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Trade unions as suppliers of goods and services

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Abstract

Trade unions are important vehicles through which social justice is achieved in the South African society. They play a role in the social, political, and economic spheres. Trade unions are powerful institutions and many provide a wide variety of services and goods to their members, having extended their activities to financial services such as insurance, pension funds, and health products. Some unions have questioned the constitutionality of limiting workers to a particular pension fund which has the effect of impinging on their freedom of association. ¹ Section 5(6) of the Consumer Protection Act 68 of 2008 ('the CPA') forms part of the application provisions of the Act. The aim of the section is to provide 'greater certainty' regarding the scope of application of the CPA. It provides that the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society, or other collective entity, whether incorporated or not, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity, will fall under the Act. This section implies that the goods and services provided by trade unions to their members are subject to the Act, and has fundamental implications for trade unions and their members. This contribution illustrates the development and extended role that trade unions play, not only with regard to labour relations, but also as the suppliers of goods and services to their members.

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I Introduction

Trade unions in South Africa (and worldwide) are 'important and influential bodies' ² in the political, economic, and social spheres and, as pressure groups, they can influence government or politics and business 'in favour of labour, principally and accessorially to promote the interests of society at large.' ³ There were 192 trade unions registered at the Department of Labour in 2017. ⁴ This is a large number compared to the size of the labour market. Trade unions have become highly influential and compete in order to secure majority representation ⁵ in the workplace. A trade union has been defined as nothing other than 'an association of employees whose principal purpose is to regulate relations between employees and employers, including employers' organisations'. ⁶ Through the trade unions, labour, as a component of society, plays an important and active role in decision-making that 'vitality concerns its interests'. ⁷ The role of trade unions, not only in the labour domain, but also in society, cannot be overstated. In addition to defending and vindicating the rights of their members, trade unions also play an important role in the economic life, social consciences, and development of workers. ⁸ Trade unionism ⁹ is complex ¹⁰ not only in the South African context, but also in other jurisdictions. It relates to 'the principles, methods, and practices of trade unions, or it may refer to trade unions considered collectively'. ¹¹ Trade unions have a duty to collaborate with other social institutions, including representatives of management and capital. In addition, they have responsibilities when it

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comes to the production of wealth. ¹² It is therefore important for society as a whole (not only corporations and their shareholders) that wealth creation takes place on a continuous basis and in a sustainable manner. It is argued that sustainable development and participatory democracy are inextricably linked, and that trade unions play a key role in the democratic process. ¹³

Trade unions have always played an important role in demanding greater democracy and the involvement in decision-making of workers in the workplace. In this context, it is important to note the primary objectives of the LRA, which include the provision of

'a framework within which employees and their trade unions, employers and employers' organisations can (i) collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest; and (ii) formulate industrial policy ¹⁴ and ... to promote orderly collective bargaining [and] ... collective bargaining at sectoral level'. ¹⁵

In this light, Khan-Freund remarks that the primary purpose of labour law is, and always will be, 'a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'. ¹⁶ The power imbalance between employees and employers can be addressed through trade unions by enabling workers to organise and bargain collectively. In this context, the necessity for trade unions can be summarised as follows:

'The most important function of trade unions is to level the playing fields for management and the workforce ... Actually, the capitalist system gives the employers more rights and powers than it does the employee. It is accepted that as investor and risk bearer the employee could be exploited as a result of decisions made by the employer. The trade union has the potential to mobilise labour in a collective unit to decrease the extent of the decision-making autonomy of the employer. ... The trade union can play this role in different ways. The crucial issue is collective bargaining. This means the inclusion of checks and balances in the decision-making process, the creation of a culture of legitimacy and fairness, the acceptance of co-dependence on and respect for each other, the development of respect for basic fundamental principles and rights of people in the workplace, the development of the understanding that healthy labour relations are good for the enterprise performance as well as the broader

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economy and the consequent social liability, the protection and improvement of workers' interests, and through this combating of poverty and the application of different theories the trade unions' goals.' ¹⁷

Trade unions, trade union federations, employer bodies, ¹⁸ the government, and civic organisations have played a vital role in reforming the statutory industrial relations system in South Africa. Unprecedented negotiations have taken place at the National Economic, Development and Labour Council ('Nedlac') which resulted in the LRA, the Basic Conditions of Employment Act, ¹⁹ the Employment Equity Act, ²⁰ and the Skills Development Act. ²¹ South Africa's post-1994 labour legislation is among the most progressive in the world as it provides for different institutions to settle disputes, ensures fairness in the workplace, and nurtures sound, cooperative industrial relations. This research focuses on the current rights and duties of trade unions in South African law, as well as the existing practices by trade unions that may be affected by the CPA. Part II deals with trade unionism and majoritarianism, while Parts III and IV examine the changing role of trade unions and the position of trade unions in the provision of goods and services under the CPA and other legislation.

II Trade unions and majoritarianism

The role of collective bargaining in industrial relations cannot be overemphasised. This is clear from the Constitutional Court's statements in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*,

where it held that '[c]ollective bargaining is based on the recognition individual workers. Workers therefore need to act in concert to provide employers.' Section 23(2) of the Constitution of the Republic of South Africa grants workers the right to strike. The rights to strike, freedom of association, and to organise, form integral components of the South African collective bargaining framework. The LRA protects the freedom of association and the right to organise in two ways: (i) Chapter II of the LRA extends specific rights and protections to employees and employers; and (ii) Chapter III extends organisational rights to registered trade unions that meet the thresholds set for representation.²³ Organisational rights 'strengthen and support trade unions, and doing so promote the institution of collective bargaining'²⁴ and 'make it possible for trade unions to recruit members, to interact and engage with them, and to maintain a degree of financial stability, which ultimately serves to promote collective bargaining'.²⁵

Trade unions are required to register in terms of the LRA. A registered trade union is a juristic person with powers and duties determined by its constitution.²⁶ Trade unions act through their duly appointed representatives and their actions are generally binding if the representatives act in accordance with the trade union's constitution.²⁷ In this regard, trade unions differ from other corporate entities.²⁸ It should further be noted that employees have the right to participate in the lawful activities of

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trade unions and to act as union office-bearers or officials.²⁹ In this regard, in *National Union of Public Service & Allied Workers on behalf of Mani v National Lotteries Board*,³⁰ for example, the Constitutional Court noted regarding the phrase 'lawful activities' in sections 4(2)(a) and 5(2)(c)(iii) of the LRA, that it

'must exclude illegal activities or activities that constitute activities that constitute contraventions of the law. It definitely excludes conduct that constitutes criminal offences. The provisions include participation by union members in union activities that form part of the core functions of a trade union. These include taking up its members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, collective bargaining, attending statutory tribunals to represent their members' interests and communicating with its members' employer about workplace issues. In this regard s 200 of the LRA is important. It provides that a trade union may act in any or more of three capacities 'in any dispute to which any of its members is a party', namely, in its own interest, or on behalf of any of its members, or in the interest of any of its members'.

Not all trade unions qualify for organisational rights in terms of the LRA.³¹ In fact, not even all registered trade unions are entitled to these rights.³² Representivity 'is determined with reference to the particular workplace where the trade union seeks organisational rights, not the unit within which it seeks to exercise those rights'.³³ Section 213 of the LRA defines 'workplace' as

'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.'³⁴

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Chapter III of the LRA establishes various organisational rights³⁵ that can be enforced by sufficiently representative³⁶ and majority representative trade unions.³⁷ These rights include trade union access to the workplace, deduction of trade union subscriptions, election of trade union representatives, leave for union office bearers, time off from work for union-related purposes, as well the disclosure of information. On the face of it, it appears that the LRA promotes pluralism when it grants organisational rights to 'sufficiently representative' trade unions, even though they are not majority trade unions.³⁸ However, 'sufficiently representative' is not defined by the LRA: they are 'those unions that do not have as their members the majority of employees employed by an employer at the workplace'.³⁹ A 'representative trade union' is defined by section 11 of the LRA as 'a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees by an employer in a workplace'. The term 'pluralist' was defined under the 1956 Act to describe 'a model of collective bargaining that, in contrast to the "majoritarian" model grants recognition to more than one trade union provided they are sufficiently representative of a defined bargaining unit'.⁴⁰ The right to appoint trade union representatives⁴¹ and the right to disclosure of information⁴² are

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enjoyed by majority trade unions only; the other three organisational rights mentioned earlier are afforded to both sufficiently and majority representative trade unions.⁴³ In line with the definition of 'trade union', the LRA states that a registered trade union may act in any dispute to which any of its members is a party: (a) in its own interest; (b) on behalf of any of its members; or (c) in the interests of any of its members.⁴⁴ Trade unions have also been held liable for the actions of their members which cause damage during a public gathering,⁴⁵ as well as where the trade union has failed to perform its mandate to represent its members at the Council for Conciliation, Mediation and Arbitration ('the CCMA').⁴⁶

In *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others*, the Constitutional Court again confirmed the principle of majoritarianism and stated that it 'is both a premise of and recurrent theme throughout the LRA'. Regardless of provisions that appear to favour a pluralistic model, it is clear that the LRA as a whole favours majoritarianism.⁴⁸ The court in *Kem-Lin Fashions CC v Brunton* recognised the fact that the majoritarian principle is part and parcel of our jurisprudence:

'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective

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bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism.'

