gouws (2010) *SA Merc LJ* 94.

¹³¹ Opperman *Understanding the Consumer Protection Act* (2012) 107.

¹³² s 22(2).

- the use of any illustrations, examples, headings or other aids to reading and understanding.¹³³

Disclosure of price

The disclosure of the purchase price is essential to the franchise relationship when franchisors provide franchisees with brochures or price lists.¹³⁴ The price of the goods or services must be included in the documents and franchisors may not demand a higher payment than what was advertised.¹³⁵ The only exception is where franchisors can prove that there is an inadvertent and obvious error.¹³⁶ Section 23(5) of the CPA specifies the manner in which a price must be disclosed.¹³⁷

Product labelling and trade description

Section 24 of the CPA protects the franchisee against any misleading trade descriptions or trade descriptions that have been altered. A trade description is defined in section 1 of the CPA as a description, statement or other indication, other than a trade mark, which relates to:

- the number, quantity, measure, weight or gauge of any goods;
- the name of the producer of the goods;

¹³³ Also, the National Consumer Commission may publish guidelines in which it will outline methods of assessing whether a document satisfies the plain language test.

¹³⁴ Woker 79.

¹³⁵ s 23(6).

¹³⁶ s 23(9). See Melville 42.

¹³⁷ A price is adequately displayed to a consumer if, expressed in the currency of the Republic, is— (a) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale; (b) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question; or (c) published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if — (i) a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed; or (ii) in any other case, the catalogue, brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date.

- the ingredients of which the goods consist or material from which the goods are made;
- the place or country of origin of any goods;
- the mode of manufacturing or producing any goods; and
- any goods being the subject of any patent, privilege or copyright.

Franchisors must abstain from providing goods to franchisees when they know or could sensibly determine that the trade descriptions are misleading.¹³⁸

Sales records

When supplying goods or services a franchisor must provide a written sales record to their franchisee.¹³⁹ These records must contain the supplier's name, address and VAT registration number, a description of the goods or services supplied, the unit price of the goods or services, the quantity of the goods or services, the total price of the transaction and the amount of any applicable taxes.¹⁴⁰

5.5 The right to fair and responsible marketing

The CPA protects consumers even before they enter into a transaction and even if they do not ultimately enter into it.¹⁴¹ This fundamental right sets a new standard for the marketing of goods and services in order to protect the franchisee as a consumer. This right also includes the regulation of certain marketing practices such as bait marketing, direct marketing and promotional competitions. In terms of section 29 of the CPA, franchisors may not market the franchise in a manner that is misleading, fraudulent or deceptive in any way including in respect of the nature, properties, advantages or use of the franchise, the manner in or conditions on which the franchise may be supplied and the price at which the franchise or any franchise goods may be supplied.

¹³⁸ s 24(2).

¹³⁹ s 26. See Woker 80.

¹⁴⁰ s 26(3).

¹⁴¹ Lake "Marketing Practices Under the CPA" (2011) *De Rebus* 51.

In terms of section 32 of the CPA, negative option marketing is prohibited. This means that a franchisor may not influence a franchisee to receive goods or services or to enter into or modify an agreement, on the basis that the goods or services will be supplied or the agreement or modification will automatically come into effect, unless the franchisee expressly denies the offer.

5.6 The right to fair and honest dealing

This fundamental right entails franchisees protection against:

- unconscionable conduct;¹⁴² and
- false, misleading or deceptive representations.¹⁴³

Unconscionable conduct

A franchisor is not allowed to use physical force against a franchisee or any form of coercion or duress in:

- the marketing or supply of any goods or services;
- the negotiation of a franchise agreement;
- the enforcement of a franchise agreement;
- the demand for or collection of payment for goods; or
- the recovery of goods from a franchisee.

The CPA defines ‘unconscionable conduct’ in a wide sense hence the concept is not limited to the provisions of the CPA.¹⁴⁴ By labelling such behaviour unconscionable and void, the CPA levels the playing field in order to ensure fair and just conduct, terms and conditions.¹⁴⁵

¹⁴² s 40.

¹⁴³ s 41.

¹⁴⁴ Hawthorne “Public Governance: Unpacking the Consumer Protection Act 68 of 2008” (2012) *THRHR* 358.

¹⁴⁵ Hawthorne (2012) *THRHR* 360.

In addition to the above mentioned, a franchisor may not knowingly take advantage of a franchisee's inability to protect the franchisee's own interest because of a disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.¹⁴⁶ The word 'knowingly' implies that the provision only applies if franchisors intentionally exploit franchisees' disabilities. There is however no general obligation on franchisors to confirm that franchisees have a full understanding of the nature and significance of each and every aspect of the contract which they are entering into.¹⁴⁷

In the Canadian case, *Ellis v Subway Franchise Systems of Canada Ltd*¹⁴⁸ the issue regarding fair and honest dealing was decided. The court held that before it can set a franchise contract aside, there must be some sort of evidence that shows fraud, duress or some abuse of inequality of bargaining power was present. The important part of this decision was that the court accepted that the terms of franchise agreement may be burdensome; but that alone does not constitute sufficient grounds to set the contract aside.

5.7 The right to fair, just and reasonable terms and conditions

Franchisees have the right to:

- protection against unfair contractual terms;
- obtain prior notice for certain terms and conditions; and
- refuse prohibited terms or conditions.

Section 48 of the CPA introduces the right to fair, just and reasonable terms and conditions. It is submitted that this section qualifies as the South African equivalent of 'General Clause', or 'Generalklausel' as the Germans would call it.¹⁴⁹ This section

¹⁴⁶ s 40(2).

¹⁴⁷ Woker 81.

¹⁴⁸ *Ellis v Subway Franchise Systems of Canada Ltd* (2000) 8 BLR.

¹⁴⁹ Hawthorne (2012) *THRHR* 361.

provides, amongst others that franchisors may not charge franchise, marketing or other fees relating to the franchise at a price which is unfair. In addition, the terms of the franchise agreement itself must not be unfair. Franchisors may not, for instance require franchisees to abandon any of their rights or to undertake any obligation or waive any liability by the franchisors on terms that are unfair. This is also applicable to any other terms that are preconditions to entering into the franchise agreement.

Guidelines for 'unfair terms'

Section 48 of the CPA that defines the concept of 'unfair terms' appears to be wide and uncertain. Consequences of this will be that only the courts will be able to interpret whether a term of an agreement is indeed unfair in terms of the CPA. Guidance that the courts can take into consideration are set out in section 48(2) of the CPA when determining 'fairness'. Franchise agreements or any other related terms will be viewed as unfair or unjust if:

- they are excessively one-sided in favour of franchisors;
- the terms of the agreement are so adverse to franchisees as to be inequitable;
- the franchisees relied on false, misleading or deceptive representations or statements of opinion provided by or on behalf of franchisors, to their detriment; and
- the franchise agreements contained certain terms which should have been drawn to the franchisees' attention and which were not.

Section 52(2) of the CPA read together with section 48 of the CPA empowers the court to strike out unfair terms¹⁵⁰. When a court has to decide on this matter the following factors may in addition be taken into consideration: the fair value of the franchise; the circumstances of the agreement; the nature of the parties to the agreement; their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position of the parties.

¹⁵⁰ Naude "The Consumer's Right to Fair, Reasonable and Just Contract Terms Under the New Consumer Protection Act in Comparative Perspective" (2009) *SALJ* 514.

Even when considering all these factors, it is plausible that it would be still difficult for a franchisee to convince a court that the terms in the franchise agreement are excessively unfair.¹⁵¹ This is the consequences of general legislation which does not specifically deal with franchises under these circumstances. In addition to this, many of the terms that may initially seem to be unfair, may be regarded as necessary in the franchise trade for the franchisor to protect its legitimate interest or the whole network, for instance when terminating the franchise agreement.

Notice required for certain terms and conditions

A franchisor must draw to the attention of the franchisee any limitation of risk or liability of the supplier or an assumption of risk or liability by the franchisee. The franchisee must be given adequate prior opportunity to consider the warning.¹⁵² The Act does not stipulate the manner in which these terms should be brought to the attention of a consumer. However, the predominant rule is that the terms must be drawn to the attention of consumers in a manner which is likely to attract consideration and observance. It is submitted that it should not be sufficient for these terms to be merely printed on the contractual documents even if that is done in contrasting colour or font.¹⁵³ According to Woker,¹⁵⁴ a franchisor may avoid a dispute regarding unconscionable conduct, if he could discuss and record these type of terms with the franchisee in a fair amount of detail during the process of conducting the negotiations for the franchise agreement.

Prohibited terms

¹⁵¹ Woker 84.

¹⁵² s 49.

¹⁵³ Naude (2009) SALJ 508.

¹⁵⁴ Woker 85.

The CPA provides a list of certain terms that may not be included in agreements.¹⁵⁵ This list is normally referred to as a 'black' list.¹⁵⁶ The blacklist introduced in section 51 of the CPA was largely inspired by section 90 of the National Credit Act¹⁵⁷ on unlawful provisions.¹⁵⁸ Adapting this list to be incorporated in franchising agreements means a number of terms and conditions are prohibited. These include terms that:

- waive any of a franchisee's rights under the CPA;
- avoid a supplier's duties under the CPA;
- contract out of liability for gross negligence;
- make franchisees pay damages/ assume risk for handling goods;
- falsely state that no representation or warranties have been made;
- require franchisees to forfeit money if they act in terms of the CPA;
- an undertaking by franchisees to hand their identity document, credit or debit card to the franchisor, or to provide their personal identification code number to access their bank account;
- an undertaking by the franchisee to sign in advance any documentation relating to the enforcement of the agreement; and
- set out a pre-determined value of costs relating to the enforcement of the agreement.

However, in the decision of *De Beers v Keyser*,¹⁵⁹ it was held that a term in which a borrower was expected to hand over her ATM card with her PIN was not contrary to public policy and therefore enforceable. The specific blacklisting of such terms by the CPA are therefore welcomed.

The inclusion of prohibited terms in the franchise agreement will render them null and void. If the prohibited term cannot be excluded from the agreement, the whole

¹⁵⁵ s 51.

¹⁵⁶ Woker 85.

¹⁵⁷ 34 of 2005.

¹⁵⁸ Several of the paragraphs of s 51(1) of the CPA are directly copied from section 90 of the National Credit Act.