The LRA's commitment to majoritarianism is particularly clear when it comes to resolving disputes as to whether a trade union is 'sufficiently representative'. Here the commissioner is mandated to 'seek to minimise the proliferation of trade union representation in a single workplace, and where possible encourage a system of a representative trade union in a workplace' and 'minimise the financial and administrative burden requiring an employer to grant organisational rights to more than one registered trade union'.⁵⁰

This winner-takes-all majoritarian approach to collective bargaining protects the interests of well-established and larger unions as their strength lies in the number of workers who are members.⁵¹ Majority unions are those registered unions which, on their own or in combination with any one or more unions, have as their members the majority of the employees employed by an employer in a workplace. This requires that at least 50 per cent plus one of the employees employed in the workplace must be members of the union(s).⁵² Other incentives for majoritarianism include the right to enter into a collective agreement setting thresholds of representivity⁵³ to grant access to the workplace,⁵⁴ the deduction of trade union subscription fees or levies,⁵⁵ and leave for trade union activities.⁵⁶ A majority trade union may conclude agency-shop

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and closed-shop agreements;⁵⁷ conclude collective agreements that will bind employees who are not members of the trade union or unions party to the agreement; apply to establish workplace forums; and may choose the members of the workplace forum from among its elected representatives if it is recognised in terms of a collective agreement as the sole bargaining agent for all employees in the workplace.⁵⁸ Ngcukaitobi points out that the majoritarian approach is out of tune with the realities of today's labour relations and observes that the

'winner-takes-all approach was developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade

union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then'.⁵⁹

Freedom of association arises when answering the question of whether the legislative determination of the constituency within which the majority counts, namely, the workplace as defined, is constitutionally —
Bader Bop (Pty) Ltd & others,⁶¹ for example, the court expressly no unions, and even though minority trade unions do not meet the statut embark on industrial action in order to secure their rights.⁶²

Minority trade unions may be granted the rights provided for in

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sections 14 and 16 of the LRA in specified circumstances.⁶³ Strike action in terms of section 65(2)(a) of the LRA is also permitted regarding organisational rights, but excludes the right to information. Minority trade unions, however, are granted access (in terms of the Labour Relations Amendment Act 6 of 2014)⁶⁴ to the organisational rights which ordinarily would have been reserved for majority unions.⁶⁵ An arbitrator is empowered to grant a registered trade union the right to elect trade union representatives and to the disclosure of information if the applicant union meets the following criteria: (i) the applicant trade union meets the 'sufficiently representivity' threshold; and (ii) if there is no other union in the workplace that has been granted those rights.⁶⁶ Section 21(8C) of the 2014 Amendment Act provides that a commissioner in an arbitration may grant organisational rights⁶⁷ to a registered trade union (or two or more registered trade unions who act jointly) which does not meet the thresholds of representivity established by a collective agreement to which the employer and other unions are party.⁶⁸ These rights will be granted if all parties to the collective

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agreement have been given an opportunity to participate in the arbitration proceedings, and if the union represents a significant interest or substantial number of employees in the workplace. In this regard, cognisance should be taken of the decision in *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others*,⁶⁹ where the court held:

'This means that the LRA, though premised on majoritarianism, does not make it an implement of oppression. It does not entirely suppress minority unions. Its provisions give ample scope for minority unions to organise within the workforce — and to canvass support to challenge the hegemony of established unions. It is precisely because the LRA affords AMCU these rights that AMCU, as an insurgent force in the established union field, was able to increase its membership, its strength and its influence as powerfully as it has. And this is important in determining the extent of the limitation on rights that section 23(1)(d) imposes. ... That majoritarianism is functional to enhanced collective bargaining is internationally recognised. Instruments NUM relied upon in oral argument clearly display this. Indeed, seemingly paradoxically, promotion of collective bargaining is so deeply rooted a principle of internationally recognised labour dispensations that they require merely adequate or sufficient representivity for enforcement against non-members, and not necessarily majority representation. ... This Court has recognised the constitutional warrant for majoritarianism in the service of collective bargaining.'

From the above it is clear that trade unions participate in collective bargaining in order to represent and advance the interests of their members. They will try to ensure that their members receive the best possible wages for their labour input and that they enjoy job security.⁷⁰

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Collective bargaining, however, cannot fully recognise or address the needs of trade unions and their members and, therefore, expansion into other avenues as well as other product offerings and services might benefit trade unions and their members in the long term. Such benefits, as well as a decline in membership and the use of informal-worker structures, might be possible reasons for larger trade unions wishing to expand their dominance and product offerings. Although collective bargaining promotes the interests of both employers and employees, it does not always result in employees gaining a larger share in the fruits of their labours.

It is clear from the discussion above that majority representation of a trade union in the workplace is not only beneficial to employees as members, but also provides a stronger foothold for a trade union to enforce rights and negotiate terms. Furthermore, an increase in membership also means an increase in membership fees for the union. Consequently, a trade union has a strong incentive to convince employees to join it — rather than another union — by providing better or at least competitive benefits. This is accomplished by offering a wider range of benefits, assistance, and services. Some of these services are directly related to the employer-employee relationship, a collective agreement, or collective bargaining, while other services go beyond the traditional labour relations sphere. This is illustrated in the discussion below.

III Changing role and branching out

Trade unions have long since entered the arena of financial services. These financial services include funeral cover,⁷¹ life insurance,⁷² disability policies,⁷³ indemnity insurance,⁷⁴ and short-term insurance.⁷⁵ They provide services such as investment opportunities⁷⁶ and financial advice to their members, bursaries,⁷⁷ and retirement planning and benefits.⁷⁸ Some trade unions also offer banking services which include private

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loans and loan schemes,⁷⁹ savings accounts,⁸⁰ debt-restructuring, debt-review, and debt-relief services.⁸¹ Many trade unions offer their members medical-aid schemes⁸² and medical services⁸³ such as health assessments and health information and education. They provide benefits such as 'HIV infection insurance payments' and 'social relief loans'.⁸⁴ Banking or other financial institutions generally underwrite certain of these financial services, but this is not necessarily the case.⁸⁵ These benefits and services (or access to them) are, in the main, offered at preferential rates. Banking services, other financial services, and medical services offered by trade unions, are regulated comprehensively and recognised by bodies such as: the South African Reserve Bank; the Financial Services Board;⁸⁶ the Ombudsman for Banking Services; the Ombudsman for Long-term Insurance;⁸⁷ the Ombudsman for Short-term Insurance;⁸⁸ the National Credit Regulator; the Pension Fund Adjudicator; the Council for Medical Schemes South Africa; and the Medical Aid Board. Legislation such as the Financial Advisory and Intermediary Services Act;⁸⁹ the National Credit Act;⁹⁰ the Long-term Insurance Act;⁹¹ the Short-term Insurance Act;⁹² the Pension Funds Act;⁹³ and the Medical Schemes Act⁹⁴ govern these services.

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Trade unions provide training, education, and access to information. Depending on the trade union and the type of industry in which it operates, this could include legal advice (not limited to labour-relations issues); access to information on the latest decisions of a court or particular enforcement body; regulations and applicable policies in that industry; access to online journal subscriptions and magazines; and even short courses and accredited qualifications.⁹⁵

In addition, trade unions have branched out to provide other goods and such as online stores where branded clothing and corporate accessories are sold and listed in catalogues.⁹⁶ Other examples include: access to selected holiday resorts and accommodation at discounted rates for their members;⁹⁷ reduced prices on specific foods items⁹⁸ and goods such as motor vehicles⁹⁹ and tyres;¹⁰⁰ and discounts where particular motor dealerships affiliated with a trade union sell a member's vehicle.¹⁰¹ Services and access to services consist of the installation of kitchen cabinets,¹⁰² secular publications and book clubs,¹⁰³ entertainment,¹⁰⁴ roadside assistance,¹⁰⁵ and packages on cellular airtime and cash-back on items bought at selected stores.¹⁰⁶ Members of particular trade unions are able to purchase electronic devices like computers, laptops, tablets, and accessories online at discount prices using purchase options including cash, credit, or 'lay-by'.¹⁰⁷ Customer-loyalty programmes are also frequently available to members.¹⁰⁸

It is therefore clear that the services trade unions offer their members or prospective members have branched out and developed immensely. An assessment of the duties and responsibilities of trade unions to supply these goods and services is, therefore, needed and includes the applicability of legislation governing such goods as services. The primary focus of the overview below arises from the provisions of the CPA on

supply of goods and services currently provided by trade unions to their members (and prospective members) in South Africa.