¹⁵⁹ *De Beers v Keyser* (2002) 1 SA 827 (SCA).

agreement will be regarded as null and void.¹⁶⁰ It should also be noted that the inclusion of these prohibited terms in an agreement constitutes 'prohibited conduct' with the effect that this conduct can be referred to the National Consumer Commission for investigation.

5.8 The right to fair value, good quality and safety

Franchisees have a right to:

- demand quality service from their franchisors;
- safe, good quality goods;
- receive warnings on the fact and nature of risks; and
- claim damages for injuries caused by unsafe or defective goods.

Quality goods and services

When a franchisor undertakes to perform any services for a franchisee, he is obliged to perform and complete those services timeously.¹⁶¹ If there is going to be an unavoidable delay in the performance of the service, the franchisor must notify the franchisee in advance. Furthermore, the franchisors will still be obliged to perform those services in a manner and quality that franchisees are entitled to expect.

If a franchisor fails to perform services properly in the manner expected, franchisees may demand from the franchisor to correct any defect in the quality of the services performed, alternatively the franchisees may ask for a full refund or a reasonable proportion of the price paid.¹⁶² The CPA in section 53 provides that a defect with regard to franchises entails any material imperfection in the performance of the service that renders the results of the service less acceptable than what a franchisee generally

¹⁶⁰ s 52(4)(a).

¹⁶¹ s 54. See Melville 100.

¹⁶² s 54(2).

would expect in the circumstances. Van Eeden,¹⁶³ however, states that the definitions in terms of section 53 of the CPA (and especially the definition of ‘defect’) would depend on evidence about the imperfection or characteristics of the service, and also evidence of the quality of the service without the imperfections or characteristics.

Damages for defective goods

The provisions in the CPA that introduced the largest impact is in the area of product liability.¹⁶⁴ Under the common law, the general rule regarding damages is captured by the phrase ‘the loss lies where it falls’.¹⁶⁵ The loss of the damage is thus on the person who suffered it, unless the law permits another party to be liable for the damages.¹⁶⁶ There is rarely a direct contractual link between the producer (or supplier) of the product and the consumer.¹⁶⁷ The consumer has his or her contractual remedies and remedies in the law of delict, for recourse.¹⁶⁸ Under the law of delict, all the elements of a delict have to be proven to confirm the supplier’s liability.¹⁶⁹

It is normally a difficult onus for a consumer to prove fault on the part of the supplier.¹⁷⁰ In the decision of *Wagener v Pharmacare Ltd*,¹⁷¹ the Supreme Court of Appeal was not prepared to recognize strict product liability and confirmed the requirement of fault for product liability. The court concluded that in cases in which strict product liability is to be imposed, it is a task for the legislature to introduce same. This is exactly what the introduction of the CPA achieved.

¹⁶³ Van Eeden *Guide to the Consumer Protection Act* (2009) 66.

¹⁶⁴ Melville *The Consumer Protection Act Made Easy* (2011) 24.

¹⁶⁵ Zimmermann *The Law of Obligations* (1996) 154.

¹⁶⁶ Visser *Unjustified Enrichment* (2008) 499.

¹⁶⁷ Jacobs, Stoop and Van Niekerk “Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis” (2010) *PELJ* 382.

¹⁶⁸ Barnard “The Influence of the Consumer Protection Act 68 of 2008 on the Warranty Against Latent Defects, Voetstoets Clauses and Liability for Damages” (2012) *De Jure* 478.

¹⁶⁹ Neethling, Potgieter and Visser *Law of Delict* (2001) 292.

¹⁷⁰ Barnard (2012) *De Jure* 479.

¹⁷¹ *Wagener v Pharmacare Ltd* (2003) 4 SA 285 (SCA).

The CPA introduced a form of strict liability for those in the product supply chain.¹⁷² The producer, importer, distributor or retailer is liable for any harm caused as a consequence of supplying defective goods irrespective of the lack of any negligence on their part.¹⁷³ Therefore, franchisors who supply franchisees with goods directly will be strictly liable for any damages franchisees may suffer as a result of the supply of goods that were defective. Damages for which franchisors may be held liable includes the death, injury or illness to a natural person, physical damage or loss to property or any economic loss due to the aforesaid.¹⁷⁴ A franchisor may only be able to avoid this liability against claims by franchisees by proving that it is '*unreasonable to expect them to have discovered the unsafe product characteristics, failure, defect or hazard having regard to their role in marketing the goods*'.¹⁷⁵

5.9 Sections of the CPA that do not apply to franchises

Although the CPA applies to franchise agreements, there are sections in the Act that specifically do not apply to franchises. These are:

*Expiry and renewal of fixed-term agreements*¹⁷⁶

Where a consumer agreement is for a fixed term, the supplier is obligated to inform the consumer in writing or in any other recordable form, of the pending expiry date.

Consumer's right with respect to delivery of goods or supply of services

¹⁷² s 61. See Melville 24.

¹⁷³ Botha & Joubert "Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability?" (2011) *THRHR* 313.

¹⁷⁴ s 61(5).

¹⁷⁵ s 61(4)(c).

¹⁷⁶ S 14. This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value. Therefore, it includes a transaction between a franchisor and a franchisee if the franchisee is a legal entity. However, the section would apply to a franchisee trading in his own name.