IV Trade unions and the Consumer Protection Act

(a) Application of the Consumer Protection Act to trade unions as suppliers

The Consumer Protection Act 68 of 2008 ¹⁰⁹ was fully implemented on 21 March 2011 and introduced an increased level of consumer protection in South Africa. The CPA aims to promote a fair, accessible, and sustainable marketplace for consumer products and services by establishing national norms and standards relating to consumer protection and the relationship between suppliers and consumers. ¹¹⁰ The Act further aims to: provide for improved standards of consumer information and education; prohibit unfair marketing and business practices; promote responsible consumer behaviour; and promote a consistent legislative and enforcement framework focussing on consensual dispute resolution.

The CPA further purports to protect vulnerable consumers. The categories of vulnerable consumers are listed in section 3(1)(b) and include: low-income consumers; consumers from remote communities; minors and seniors; and consumers whose ability to read and comprehend any advertisement, warning, or agreement is limited by reason of low literacy, visual impairment or lack of fluency in the relevant language. The Act provides an extensive redress and enforcement framework in Chapter 3 where the National Consumer Tribunal (NCT) and National Consumer Commission (NCC) play vital roles together with provincial consumer courts and other alternative dispute resolution agents. ¹¹¹ Section 4 provides the lists of persons or groups with locus standi in terms of the Act, and introduces class actions with regard to consumer disputes and the redress process.

The CPA lists eight fundamental consumer rights: the right to equality in the consumer market; privacy; choice; disclosure and information;

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fair and responsible marketing; fair and honest dealing; fair contract terms and conditions; and safe, good quality goods. ¹¹² Due to its overarching purpose and aim, the CPA, in most instances, applies concurrently with existing legislation or law, including existing common-law principles. Section 2(10) states that provisions in the Act must be interpreted to protect the common-law rights of consumers. Where a matter is brought before a court, the court must develop the common law as necessary to improve the realisation and employment of consumer rights generally and, in particular, with regard to vulnerable consumers listed in section 3(1)(b). ¹¹³ In the event of an inconsistency between any provision of the CPA and a provision in any other Act (excluding two exceptions), ¹¹⁴ the provisions of both Acts apply concurrently, to the extent that it is possible to apply one of the inconsistent provisions without contravening the second. If this is not possible, the provision that extends greater protection to the consumer prevails. ¹¹⁵

Generally, it can be said that the Act applies to suppliers who supply goods ¹¹⁶ and services in the ordinary course of business to consumers for consideration. Each of these concepts has its own specific definition in section 1 of the CPA. It is important to note that the CPA provides protection throughout the supplier-consumer relationship, which includes the marketing of the goods and services to the consumer, the actual provision of the goods and services (which includes the practices and conduct of suppliers), and any goods and services provided as part of an 'after service' agreement. ¹¹⁷ 'Consideration' includes money or credits (gift vouchers or customer-loyalty points as part of a customer-loyalty programme), or any other valid form of counter performance. ¹¹⁸ 'Ordinary course of business' is not defined in the Act, but has been interpreted in respect of insolvency matters, where it was held that the

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test is an objective one and regard must be had to all the circumstances, including the actions of both parties to the transaction. ¹¹⁹ This approach was confirmed in *Eskom Holdings Ltd v Halstead-Cleak* and the NCT decision in *Doyle v Killeen & others*.

Although 'supplier' is defined as a person who markets any goods or services, ¹²² it is also used throughout the Act as an umbrella term to include producers, importers, retailers, and service providers. 'Consumer' is a wide concept which includes natural and certain juristic persons, as well as the users or beneficiaries of the goods or services supplied. ¹²³ In *Eskom Holdings Ltd v Halstead-Cleak*, the court held that a consumer-supplier relationship had to be present for the CPA to apply. In that case the respondent was held not to be a consumer as he: (a) had not entered into any transaction with Eskom (the appellant) as a supplier or producer of electricity in the ordinary course of Eskom's business; and (b) was not at the time utilising the electricity as a recipient or beneficiary.

'Goods' include anything marketed for human consumption, including tangible objects (movables), immovable property, music, data, software, water, gas and electricity, to name but a few. 'Service' includes: any work or undertaking; provision of any information, education, advice, or consultation; ¹²⁵ any banking or financial services that do not fall under specific listed legislation; ¹²⁶ and the transportation of individuals or goods. 'Service' further includes: accommodation or sustenance, entertainment, access to any electronic communication infrastructure; access to premises or a right to immovable property; and also applies to franchise agreements. 'Supply' in relation to goods, includes to sell, rent, exchange, and hire in the ordinary course of business for consideration; and in relation to services, includes the sale

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of services, or to perform services or cause them to be performed, or to grant access to any premises, event, activity, or facility in the ordinary course of business. ¹²⁷ 'Supply chain', with respect to any particular goods or services, means the collective of all suppliers who directly or indirectly contribute in turn to the final supply of those goods or services to a consumer, whether as a producer, importer, distributor, or retailer of goods, or as a service provider. ¹²⁸

Section 5 provides further guidance regarding the application of the Act. The CPA does not apply to any transaction relating to the services to be supplied in terms of an employment contract; or a transaction giving effect to a collective bargaining agreement in terms of section 23 of the Constitution and the LRA; or a transaction giving effect to a collective agreement in terms of section 213 of the LRA. ¹²⁹

Section 5(6) of the Act requires particular attention. It states that for greater certainty, certain other arrangements must be regarded as transactions between consumers and suppliers in terms of the CPA. Section 5(6)(a) states that the CPA will apply where there is:

'[T]he supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity.'

De Stadler ¹³⁰ asks why section 5(6) was not included as part of the definition of 'transaction' from the outset. She observes that the aim of section 5 is to create certainty, but doubts whether the content of section 5(6) complies with this aim. ¹³¹ De Stadler draws attention to the wording of the subsection, namely that it is irrelevant whether the supply of goods and services is for fair value consideration or otherwise, and also irrespective of whether there is a charge or economic contribution demanded or expected to become a member of that entity. ¹³² She correctly observes that the definition of 'consideration' in section 1 does not suggest that a 'fair value' consideration is a requirement, making such a qualification redundant, and that it was, therefore, not the

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intention of the legislature to relax the consideration requirement completely. ¹³³ Trade union members will always have to pay a membership fee ¹³⁴ in order to benefit from the goods and services offered (supplied) to them by trade unions. This includes the supply of the goods and services by the trade unions themselves, as well as access to the supply of goods and services by other affiliated suppliers at preferential rates or considerations that fall within the ambit of the CPA.

Nothing in any of the versions of the original Consumer Protection Bill, including the final version, or in the amendments to the Bill by the Portfolio Committee, gives any indication of the reasons for including trade unions as suppliers to their members under the Act. ¹³⁵ The Bill does, however, state that it was published in the *Government Gazette* for public comment, and further consultations were held with other government departments, sector regulators, industry associations, consumer groups, professional associations, the Department of Trade and Industry, and trade unions. ¹³⁶ It is unclear what the content of these consultations were.

(b) Overview of the consequences of the Consumer Protection Act on goods and services currently provided by trade unions to their members in South Africa

(i) Marketing practices

As explained above, the CPA not only governs the supply of goods and services by trade unions to their members, but also the marketing of such goods and services. A consumer's right to privacy is closely linked to direct marketing (including the restriction thereof) as well as a consumer's cooling-off right in terms of section 16. A consumer has a right to restrict unwanted direct marketing, and the Minister may regulate the times at which a consumer may be contacted for purposes of direct marketing. Direct marketing means

'to approach someone, either in person or by the post or electronic communication, for the direct or indirect purpose of promoting goods and services to that person or to offer to supply such goods or services, in

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the ordinary course of business or to request the person to make a donation of any nature for any purpose'. ¹³⁷

Section 11 provides that each person's right to privacy includes the right to refuse an approach or communication, if such approach or communication is primarily for purposes of direct marketing, or to require that it be discontinued, or, in the case of an approach other than in person, to pre-emptively block it. The National Consumer Commission ('NCC') may establish a registry in which any person may register a pre-emptive block against any communication the primary purpose of which is direct marketing. ¹³⁸ Unfortunately, this has not yet been done by the NCC.