According to section 19 of the CPA the parties are free to agree upon the details of delivery of goods or the performing of services. If there is no such agreement, it becomes an implied condition that the supplier is responsible for delivery of the goods or performance of service of every transaction.

Catalogue selling

Where the agreement for the supply for goods or services was not entered into in person and the consumer did not have the opportunity to inspect goods before concluding an agreement, a supplier must disclose information as set out in section 33.

Trade coupons and similar promotions

Section 34 of the CPA provides that a person making a promotional offer must be able to fulfill it and meet the reasonably expected demands resulting from the offer.

Referral selling

Section 38 of the CPA prohibits the offering or supplying goods or services on the basis that the consumer will receive a rebate or commission if he provides the supplier with names is.

Over-selling and over-booking

In terms of section 47 of the CPA supplier may not accept payment for any goods or service unless the supplier has a reasonable basis for stating that he was able to supply those goods or provide those services.

Chapter 6: Remedies

6.1	Introduction.....	45
6.2	Governing bodies	46
6.3	Enforcement	50

6.1. Introduction

In the past resolving disputes are known to be difficult in the franchise industry. Unless the parties could come to an agreement about their disputes, they had no other choice than to approach the court for relief.¹⁷⁷ To guarantee that aggrieved consumers have access to redress is a universal consumer right and also one of the fundamental aims of the CPA.¹⁷⁸ Most franchisees do not have the means to approach the court and make use of expensive litigation. The franchisees are usually in a weaker financial position to their franchisors, that normally have ample financial resources to finance litigation.¹⁷⁹

When franchisees were confronted with disputes, they approached the Consumer Affairs Committee (CAFCOM) in order to receive some kind of assistance in terms of the Consumer Affairs Act.¹⁸⁰ There was therefore a need for the development of a distinct body of law that is specifically designed to deal with franchises.¹⁸¹

Although the Competition Act could also be used by franchisees relating to competition disputes, this will not be the focus of this dissertation. The emphasis will be rather on the remedies available to a franchisee in terms of the provisions of the CPA. On 25 July 2011, the National Consumer Commissioner (NCC) published a document namely 'NCC Final Enforcement Guidelines' in which it describes the different consumer matters that the NCC may deal with. In terms of guideline 2.4 the NCC will have

¹⁷⁷ Woker *The Franchise Relationship Under South African Law* (2012) 148.

¹⁷⁸ Melville *The Consumer Protection Act Made Easy* (2011) 125.

¹⁷⁹ Woker 148.

¹⁸⁰ *FTCK Consultants CC v Shoprite Checkers Ltd* (2004) 2 SA 504 (T).

¹⁸¹ Woker "Franchising and Restraints of Trade – Restraining Ex-franchisees From Competing With the Franchise Network" (2005) *Obiter* 13.

jurisdiction over matters concerning franchise transactions irrespective of the value of the transaction. One has to assume that the remedies of a normal consumer under the CPA will then similarly apply to a franchisee. This means that franchisees that has disputes with amongst others, a franchisor, can attend to any manner of redress as provided for by the CPA.

6.2. Governing bodies

To make the CPA more accessible and enforceable, it introduced governing structures for consumers to enforce their rights. This include the National Consumer Commission (The Commission) and the National Consumer Tribunal (The Tribunal) which has the primary responsibility to ensure compliance with the CPA. The ordinary jurisdictions of the courts are however not excluded by the CPA.¹⁸² For instance, damages or unfair contractual terms may still be dealt with by the ordinary courts if there is no agreement between the parties to resolve their differences elsewhere.

The National Consumer Commission (NCC)

The NCC has extensive powers and responsibilities in order to ensure proper enforcement of the Act.¹⁸³ This commission is an independent legal entity. The chief executive officer of the National Consumer Commissioner is responsible for the functioning of the Commission and may appoint inspectors to investigate complaints.

Proceedings before the Commission may be instituted when an aggrieved party launch a complaint with the Commission claiming that someone else has acted in a manner inconsistent with the Act,¹⁸⁴ or the Commission may institute proceedings upon its own initiative.¹⁸⁵ Section 72 of the CPA sets out a list of possibilities to proceed after the

¹⁸² Woker 148.

¹⁸³ Nagel *Commercial Law* (2011) 754. See section 99 for the list of responsibilities.

¹⁸⁴ s 71.

¹⁸⁵ Horn "I Have a Complaint – What now?" (2011) *De Rebus* 53.

Commission received or accepted a complaint from a franchisee. These includes the following:

- (a) issue a notice of non-referral to the complainant in the prescribed form;
- (b) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court;
- (c) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or
- (d) direct an inspector to investigate the complaint as quickly as practicable, in any other case.

After concluding an investigation into a complaint, the Commission may issue a notice of non-referral to the complainant or if the Commission is of the opinion that a criminal offence has been committed by for instance, a franchisor, it may refer the matter to the National Prosecuting Authority.¹⁸⁶ Alternatively, if the Commission believes that it is appropriate that the conduct of the franchisor be addressed, it may refer the matter to the equality court where appropriate, or propose a draft consent order in terms of section 74 of the CPA, or make a referral to the consumer court or issue a compliance notice.¹⁸⁷

Once a matter has been investigated by the Commission and the Commission as well as the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court may confirm that agreement as a consent order.¹⁸⁸ This order may also include an award for damages.¹⁸⁹

¹⁸⁶ s 73(1). There has been criticism regarding the enforcement of this section and criminal proceedings as the implementation does not necessarily work. See Du Plessis "Enforcement and Execution of Consumer Courts" (2010) *SA Merc LJ* 521.