The contact times in which trade unions may engage in direct marketing to their members are, therefore, also restricted in terms of the CPA. ¹³⁹ A trade union may not engage in any direct marketing aimed at a member on Sundays or public holidays. Direct marketing is not allowed on Saturdays before 09:00 or after 13:00, and on any other day no direct marketing is permitted between 20:00 that day and 08:00 the following day, save to the extent that the member has expressly or implicitly requested or agreed otherwise. ¹⁴⁰

It should be noted that a consumer's right to privacy and the regulation of unwanted or unsolicited communications — and with regard to electronic communications and transactions in particular — are protected in terms of the Electronic Communications and Transactions Act. ¹⁴¹ Moreover, the Protection of Personal Information Act ('the POPIA'), ¹⁴² was signed into law on 19 November 2013, and will come into effect incrementally. The Act aims: to promote the protection of personal information processed by public and private bodies; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; and to introduce codes of conduct as well as certain conditions so as to establish minimum

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requirements for the processing of personal information. ¹⁴³ The Act further provides for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions which include the regulation of the flow of personal information across the borders of the Republic. ¹⁴⁴ Chapter 8 of the POPIA regulates unwanted direct marketing by means of electronic communications and will replace certain sections of the Electronic Communications and Transactions Act once it is fully in force. Trade unions will have to comply with the restrictions on direct marketing as indicated above, unless the member specifically consents to the continuation of such marketing. Trade unions will consequently incur additional responsibilities and liability regarding the personal information of their members ¹⁴⁵ in terms of the POPIA: first, with regard to the restriction on the use of such personal information for marketing purposes (whether direct marketing by the trade union itself or making the personal information of their members available to other suppliers with which they are affiliated for marketing purposes); ¹⁴⁶ and secondly, the processing of personal information (including health and other information) of the members by the trade unions must comply with the POPIA. ¹⁴⁷ Part B of the POPIA governs the processing of special personal information. Section 26 provides that a responsible party ¹⁴⁸ may not (subject to s 27) ¹⁴⁹ process personal information concerning, amongst others, ¹⁵⁰ the trade union membership of a trade union member to the extent that

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such information relates to an offence or alleged offence in terms of the POPIA. The prohibition in section 26 does not apply to the processing of such special personal information of members by the trade union or the trade union federation to which that trade union belongs, if such processing is necessary to achieve the aims of the trade union or trade union federation. ¹⁵¹ However, no personal information may be supplied to third parties without the *consent* of the trade union member, even if that personal information may be processed in terms of section 30(1). ¹⁵²

In terms of section 16 of the CPA, a consumer may rescind a transaction resulting from any direct marketing without reason or penalty by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded, or the date on which the goods that were the subject of the transaction were delivered to the consumer. ¹⁵³ A supplier must return any payment received from the consumer in terms of the transaction within 15 business days after receiving notice of the rescission (if no goods have been delivered to the consumer in terms of the transaction), or receiving any goods supplied in terms of the transaction from the consumer. ¹⁵⁴ A supplier may also not attempt to collect any payment in terms of a transaction where the consumer has exercised his cooling-off right, except as permitted under section 20(6) of the Act. ¹⁵⁵ However, the provisions of section 20(4), in terms of which a consumer who returns goods in accordance with the cooling-off right in section 16, bears the risk and costs related to such return, must be noted. A person who directly markets goods or services and who concludes a transaction or agreement with a consumer, must notify the consumer in the prescribed manner and form regarding the cooling-off right in terms of section 16. ¹⁵⁶ The provisions containing the consumer's cooling-off right, as well as the consequences thereof, have been discussed at length elsewhere and a repetition would serve no purpose. ¹⁵⁷ What is important to note, however, is that many of the

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current marketing practices of trade unions and their affiliate suppliers, will fall within the definition of 'direct marketing' in terms of the Act, and so, therefore, also within the cooling-off right afforded to consumers in terms of section 16. This includes the duty of trade unions to inform their members of the cooling-off right afforded to them by section 16 and its consequences. ¹⁵⁸

Moreover, the marketing practices of trade unions must comply with the general marketing standards in section 29 of the CPA. Section 29 sets out general standards for the marketing of goods and services in terms of which a producer, importer, distributor, retailer, or service provider is prohibited from marketing goods in a manner that is reasonably likely to imply a false or misleading representation concerning those goods and services as contemplated in section 41. ¹⁵⁹ Marketing in a manner that is misleading, fraudulent, or deceptive in any way is prohibited, including, more specifically, in respect of: the nature, properties, advantages, or uses of goods or services; the manner in or conditions on which those goods or services may be supplied; the price at which the goods may be supplied; or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services; and the sponsoring of any event or any other material aspect of the goods or services. ¹⁶⁰

Catalogue marketing is identified as another form of marketing used by trade unions. In this respect, the provisions of both the ECT Act and the CPA should be noted. Catalogue marketing is regulated by section 33 of the CPA. Section 33 does not apply to a franchise agreement or a transaction under Chapter 7 of the ECT Act. Chapter 7 deals with consumer protection in electronic transactions and includes online marketing.

right ¹⁶² as part of electronic transactions. It also deals with unsolicited goods, services or communications, ¹⁶³ and prescribes the period in which performance must take place. ¹⁶⁴ Section 33 of the CPA applies to an agreement for the supply of goods or services that is not entered into in person, including an agreement concluded telephonically, if the contact is initiated by the consumer; or by postal order or fax, or in any similar manner in which, in respect of goods, the consumer does not have the opportunity to inspect the goods that are the subject of the transaction before concluding the agreement. ¹⁶⁵ Before concluding such an agreement or transaction, a supplier (trade union) must disclose certain minimum information to the consumer in an appropriate manner, having regard to the manner in which the supplier and consumer communicate in concluding the transaction. ¹⁶⁶ Van Heerden agrees with Van Eeden ¹⁶⁷ that catalogue marketing is a form of direct marketing. ¹⁶⁸ She further observes that the Act only specifies that information be provided in an 'appropriate manner' without explaining what this entails. ¹⁶⁹ It follows, therefore (according to Van Heerden), ¹⁷⁰ that if the parties communicated by telephone it would be sufficient for the supplier to disclose the required information telephonically, provided that a record is kept in terms of section 50(3) of the CPA. ¹⁷¹

(ii) Consumer's right to select suppliers

Section 13 of the CPA deals with the concept of 'bundling' of goods and services and indicates in which circumstances it will be acceptable to

limit the consumer's right to select suppliers in terms of the Act. Section 13 states that, as a general rule, a supplier cannot as part of the provision of goods and or services or entering into a transaction with the supplier, require a consumer to purchase other goods or services or enter into an additional transaction with the same supplier or a designated third party, *unless* the supplier can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choose. The supplier also needs to show that the bundling of those goods or services results in economic benefit for consumers, or alternatively, the supplier must offer the bundled goods or services separately and at individual prices. With regard to trade unions 'bundling' their own goods or services with, for example, additional goods and services from designated third parties or suppliers, it appears that doing this is acceptable and complies with section 13 of the CPA. The onus of proof would, however, be on the particular trade union to either prove that the convenience to its member in having such goods or services bundled outweighs the limitation of the consumer's right of choice, or that the bundling results in an economic benefit to its members. Van Zyl remarks that the 'convenience of buying bundled goods and services may lie in saving consumers time and effort'. ¹⁷² The writer argues that the onus of proving that the bundling of goods and services is not illegal, rests on the supplier. ¹⁷³ The economic benefit of bundling goods does not have to benefit of each individual consumer and the determination of an actual 'economic benefit' depends on the circumstances. ¹⁷⁴

(iii) Supply of goods and services in the form of customer-loyalty programmes

When the supply of goods and services by a trade union takes the form of a customer-loyalty programme, the provisions of section 35 of the CPA must be considered. A 'loyalty credit or award' is defined in section 1 as 'any arrangement or scheme in the ordinary course of business, in terms of which a supplier of goods or services, association of such suppliers, or other person on behalf of or in association with any such suppliers, offers or grants to a consumer any loyalty credit or award in connection with a transaction or an agreement'. A customer-loyalty programme may allow consumers to exchange their loyalty credits or awards for goods or services. Where the programme permits this, the sponsor or any person

who accepts the loyalty credits in terms of the programme, is obliged to accept the awards in exchange for goods or services, provided the awards constitute adequate consideration for the goods or services as the loyalty credits or awards are deemed to be a legal medium of exchange. ¹⁷⁵ The goods or services must be available at any given time and must be sufficient to cover the consideration of the loyalty awards or credits earned by all consumers. ¹⁷⁶ Moreover, where a consumer uses loyalty awards to obtain goods or services, the goods or services obtained must not be of a quality inferior to goods or services that the consumer would have obtained had he or she used a different form of consideration. ¹⁷⁷ Where loyalty awards or credits are used as consideration for goods or services, no administration or processing charge may be levied, and the consumer is not obliged to purchase any other goods or services, or to pay any monetary charge in respect of the transaction. ¹⁷⁸ Such monetary charge is precluded even where it is ordinarily imposed by public regulation, or where the supplier incurs a charge in order to afford the consumer the right to gain access to or use his or her loyalty credits. ¹⁷⁹ Section 35(5) further provides that the sponsor of a loyalty programme cannot demand that the consumer purchase any other goods or services when the consumer seeks to use his or her loyalty credits or awards. The sponsor of a loyalty programme or a supplier (trade union) that accepts loyalty credits or awards as consideration for goods or services, may restrict the use of loyalty awards. Such restriction may not exceed 30 days per annum and notice of the impending restriction must be given to members of the programme at least 20 business days before the onset of the restricted period. ¹⁸⁰ Moreover, the restriction on the use of loyalty credits or awards as consideration for goods or services cannot exceed a total of 90 days within a calendar year. ¹⁸¹ Section 35(2) prohibits any person from offering a loyalty programme or loyalty credit or award without the intention of providing such a programme, award or credit, or from providing the programme, award or loyalty credit in a manner other than the manner in which it was initially offered to the consumer. Where the sponsor of a loyalty programme is not able to accept the consumer's tendered loyalty credits or awards in exchange for particular goods or services, the supplier or trade union may procure

another person to supply the goods or services in question, and where the consumer unreasonably refuses the sponsor's offer to do so, the sponsor shall not be found to be in contravention of CPA. ¹⁸²

Trade unions as the suppliers of goods and services, as well as other suppliers, service providers, or 'sponsors' taking part in the loyalty programme, must ensure that the goods offered are in stock and that any restriction on the loyalty credits or awards complies with the provisions of section 35 as set out above. This includes the particular information and periods in which such information is to be given to the members of the trade union. The document (online as part of a website or otherwise) that sets out the offer of a customer-loyalty programme must comply with the content requirements of section 35(2) of the Act. ¹⁸³ It is important to note that a loyalty programme customer or 'account number' also falls within the definition of an 'account number' under the POPIA. ¹⁸⁴

(iv) Restriction or exclusion of liability

Where the supply of goods and services by a trade union is subject to certain terms and conditions regarding, for example, the limitation of liability of the trade union as a supplier, or the exclusion of liability of the trade union, the provisions of sections 48, 49 and 50 should be taken into account. The latter sections should also be considered where the terms of the supply of service are subject to change without prior notice; or where the consumer (member) incurs additional duties, liability or risks.

(v) Defective service

Section 54 of the CPA will apply where the trade union undertakes to perform any services for or on behalf of a member or members. Section 54 will also be applicable where the trade union provides access to the services rendered by other suppliers to which the trade union is affiliated. With regard to the performance of services, the consumer (member) has a right to: (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services; (b) the performance of the services in a manner and quality that consumers are generally entitled to expect; (c) the use, delivery, or installation of goods that are free of defects and of a quality that

consumers are generally entitled to expect, if any such goods are required for performance of the services; and (d) the return of any property or control over any of his or her property in at least as good a condition as it was when he or she made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services. ¹⁸⁵

If a supplier fails to perform a service in accordance with the standards contemplated in section 54(1), the consumer may require him or her either to remedy any defect in the quality of the services performed or goods supplied, ¹⁸⁶ or to refund a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure. ¹⁸⁷ A 'defect', as defined in section 53(1)(a)(i), means any material imperfection in performance of the services which renders the results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances.

Section 54(1)(a) and (b) relate to the rights of a consumer in respect of the performance of services, and section 54(1)(d) relates to the rights of a consumer in respect of the return of property made available by the consumer to the supplier. Section 54 has a very broad scope taking into account core definitions such as 'service provider', 'supply' and 'service' in section 1 of the Act. It is further important to establish whether goods will be subject to section 54 as part of a service, or whether they will be regulated by the consumer's implied warranty of quality (s 56), as the remedies available in each of these instances differ. ¹⁸⁸ Section 54 will apply in conjunction with other provisions such as section 15 (pre-authorisation of repair or maintenance service) and section 40 (unconscionable conduct). The application of section 54 to the services performed by trade unions will vary depending on the nature of the service. Where an ambiguous interpretation arises, the provisions should be interpreted to give effect to the purpose of the CPA and favour the member of the trade union as a consumer. De Stadler remarks that 'the interest of consumers and suppliers will not necessarily be at odds with each other and even though an outcome may favour a consumer in particular circumstances, the outcome may result in a less favourable

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outcome for consumers as a whole (for example higher prices)'. ¹⁸⁹ It is therefore important that courts should take the broader interests of consumers into account by considering the reasonable interests of suppliers. Due to the current wording of the Act, this is problematic.

De Stadler observes that the right to quality service in terms of section 54 can be divided into four specific rights: (a) a right to timely performance of services; (b) services which are of a quality that persons are generally entitled to expect; (c) use, delivery and installation of good quality goods; and (d) the return of a consumer's property where the service provider had to take possession thereof to perform the service. ¹⁹⁰ Timely performance at common law is determined by the agreement between the parties, and where no time or place has been agreed upon, performance of the service must be within a reasonable time which will depend on the particular circumstances and the type of agreement. ¹⁹¹ A supplier must perform the services in a manner and quality that persons are reasonably entitled to expect and the goods used, delivered, or installed as part of the service, must be free of defects and of a quality that persons are reasonably entitled to expect. ¹⁹² Where the supplier returns property of the consumer under section 54(1)(d), the duties of the supplier in terms of sections 65 and 67 must be taken into account depending on the type of service provided. ¹⁹³

(vi) Defective goods and product liability

Part H of the CPA provides a consumer with the right to good quality goods, fair value, and safety. Section 53 provides definitions specifically applicable to Part H. The definition of a defect is broad and includes elements applicable to the quality of goods, but also to safety requirements as would apply to section 61, and liability for damage caused by goods. ¹⁹⁴ 'Defect' means

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- '(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances'. ¹⁹⁵

In terms of section 55, every consumer has the right to safe, good quality goods. Except to the extent contemplated in section 55(6), the goods received must: (a) be reasonably suitable for the purpose for which they are generally intended; (b) be of good quality, in good working order, and free from any defects; (c) usable and durable for a reasonable period of time taking into account normal use, wear and tear, and the surrounding circumstances of their supply; and (d) comply with any prescribed legislative standards where applicable. ¹⁹⁶ Where goods are supplied for a particular purpose and the consumer specifically informs the supplier of this intended purpose, the consumer has a right to expect that the goods are suitable for that particular purpose, provided that the supplier ordinarily provides such goods and acts in a manner consistent with being knowledgeable about the use thereof. Subsections (4) and (5) of section 55 provide further guidance in determining whether goods comply with the requirements of section 55(2) or (3), and include taking into account: the manner in which goods were supplied; the time of the supply; the possible uses of the goods; that it is irrelevant whether the defect is latent or patent; and whether or not new or better goods become available (which will not amount to goods being defective). ¹⁹⁷

Suppliers have the opportunity to limit their liability regarding defective goods provided that section 55(6) is complied with. Section 55(6) provides that section 55(2)(a) and (b) will not apply where (a) the consumer has been expressly informed that particular goods were offered in a specific condition (for example, second-hand goods with the particular or possible defects); and (b) the consumer has expressly agreed to accept the goods in that condition, or has knowingly acted in a

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manner consistent with accepting the goods in that condition. ¹⁹⁸ Where goods are supplied by a trade union as contemplated in the CPA, such goods must comply with the provisions of section 55. The trade union as a supplier of the goods will also be liable in terms of the implied warranty of quality provided in section 56 of the Act. If the goods fail to satisfy the requirements and standards contemplated in section 55, the consumer (member of the trade union) may, without penalty and at the supplier's risk and expense, return any goods to the supplier within six months after delivery. ¹⁹⁹ The supplier must, at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods; or refund to the consumer the price he or she paid for them. ²⁰⁰ If a supplier repairs any particular goods or any component thereof, and within three months after that repair, the failure, defect, or unsafe feature has not been remedied, or a further failure, defect, or unsafe feature is discovered, the supplier must replace the goods or refund to the consumer the price he or she paid. ²⁰¹

The implied warranty imposed by section 56(1), and the right to return goods set out in section 56(2), are both 'in addition' to any other implied warranty or warranty imposed by the common law, the Act, or any other public regulation, and any express warranty or condition stipulated by the producer, importer, distributor, or retailer. ²⁰² Van Eeden ²⁰³ and De Stadler ²⁰⁴ observe that the wording of section 56(2) suggests that the consumer's first choice would be between repair and replacement of the goods, and he or she would only thereafter be eligible for a refund. It appears that the approach of the courts, National Consumer Tribunal ('the NCT'), and Alternative Dispute Resolution Agents such as the Consumer Goods and Services Ombud, in awarding the specific remedies of repair, replacement, or refund is dependent on how substantial the defect in the goods is, its overall effect on the supply of the goods, and the agreement. ²⁰⁵