¹⁸⁷ s 73(1)(c).

¹⁸⁸ s 74(1).

¹⁸⁹ Van Heerden and Barnard (2010) *IAITL* 651.

The National Consumer Tribunal

The National Consumer Tribunal was established in terms of section 26 of the National Credit Act 34 of 2005. The Tribunal meets periodically to also deal with consumer matters that fall under the CPA. The Tribunal is a juristic person and has jurisdiction on matters throughout South Africa.¹⁹⁰ Any decision made by the Tribunal will be regarded as if it was an order made by the High Court of South Africa and is binding on the Commission, the Consumer courts, alternative dispute resolution (ADR) agents and the Magistrates' courts.¹⁹¹

Should the Tribunal find for instance that the franchisor has been involved in unauthorized conduct, it may declare such conduct to be in contravention of the CPA and also impose an administrative fine against such franchisor which may not exceed the greater of 10% of the respondents' annual turnover during the preceding financial year or R1 000 000 whichever the greater.¹⁹² When determining an appropriate fine, the Tribunal must consider the following factors:¹⁹³

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the franchisor;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the franchisor co-operated with the Commission and the Tribunal; and
- whether the franchisor had previously been found in contravention of the Act.

The abovementioned factors are identical to the factors which are normally considered by the Competition Tribunal when imposing administrative penalties on parties who

¹⁹⁰ Nagel 755.

¹⁹¹ Woker 154.

¹⁹² s 112(2). See Melville 142.

¹⁹³ s 112(3).

contravene the Competition Act.¹⁹⁴ The purpose of these factors was to establish a benchmark of aggravating and mitigating circumstances in order to create a balanced approach in all similar statutes.¹⁹⁵

Alternative dispute resolution

“*alternative dispute resolution agent*” (ADR Agent) means—

- (a) an ombud with jurisdiction;
- (b) an industry ombud accredited in terms of section 82(6) of the CPA; or
- (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud.¹⁹⁶

An ADR agent can resolve a dispute between a franchisee and franchisor, if the parties so agree thereto. An ADR agent can be approached directly by the parties,¹⁹⁷ alternatively the dispute can be referred by the Commission after a complaint was received and investigated. If the ADR agent succeeds in resolving the dispute, the resolution or order may be recorded. This order may include an award for damages.¹⁹⁸ This order can be submitted to the Tribunal or High Court and made a consent order if the parties agree to it.¹⁹⁹

If the ADR agent decides that there is no reasonable prospect in resolving the dispute through the ADR process, the agent may dismiss the process and the franchisee may then refer the matter to the Commissioner.²⁰⁰

¹⁹⁴ 89 of 1998.

¹⁹⁵ Competition Commission v Pioneer Foods (Pty) Ltd (2010) ZACT 9.

¹⁹⁶ s 1.

¹⁹⁷ Van Heerden and Barnard (2010) *IAITL* 653.

¹⁹⁸ Melville 128.

¹⁹⁹ *Ibid.*

²⁰⁰ Melville 128.

Consumer courts

The CPA provides for various ways in which a consumer may apply to the court for relief against a wrongdoer. The CPA defines both concepts of ‘court’ and ‘consumer court’. It is important to note that the definition of a ‘court’ does not include a consumer court. Therefore, a ‘court’ should be regarded as a High Court, Magistrates’ Court or Small Claim Court.²⁰¹ The definition of a ‘consumer court’ refers ‘a body of that name, or a consumer tribunal, that has been established in terms of applicable consumer legislation’.²⁰²

Currently, only a few consumer courts have been established in South Africa, which is a cause for concern to the consumer.²⁰³ Legal representation is not required for a franchisee when approaching a consumer court, as each court has its own individual ‘consumer protector’ who is appointed to act in the interest of the consumers.

6.3. Enforcement

In law, a person must have locus standi, that is, the legal right to enforce or litigate on any matter or issue or complaint on behalf of any entity or on behalf of himself.²⁰⁴ Any of the following persons may, in any matter provided for in the CPA, approach the court, the National Consumer Tribunal or the National Consumer Commission alleging that a right entrenched in the CPA has been infringed, impaired or threatened or that prohibited conduct has occurred or is occurring:²⁰⁵

- a person acting on his or her own behalf;
- an authorized person acting on behalf of another person who cannot act in his or her own name;

²⁰¹ Van Heerden and Barnard (2010) *IAITL* 653.

²⁰² s 1.

²⁰³ Du Plessis (2010) *SA Merc LJ* 518.

²⁰⁴ Van Heerden & Barnard “Redress for consumers in terms of The Consumer Protection Act 68 of 2008: A Comparative Perspective” (2010) *Private Law: Rights Duties & Conflicts (IAITL)* 649.

²⁰⁵ s 4.