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Section 61 of the CPA introduces a new product liability regime for damage caused by defective goods in South Africa. Section 61 has been discussed extensively in other contributions, ²⁰⁶ and warrants a contribution on its own. It is important to note that a trade union will be held jointly and severally liable for damages ²⁰⁷ caused by a defective product in terms of section 61(3) of the CPA. Section 61(2) provides that 'a supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer'. A trade union will, however, not be liable if it can prove that one of the defences listed in section 61(4) is applicable. ²⁰⁸

(vii) Enforcement of rights by consumers

As explained above, one of the main aims and purposes of the CPA is the establishment of a consensual dispute resolution framework and to provide consumers with an opportunity for effective redress and enforcement. ²⁰⁹ Chapter 3, Part A of the Act governs the consumer's right to be heard and receive redress. Section 69 sets out the enforcement mechanisms by which consumers may exercise their rights in terms of the Act. A hierarchy of avenues of redress as listed in section 69 are: (a) directly referring the matter to the National Consumer Tribunal (if authorised by the Act); (b) referring the matter to the applicable ombud having jurisdiction ²¹⁰ over the supplier; (c) otherwise referring

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the matter to the applicable accredited industry ombud ²¹¹ or a consumer court ²¹² with jurisdiction, or to an alternative dispute resolution agent ²¹³ or by filing a complaint with the National Consumer Commission; or (d) by approaching a court ²¹⁴ with jurisdiction over the matter after all other remedies available to the person in terms of national legislation have been exhausted. Section 69 and the hierarchy of enforcement institutions have been the topic of much criticism and discussion. ²¹⁵ The most prominent suggestions include: legislative amendment of section 69 and the other sections of Chapter 3 to ensure legal certainty; ²¹⁶ streamlining the redress process which would require more rigid control through institutions such as the NCC; ²¹⁷ clarity on the role of consumer courts, ombuds, and other alternative dispute resolution agents; and, finally, judicial intervention. ²¹⁸

Where disputes arise between a trade union and its members regarding the supply of goods and services in terms of the CPA, the avenues of redress available to consumers in terms of section 69 will be available to those members. It is submitted that the CCMA will not have jurisdiction over consumer disputes. The CCMA is a dispute resolution body

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established in terms of the LRA, and has jurisdiction only over matters directly related to labour relations. Most trade unions likely already have internal processes or protocols on the process to be followed in a dispute between the union and its members regarding labour relations issues and services in general. This conforms to the notion that consumer disputes should ideally be resolved by consensus. However, the member will still be able to exercise the rights of redress and enforcement in the CPA where internal consensual dispute resolution fails.

V Conclusion

Trade unions have a significant impact on society. This is well illustrated in South Africa when one takes into account the historically significant role trade unions have played in bringing about democracy in the country, and the influence they continue to exert on policy making. This is true not only with regard to the socio-economic welfare of a community or country, but also in the provision of basic needs to their members. The traditional role of the trade union has expanded and changed. Trade unions no longer merely reflect the voice of the worker, but have branched out to become manufacturers, service providers, insurers, and suppliers of a range of goods and services to their members. There are many advantages to this new extended role of trade unions, but with great power comes great responsibility. Trade unions need to recognise that as institutions which traditionally 'carry the torch' for the rights and freedoms of the workers, they, as suppliers, need to bear the same torch for their members in the realm of consumer protection. Trade unions must take heed of all the additional statutory obligations that their changing role brings and be ready to don their many 'hats' not only from the traditional labour law perspective, but also as financial service providers and suppliers. The obligations and duties in terms of the CPA highlight the responsibilities of trade unions towards their members in this regard.

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1 *Mtyhopo v South African Municipal Workers Union National Provident Fund* 2015 JDR 2098 (CC). See also Coyle, 'Long-standing moratorium imposed on pension fund transfers may be unconstitutional and unlawful', available at <http://bit.ly/2vzu4el> in 'Legal Articles' on 14 August 2015 *Webber Wentzel*, accessed on 1 July 2017.

2 Budeli, 'Trade unionism and politics in Africa: The South African experience' 2012 *CILSA* 479.

3 Budeli, 2012 *CILSA* 479.

4 Available at <http://bit.ly/2vTQaDE> accessed on 13 August 2017.

5 Representation of 50% plus one members in the workplace. See the discussion below.

6 See s 213 of the Labour Relations Act 66 of 1995 ('the LRA').

7 Lower, *Employee Participation in Governance: A Legal and Ethical Analysis* (Cambridge University Press 2012) 151.

8 Lower, (Cambridge University Press 2012) 151, where he quotes from *The Compendium of the Social Doctrine of the Church*.

9 Trade unionism and politics in South Africa cannot be separated and the history of trade unionism and political involvement in South Africa may be divided into four periods: (i) the colonial period from the Dutch settlement during the seventeenth century and the formation of the Union of South Africa in 1910; (ii) the period between 1910 and 1948; (iii) the establishment of apartheid (1948) and the end of apartheid (1993); and (iv) the democratic post-apartheid-era (1994 and onwards) (see Budeli 2012 *CILSA* 465).

10 Budeli, 2012 *CILSA* 454.

11 Budeli, 2012 *CILSA* 454.

12 Lower, (Cambridge University Press 2012) 151.

13 Kester, *Trade Unions and Workplace Democracy in Africa* (Ashgate 2007) 3.

14 Section 1(c)(i)-(ii) of the LRA.

15 Section 1(d)(i)-(ii) of the LRA. The long title of the LRA includes as one of its purposes, the promotion and facilitation of collective bargaining at the workplace and sectoral levels.

16 Davies & Friedland, *Kahn-Freund's Labour Law* (Stevens and Sons 1983) 18.

17 Rust, 'So, you think being a trade union is plain sailing?' 2001 *SA Journal of Labour Relations* 59-60.

18 Section 213 of the LRA defines an employer's organisation as 'any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions'.

19 Act 75 of 1997 ('the BCEA').

20 Act 55 of 1998 ('the EEA').

21 Act 97 of 1998 ('the SDA').

22 1996 (4) SA 744 (CC) para 66. Godfrey et al, *Collective Bargaining* (Juta 2010) 22 emphasise that by protecting the right to strike, organisational rights, as well as other provisions aimed at promoting an environment that is conducive to trade union organisation, are created: '[G]overnment set out to create a system "which allows the parties, through the exercise of power, to determine their own [bargaining] arrangements" and in doing so, it brought collective bargaining in South Africa in line with the international norm. In the classical model, collective bargaining depended on the power of the parties to compel acceptance of their demands, including the demand to engage in collective bargaining. In this respect the LRA faithfully embraces "the central purpose" of law according to Kahn-Freund: that is, "maintaining equilibrium between employers and workers by ensuring the effective operation of a voluntary system of collective bargaining".' See also Du Toit, 'What is the future of collective bargaining (and labour law) in South Africa?' 2007 *ILJ* 1405 at 1418 in this regard, where he points out that on the one hand LRA 'did away with the "duty to bargain" which the Industrial Court had placed on employers in certain circumstances' and adopted an essentially voluntarist framework. The drafters of the Act were satisfied that the constitutional right '[did] not require Parliament to create a legally enforceable right to bargain in the statute'. At the same time the Act set out to 'unashamedly [promote] collective bargaining], inter alia by providing trade unions with a series of organisational rights and regulating the right to strike'.

23 Van Niekerk & Smit (eds), *Law@work* (LexisNexis 2018) 365.

24 Van Niekerk & Smit (eds), (LexisNexis 2018) 365.

25 Van Niekerk & Smit (eds), (LexisNexis 2018) 365. See also *Hospersa and Zuid-Afrikaanse Hospitaal* 1997 1 LLD 29 (CCMA), where it was suggested that organisational rights are meant to enable trade unions 'to get their foot in the door'.

26 See in this regard ss 97(1) and 95(5) of the LRA. A trade union can therefore be sued or sue in its own name, acquire and dispose of property, and conclude agreements.

27 Du Toit et al, *Labour Relations Law* ((LexisNexis 2015) 244.

28 See Du Toit et al, (LexisNexis 2015) 244, where they refer to Cilliers & Benade, *Corporate Law* (Butterworths 2000) 5-6.