- a person acting as a member of or in the interest of, a group or class of affected persons;
- a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- an association acting in the interest of its members.

When a matter is brought before the National Consumer Tribunal or a court they must develop the common law as is necessary to improve the realization and enjoyment of consumer rights.²⁰⁶ The Tribunal and court are also obliged to promote the spirit and purpose of the CPA and make appropriate orders in order to give realization to the rights of the consumers.²⁰⁷ It is again important to note that the court with the jurisdiction to make such orders include the High Court and the Magistrate's Court, as the definition of 'court' in the CPA merely states that a court does not include a consumer court.²⁰⁸

²⁰⁶ s 4(2)(a).

²⁰⁷ s 4(2)(b). See Van Eeden *Consumer Protection Law in South Africa* (2013) 455.

²⁰⁸ s 1.

Chapter 7: Conclusion

The promulgation of the Consumer Protection Act has made major impact on development of consumer protection in South Africa. It had a substantial influence in the relationship between consumers and businesses with the result that the consumer obtained more protection in compliance with the primary aim of the CPA.²⁰⁹ More in particular, it also impacted significantly on the law of franchising in South Africa.²¹⁰

Although franchisees were afforded some protection in terms of general legislation, the franchise relationship was not regulated in detail. The CPA which now includes 'franchisees' within the definition of consumers neutralized the economic inequality between franchisors and franchisees. The fundamental consumer rights afforded to franchisees by the CPA empowers franchisees to protect their interests within a legal framework.

Section 69 of the CPA provides for the enforcement of rights of consumers and franchisees. These remedies for aggrieved franchisees level the playing field in the franchising industry and require franchisors to comply with the provisions of the CPA. Previously franchisees were generally not in the financial position seek relief in the High Court and attend to expensive litigation. By making use of the alternative remedies in terms of the CPA instead of the conventional court processes, the enforcement of the consumer rights became more economical.²¹¹

As set out *supra*, South Africa saw the establishment of the Franchise Association of South Africa (FASA). Unfortunately, FASA's role has been very limited, mainly because it is a voluntary body and is dependent on the members' voluntary compliance of its rules.²¹² This has impacted on the effectiveness of that association. Furthermore many of the franchises in South Africa are not members of FASA. Popular belief has it that

²⁰⁹ Stadler "The Consumer Protection Act – a Short Introduction" *De Rebus* (2010) 43.

²¹⁰ Louw "The CPA and Franchise Agreements" (2011) *Without Prejudice* 32.

²¹¹ Du Plessis "Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training" (2007) *Journal for Juridical Science* 53.

²¹² Woker "Franchising – The Need for Legislation" (2005) *SA Merc LJ* 53.

FASA's principal objective is only to protect the interest of the franchisors. This has however been denied by FASA.²¹³ Woker²¹⁴ suggests that FASA or a body with a similar code of conduct should be authorized under the CPA to act as an ombud scheme for franchises to deal with disputes referred to this body for resolution. This will have the effect that disputes in the franchising industry would be subject to a system of self-regulation and an opportunity can be created within the franchising sector to govern itself.²¹⁵

With the development of franchising law in South Africa similar legal principles on the law of franchising as developed in the United States and Australia were adopted in our local legislation. This is possibly due to similar needs that were experienced in the franchise industry elsewhere in the world. Governing bodies dealing with franchise disputes were established in South Africa similar to those in the US and in Australia. This enabled our courts to also consider appropriate international law and jurisprudence when interpreting the CPA.

It is the object of our law that the relationship between the franchise parties should be fair and equal. A great deal of discussions concerning franchise agreements concentrated on protection of franchisees and problems experienced by them. Nevertheless, it is also essential that the interest of the franchisors should be brought into consideration in order not to favour franchisees. Legislation must be to protect both the franchisor and franchisee and to balance the relationship between the parties based on fairness to both parties.²¹⁶

It is submitted that for the duration of the franchise relationship, the parties should be governed by obligations of mutual good faith, especially in a manner that also protects the franchise trade secrets or brand name.²¹⁷ The over regulation of the franchising industry may impact negatively on the trade if it interferes with the concept of free

²¹³ Ibid.

²¹⁴ Woker *The Franchise Relationship Under South African Law* (2012) 236.

²¹⁵ Ibid.

²¹⁶ Woker (2005) *SA Merc LJ* 55.

²¹⁷ Brown and Cohen "Franchise Misuse" (1972) *Notre Dame Law Review* 1163.

market principles. It is understandable that a franchisor would like to protect its trademark and therefore drive 'a hard bargain',²¹⁸ but if its conduct involves unconscionable conduct it will become unacceptable and need to be regulated. On the other hand, a franchisee that is incapable of doing business successfully should not be entitled to rely on a legal system to protect his or her inabilities.