29 See s 4 of the LRA.
30 (2014) 35 ILJ 1929 (CC) para 153.
31 Van Niekerk & Smit (eds), (LexisNexis 2018) 374.
32 Van Niekerk & Smit (eds), (LexisNexis 2018) 374.
33 Van Niekerk & Smit (eds), (LexisNexis 2018) 374.
34 Section 213 of the LRA. In this regard see *Professional Transport and Allied Workers Union obo members/Professional Aviation Services* [2016] 4 BALR 421 (CCMA), where it was found that the meaning of 'workplace' in the LRA is determined by reference to a range of factors, not only geographical location. The 'workplace' will not always necessarily be where the head office is situated or where the majority of the workforce is employed. The commissioner found in casu that a certain branch of the employer (in Bloemfontein) was in fact the 'workplace', and that by having recruited 12 of the 18 employees, the trade union had secured more than 50% of the workforce as members and thus granted the trade union organisational rights in terms of ss 13–16 of the LRA. See also *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others* [2017] ZACC 3, where AMCU argued that the Labour Appeal court failed to properly interpret 'workplace' in the context of s 23(1)(d) of the LRA. AMCU submitted that 'workplace' is capable of two interpretations in that (i) the statutory definition of 'workplace' can refer to the mining operations of each of the three companies as a whole (the strict interpretation) and (ii) 'workplace' can refer to each individual mine of the three companies (the broad interpretation) (each AMCU-majority mine is a workplace). The court held as follows: 'That's not right. First, to adopt AMCU's argument, the Court would have to ignore entirely the colour the statute and the rights it implements give to the interpretive process. As NUM persuasively counters, adopting this "broad interpretation" effectively involves jettisoning the statutory definition and adopting a new, independently created, meaning of "workplace", one that flows from the facts of this case. But, as already said, there is no sound reason to depart from the statutory definition' (para 39).
35 Sections 12–16 of the LRA.
36 See, for example, *SACTWU v Sheraton Textiles (Pty) Ltd* 1997 7 SALLR 48 (CCMA) and *OCGAWU v Woolworths (Pty) Ltd* 1997 7 BALR 813 (CCMA) as to when a trade union will be regarded as being 'sufficiently representative'.
37 Majority unions 'are those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by an employer in a workplace. This requires that at least 50 percent plus one of the employees employed in the workplace must be members of the union(s)'. See Van Niekerk & Smit, (eds) (LexisNexis 2018) 377.
38 Section 11 of the LRA; Du Toit et al, (LexisNexis 2015) 283.
39 Van Niekerk & Smit (eds), (LexisNexis 2018) 359. See also *OCGAWU v Volkswagen SA (Pty) Ltd* 2002 23 ILJ 220 (CCMA).
40 Du Toit et al, *Labour Relations Law* (LexisNexis 2015) 283. See also Baskin & Satgar, 'South Africa's New Labour Relations Act: A Critical Assessment and Challenges for Labour' (National Labour Economic and Development Institute Johannesburg 1995) 12 in this regard.
41 Section 14 of the LRA.
42 Section 16 of the LRA provides that only relevant information should be disclosed. See, for example, s 89 of the LRA with regard to disclosure of information to a workplace forum. The same rules apply to disclosure of information to trade unions, which means that information that will allow a trade union representative to perform his or her functions referred to in s 14(4) of the LRA must be disclosed, but not information that is legally privileged or information that the employer, by law or order of court, is not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer, or is private personal information relating to an employee, unless that employee consents to the disclosure of that information. Together with the unique nature of the work-wage bargain, these requirements put management in a superior bargaining position in relation to trade unions.
43 See in this regard s 21(8A) and 21(8C) of the LRA discussed above.
44 See s 200(1) of the LRA in this regard. Du Toit et al, (LexisNexis 2015) 244 state that these terms refer to situations where the union itself becomes a party to a dispute rather than merely assisting a member.
45 *SA Transport and Allied Workers Union v Garvis (City of Cape Town as Intervening Party and Freedom of Expression Institute as amicus curiae)* 2012 ILJ 1593 (CC). See Botha, 'Responsible unionism during collective bargaining and industrial action: Are we ready yet?' 2015 *De Jure* 328–350 in this regard, as well as Gericke, 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' 2013 *THRHR* 566–585.
46 *Food & Allied Workers Union v Ngcobo* 2013 ILJ 1383 (SCA).
47 [2017] ZACC 3 para 43.
48 Du Toit et al, (LexisNexis 2015) 283.
49 (2001) 22 ILJ 109 (LAC) para 19.
50 See s 21(8)(a)(i) and (ii) of the LRA as well as Du Toit et al, (LexisNexis 2015) 284 and Van Niekerk & Smit (eds), (LexisNexis 2018) 359.
51 See Ngcukaitobi, 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836 at 854 in this regard. The following can be also be added with regard to the 'winner takes all' approach: 'The point being made is that working outside of established bargaining structures can mean workers are subjected to decreased access to information, thereby increasing frustration and insecurity. More broadly, the effect of this approach has meant that neither employers nor employees derive the intended value from its framework. It has become increasingly difficult for employers to maintain industrial peace while workers struggle to maintain certain standards of rewards and of stability in their employment. While employers are increasingly perceived as unrelenting, workers lose faith in the negotiation process and are forced to find unconventional ways to air their concerns' (see Ngcukaitobi 2013 *ILJ* 854).
52 Van Niekerk & Smit (eds), (LexisNexis 2018) 359.
53 Section 18 of the LRA.
54 Section 12 of the LRA.
55 Section 13 of the LRA.
56 Section 15 of the LRA.
57 The Constitutional Court in *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others* [2017] ZACC 3 para 43, with reference to *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) and majoritarianism, stated that various LRA provisions illustrate the legislative policy choice and that two of the most obtrusive suffice: 'It is majoritarianism that underlies the statute's countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members), and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union). This is not to say that these provisions are invulnerable to constitutional attack. It is only to point to them as piquantly instancing the scheme of the statute as a whole.'
58 See ss 25, 26, 23(1)(d)(iii), 80 and 81 of the LRA, as well as Du Toit et al, (LexisNexis 2015) 283 in this regard.
59 Ngcukaitobi, 2013 *ILJ* 854.
60 *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others* [2017] ZACC 3 para 52.
61 *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (C). See also Cohen, 'Limiting organisational rights of minority unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)' (2014) 17 *PELJ* 60 in this regard.
62 See also with regard to minority trade unions *South African Post Office v Commissioner Nowosenetz NO* 2013 2 BLLR 216 (LC). See also *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC); *Transnet SOC Ltd v National Transport Movement* 2014 1 BLLR 98 (LC); and *UASA & AMCU v BHP Billiton Energy Cool South Africa JS345/13* regarding granting organisational rights to minority trade unions that do not meet the required thresholds.
63 Section 18 of the LRA provides for the right to establish thresholds of representativeness and determines that 'an employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15'. Such a collective agreement is however not binding in terms of s 18(2) 'unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in section 18'. For a critical discussion on the current wording of s 18 and the abuse thereof by majority trade unions and employers who agree on unattainable thresholds despite sufficient representation by minority trade unions in the workplace, see Kruger & Tshoole, 'The impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) 16 *PELJ* 285.
64 Hereafter referred to as the 2014-Amendment Act.
65 The Constitutional Court in *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others* [2017] ZACC 3 para 54 emphasised that the statutory structures that enforce the majoritarian system nevertheless allow minority unions freedom of association. Minority unions have recruiting rights, organisational rights, deduction rights, recognition of shop stewards, time off for union office-bearers to do union work and bargaining rights. AMCU had all these rights. Though they did lose the right to strike while the agreement was in force, none of the non-signatory unions or employees lost any of their organisational and collective bargaining entitlements.
66 Section 21(8A) of the 2014-Amendment Act.
67 Sections 12, 13 and 15 of the LRA.
68 See in this regard *Police & Prisons Civil Rights Union v Ledwaba NO* (2014) 35 ILJ 1037 (LC). See, for example, *SA Correctional Services Workers Union v Police & Prisons Civil Rights Union JA87/2015* [2017] ZALAC 30 (31 May 2017), where the Labour Appeal Court ('the LAC') held that the agreed threshold which may be the subject of a s 18(1) agreement 'has the effect of giving meaning to what constitutes "sufficiently representative", as provided in s 11, in order for a union to be conferred ss 12, 13 and 15 organisational rights in a workplace'. The court emphasised that where a union has achieved the threshold agreed by way of a s 18(1) agreement, ss 12, 13 and 15 rights will be conferred on the union as a matter of right. The LAC also stated that there is nothing in Part A of Chapter III which expressly states that unions which do not meet the required threshold are prevented from using the ordinary processes of collective bargaining to persuade the employer to grant such rights to the minority union. Therefore, even where a s 18(1) threshold agreement exists, it does not preclude the conclusion of a s 20 collective agreement between an employer and a minority union which has bargained for the organisational rights contained in that agreement (para 33). The LAC also stated that '[f]urthermore, since s20 provides that "nothing" in Part A precludes the conclusion of an agreement regulating organisational rights, on a plain reading of the provision "nothing" appears to me to mean nothing in the Part, including a s 18(1) agreement. To find differently would amount to a narrow reading of s 20, which *Bader Bop* found to be "inappropriate" ' (para 34). In *Independent Municipal & Allied Trade Union v Commission for Conciliation, Mediation & Arbitration & others* the Labour Court noted that s 21(8C) empowers a commissioner to grant organisational rights to a trade union that does not meet the thresholds of representativeness established by the main agreement if the union represents 'a significant interest, or a substantial number

of employees, in the workplace' and that these considerations are 'subject to' the provisions of s 21(8) of the LRA as a whole (at 2027, forthcoming *ILJ* September 2017).