In *Cancun Trading v Seven-Eleven Corporation*,²¹⁹ the Tribunal examined the true nature of franchising. It decided that franchising does not constitute the traditional concept of agency. It correctly found that the franchisee invests his own capital into his own business, pays and is liable for operating expenses, absorbs his own losses and is entitled to enjoy its net profits. Therefore franchising offers the franchisees the freedom to own, manage and to direct their own business while having the support of an established business concept.²²⁰ Subject to reasonable regulations by the franchisor, the franchisee must be viewed as a fortunate individual owner of an independent business and therefore entitled to the full protection of that interest which the law affords to every other businessman.²²¹

Finally, it is submitted that the CPA introduced a practical mechanism in which to regulate the relationship between a franchisor and franchisee. When drafting the CPA the legislature attempted to balance the bargaining power between the parties. Given time, the regulatory framework of the franchise industry will develop and produce jurisprudence to create a better (and maybe self-regulatory) system that will be in the best interest of both the franchisor and franchisee and will give effect to universal rights that will compare favourably with other jurisdictions elsewhere in the world.

²¹⁸ Woker (2005) *SA Merc LJ* 55.

²¹⁹ *Cancun Trading No 24 CC v Seven-Eleven Corporation SA (Pty) Ltd* (unreported, case no 18/IR/Dec99).

²²⁰ Lister "The Competition Act and Franchising: Some Issues Surveyed (2002) *JBL* 32.

²²¹ Brown "Franchising: a Fiduciary Relationship" *Texas Law Review* (1970) 675.

Bibliography

Books

Asbill and Goldman *Fundamentals of International Franchising* (2001)

Brassey *Competition Law* (2002)

Cherasky *The Franchising Handbook* (1993)

FASA *How to Franchise Your Business* (2010)

Hall and Dixon *Franchising* (1988)

Hutchinson *Kontraktereg in Suid Afrika* (2010)

Melville *The Consumer Protection Act Made Easy* (2011)

Mendelsohn *The Guide to Franchising* (1992)

Nagel *Commercial Law* (2011)

Neethling, Potgieter and Visser *Law of Delict* (2001)

Opperman *Understanding the Consumer Protection Act* (2012)

Otto and Otto *The National Credit Act explained* (2013)

Van Eeden *Consumer Protection Law in South Africa* (2013)

Van Eeden *Guide to the Consumer Protection Act* (2009)

Visser *Unjustified Enrichment* (2008)

Woker *The Franchise Relationship Under the South African Law* (2012)

Zimmermann *The Law of Obligations* (1996)

Legislation

Constitution of the Republic of South Africa, 108 of 1996

Competition Act, 89 of 1998

Consumer Affairs Act, 71 of 1988

Consumer Protection Act, 68 of 2008

Labour Relations Act, 66 of 1995

National Credit Act, 34 of 2005

Case Law

Astram Financial Services Pty Ltd v Bank of Queensland Ltd (2010) FCA 101

Bertico Inc v Dunkin' Brands Canada Ltd (2012) QCCS 2809

Cancun Trading No 24 CC v Seven-Eleven Corporation SA (Pty) Ltd (unreported, case no 18/IR/Dec99)

Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd (2002) ZASCA 66

Competition Commission v Pioneer Foods (Pty) Ltd (2010) ZACT 9

FTCK Consultants CC v Shoprite Checkers Ltd (2004) 2 SA 504 (T)

De Beer v Keyser (2002) 1 SA 827 (SCA)

Ellis v Subway Franchise Systems of Canada Ltd (2000) 8 BLR

Fairview Donut Inc v The TDL Group Corp (2012) ONSC 1252

Holmdene Brickworks (Pty) Ltd v Roberts Constructions Co Ltd (1997) 3 SA 670 (A)

Konyn v Special Investigating Unit (1991) 1 SA 1001 (TK)

Pronuptia v Schillgallis (1986) ECR 353

Wagener v Pharmacare Ltd (2003) 4 SA 285 (SCA)

Journal articles

Adler and Laidhold “Assessing Materiality in Franchise Disclosure Documents: A Canada – U.S Analysis” (2011) *Franchise Law Journal* 245.

Barnard “The Influence of the Consumer Protection Act 68 of 2008 on the Warranty Against Latent Defects, Voetstoots Clauses and Liability for Damages” (2012) *De Jure* 455.

Botha “Caveat Vendor: The Consumer Protection and typical property transactions” (2009) *PLD* 3.

Botha & Joubert “Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? – a Comparative Analysis.” (2011) *THRHR* 305.

Brown “Franchising: a Fiduciary Relationship” (1970) *Texas Law Review*(1970) 650.

Buckberg and Suwanski “Disclosure Law Violations: Understanding the Penalties” (2008) *Franchising World* 67.

Cassim and Sibanda “The Consumer Protection Act and the Introduction to Collective Consumer Redress Through Class Actions” (2012) *THRHR* 586.

Chadwick “Contracting Out of Liability for Gross Negligence” (2012) *De Rebus* 34.

Curran “Understanding Franchise Law” (2009) *Young Law* 1.

Du Plessis “Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training” (2007) *Journal for Juridical Science* 44.

Du Plessis “Enforcement and Execution of Shortcomings of Consumer Courts” (2010) *SA Merc LJ* 518.

Du Plessis “Price Discretion and the Consumer’s Right to Disclosure and Information in Terms of the Consumer Protection Act 68 of 2008” (2013) *THRHR* 225.

Du Plessis “Protecting Consumers Against Unconscionable Conduct: Section 40 of the Consumer Protection Act 68 of 2008” (2012) *THRHR* 24.

Du Plessis “Towards Better Service Delivery by Consumer Courts” (2008) *SA Merc LJ* 74.

Du Preez “The Consumer Protection Bill: a Few Preliminary Comments” (2009) *TSAR* 58.

Frank “Simply Unclear: Is the Legislation an Obstacle to Plain Language?” (2012) *De Rebus* 44.

Giles and Barkoff “Australian Franchise Law: How to Avoid Being a Shrimp on the Australian Franchising Barbecue” (2009) *Franchise Law Journal* 164.

Gouws “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act” (2010) *SA Merc LJ* 79.

Grueneberg and Solish “Franchising 101” (2010) *Business Law Today* 11.

Hadfield “Problematic Relations: Franchising and the Law of Incomplete Contracts” (1990) *Stanford Law Review* 927.

Hawthorne “Public Governance: Unpacking the Consumer Protection Act 68 of 2008” (2012) *THRHR* 345.

Horn “I Have a Complaint – What now?” (2011) *De Rebus* 53.

Jacobs, Stoop and Van Niekerk “Fundamental Consumer Rights Under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis” (2010) *PELJ* 301.

Kirby “Cracking the Code” (2011) *Without Prejudice* 44.

Kirby “The CPA’s Draft Regulations – must read” (2011) *Without Prejudice* 24.

Laffontaine and Blair “The Evolution of Franchising and Franchise Contracts: Evidence from the United States” (2008) *Entrepreneurial Bus LJ* 381.

Lake “Marketing Practices Under the Consumer Protection Act” (2011) *De Rebus* 51.

Lake “The Consumer Commission : Guidance for attorneys” (2011) *De Rebus* 58.

Lake “The Consumer’s Right to Redress – Is the National Consumer Commission fulfilling its Mandate?” (2011) *De Rebus* 46.

Letzer “The Law of Contract, The Consumer Protection and Medical Malpractice Law” (2012) *De Rebus* 22.

Lister “The Competition Act and Franchising: Some Issues Surveyed” (2002) *JBL* 32.

Louw “The CPA and Franchise Agreements” (2011) *Without Prejudice* 32.

Melville and Palmer “The Applicability of the Consumer Protection Act 2008 to Credit Agreements” (2010) *SA Merc LJ* 272.

Naude “The Consumer’s Right to Fair, Reasonable and Just Contract Terms Under the New Consumer Protection Act in Comparative Perspective” (2009) *SALJ* 505.

Naude “The Consumer’s Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Section 55 and 56 of the CPA 68 of 2008” (2011) *SA Merc LJ* 336.

Newman “The Application of the Plain and Understandable Language Requirement in Terms of the Consumer Protection Act – Can We Learn From Past Precedent?” (2012) *Obiter* 637.

Otto “Verborge Gebreke, Voetstootsverkope, die Consumer Protection Act en die National Credit Act” (2011) *THRHR* 525.

Sharrock “Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act” (2010) *SA Merc LJ* 295.

Smit “Die Bydrae van die Franchisebedryf tot die Suid- Afrikaanse Ekonomie en die Faktore wat die Waarde van ‘n Franchisebedryf Beïnvloed” (2007) *Tydskrif vir Geesteswetenskappe* 181.

Stadler “The Consumer Protection Act – a Short Introduction” *De Rebus* (2010) 43.

Stassen “New Legislation: Selected Aspects of Consumer Protection” (2009) *De Rebus* 42.

Stoop “Plain Language and Assessment of Plain Language” (2011) *Int J. Private Law* 329.

Van Heerden and Barnard “Redress for Consumers in Terms of The Consumer Protection Act 68 of 2008: A Comparative Perspective (2010) *IAITL* 649.

Van Wyk and De Jager “Konsesiehouers se Vlak van Tevredenheid met die Geleentheid en Beperkings van Konsessies” (2010) *Tydskrif vir Geesteswetenskappe* 328.

Woker “Establishing When a Franchise is Actually a Franchise” (2010) *SA Merc LJ* 12.

Woker “Franchising – The Need for Legislation” (2005) *SA Merc LJ* 49.

Woker “Franchising and Restraints of Trade – Restraining Ex-franchisees From Competing With the Franchise Network” (2005) *Obiter* 1.

Woker “The Franchise Relationship and the Problem of Encroachment: Silent Pond Investments CC v Woolworths (Pty) Ltd” (2008) *SA Merc LJ* 402.

Woker “Understanding the Relationship Between Franchising and the Law of Competition” (2006) *SA Merc LJ* 107.

Woker “Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of The National Credit Act and The Consumer Protection Act” (2010) *Obiter* 217.

Websites

<http://www.bizconnect.standardbank.co.za>

<http://www.dti.gov.za/protectingconsumers/NationalConsumerSurvey.pdf>

<http://www.fasa.co.za>

<http://www.franchisedirect.co.za>

<http://www.thefranchisefactor.com>

Other

Barnard *The Influence of the Consumer Protection Act 68 of 2008 on Common Law of Sale* (LLD dissertation 2013 UP).

Code of Federal Regulations, Title 16, Chapter I, Subchapter D, Part 436 (16 CFR 436), Section 436.2, 6149 (g).

Government Gazette No 34180 1 April 2011.

Sotos *Recent Trends in Franchise Relationship Laws* IBA Annual Conference – International Franchising Committee (30 October 2011 – 4 November (2011) Dubai.