69 [2017] ZACC 3 paras 55–57.

70 O'Regan, 'Possibilities for worker participation in corporate decision-making' 1990 *Acta Juridica* 117.

71 <http://bit.ly/2wsRp06>; <http://bit.ly/2gAaBUx>; <http://bit.ly/2gxfFJc> accessed on 13 August 2017.

72 <http://bit.ly/2gszXzL>; <http://bit.ly/2wsRp06>; <http://bit.ly/2gsgtv9> accessed on 13 August 2017.

73 <http://bit.ly/2wsRp06>; <http://bit.ly/2gAaBUx>; <http://bit.ly/2vAFFKq> accessed on 14 August 2017.

74 <http://bit.ly/2vB1ABf> accessed on 14 August 2017.

75 <http://bit.ly/2gAaBUx> accessed on 14 August 2017.

76 <http://bit.ly/2vAFFKq> accessed on 13 August 2017.

77 <http://bit.ly/2gyk7Y3>; <http://bit.ly/2eOTGcN>; <http://bit.ly/2gsgtv9>; <http://bit.ly/2gxfFJc> accessed on 14 August 2017.

78 <http://bit.ly/2wvVmzS>; <http://bit.ly/2vAFFKq>; <http://bit.ly/2gyk7Y3>; <http://bit.ly/2gszXzL> accessed on 14 August 2017.

79 <http://bit.ly/2wsRp06>; <http://bit.ly/2vAFFKq>; <http://bit.ly/2wwdM3e> accessed on 13 August 2017.

80 <http://bit.ly/2vAFFKq> accessed on 13 August 2017.

81 <http://bit.ly/2gsgtv9> accessed on 13 August 2017.

82 <http://bit.ly/2wwe1LG>; <http://bit.ly/2wvVmzS>; <http://bit.ly/2gAaBUx> accessed on 13 August 2017.

83 <http://bit.ly/2gAaBUx>; <http://bit.ly/2gyk7Y3>; <http://bit.ly/2wwdM3e>; <http://bit.ly/2vB1ABf> accessed on 13 August 2017.

84 <http://www.nehawu.org.za/> accessed on 13 August 2017.

85 Examples of underwriters of trade union financial benefits are: <http://bit.ly/2wsRp06> (Metropolitan Life); <http://bit.ly/2gAaBUx> (Trans Africa Life; Mutual & Federal); <http://bit.ly/2wwdM3e> (Momentum, Metropolitan Life, Old Mutual). Examples of private or sustainable underwriting: The non-profit co-operative NEHAWU SACCO that was formed 'with the purpose of providing sustainable banking and other related services to its members at reasonable costs' and also the trade union's National Provident Fund registered as a privately administered provident fund in terms of the Pension Funds Act of 1956 and approved as a provident fund in terms of the Income Tax Act of 1962. <http://bit.ly/2vAFFKq> accessed on 13 August 2017.

86 FSB. Rebranded as the Financial Sector Conduct Authority in terms of Financial Sector Regulations Act 9 of 2007.

87 As amended by the Insurance Act 18 of 2017.

88 As amended by the Insurance Act 18 of 2017.

89 37 of 2002. As amended by the Financial Sector Regulations Act 9 of 2007.

90 34 of 2005.

91 52 of 1998.

92 53 of 1998.

93 24 of 1956.

94 131 of 1998.

95 <http://bit.ly/2vB1ABf>; <http://bit.ly/2gyk7Y3>; <http://bit.ly/2wwdM3e>; <http://bit.ly/2vB1ABf>; <http://bit.ly/2wsRp06> accessed on 14 August 2017.

96 <http://bit.ly/2gskO1p> accessed on 14 August 2017.

97 <http://bit.ly/2wwdM3e>; <http://bit.ly/2gAaBUx>; <http://bit.ly/2gsgtv9>; <http://bit.ly/2eP61xB>; <http://bit.ly/2gxfFJc>; <http://bit.ly/2wsj3KK> accessed on 13 August 2017.

98 <http://bit.ly/2wsRp06> accessed on 14 August 2017.

99 <http://bit.ly/2vTFjtK>; <http://bit.ly/2wwdM3e>; <http://bit.ly/2gAaBUx> accessed on 13 August 2017.

100 <http://bit.ly/2wsRp06> accessed on 14 August 2017.

101 <http://bit.ly/2wwdM3e> accessed 14 August 2017.

102 <http://bit.ly/2wsRp06> accessed on 14 August 2017.

103 <http://bit.ly/2eP61xB> accessed on 14 August 2017.

104 <http://bit.ly/2eP61xB> accessed on 14 August 2017.

105 <http://bit.ly/2gxfFJc>; <http://bit.ly/2gAaBUx> accessed on 13 August 2018.

106 <http://bit.ly/2wwdM3e> accessed on 13 August 2017.

107 <http://bit.ly/2wwdM3e> accessed on 13 August 2017.

108 <http://bit.ly/2wwdM3e> accessed on 13 August 2017.

109 Hereafter 'the CPA' or 'the Act'.

110 Preamble and s 3 of the CPA.

111 For a comprehensive discussion on redress and enforcement issues, see Van Heerden & Barnard, 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: A comparative perspective' 2011 *JICLT* 131; Van Heerden, 'Section 68' in Naudé & Eiselen, (LexisNexis 2014); Mupangavanhu, 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' 2012 *PELJ* 320; Woker, 2017 *SA Merc LJ* 1.

112 Chapter 2 of the CPA. Only the rights most relevant to trade unions and their current services and activities are discussed in detail.

113 Section 2(a) of the CPA.

114 Section 2(8) of the CPA: 'If there is an inconsistency between any provision of Chapter 5 of this Act and a provision of the Public Finance Management Act, 1999 (Act 1 of 1999), or the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of the Public Finance Management Act, 1999, or of the Public Service Act, 1994, as the case may be, prevail.'

115 Section 2(9) of the CPA.

116 Section 1 of the CPA definition of 'goods': 'includes — (a) anything marketed for human consumption; (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded; (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and (e) gas, water and electricity.'

117 Sections 2, 4 & 5 of the CPA.

118 Sections 1 & 4 of the CPA.

119 *Gazit Properties v Botha NO* (873/10) [2011] ZASCA 199; *I-Kharafi and Sons & another v Pema & others NNO* (2008/12359) [2008] ZAGPHC 273; and *Van Zyl & others NNO v Turner & another NNO* 1998 (2) SA 236 (C).

120 2017 (1) SA 333 (SCA) para 20.

121 NCT/12984/2014/75(1)(b)CPA.

122 Section 1 of the CPA.

123 Section 1 of the CPA definition of 'consumer' read together with definition of 'juristic' person. For purposes of this contribution 'consumer' and 'member' of a trade union; as well as 'supplier' and 'trade union' are used interchangeably as they relate to the supply of goods and services in terms of the CPA.

124 2017 (1) SA 333 (SCA) paras 22, 23.

125 Except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS').

126 Where the service falls under the FAIS or is regulated in terms of the Long-term Insurance Act 52 of 1998 or the Short-term Insurance Act 53 of 1998, such service/s will not fall within the ambit of the CPA.

127 Section 1 of the CPA.

128 Section 1 of the CPA.

129 66 of 1995 ('the LRA').

130 De Stadler, 'Section 5' in Naudé & Eiselen, *Commentary on the Consumer Protection Act* (2016 loose-leaf LexisNexis) 5–12 (De Stadler, (LexisNexis 2016).

131 De Stadler, (LexisNexis 2016) 5–12 at n 5.

132 De Stadler, (LexisNexis 2016) 5–12.

133 De Stadler, (LexisNexis 2016) 5–12.

134 Section 25 of the LRA.

135 Consumer Protection Bill and Amendments: [B 19A – 2008]; [B 19B – 2008]; [B 19C – 2008]; [B 19D – 2008].

136 The Consumer Protection Bill [B 19D – 2008] '13. Communications Implications'.

137 Section 1 of the CPA definition of 'direct marketing'. For a general discussion of marketing practices and the CPA see Barnard & Scott, 'An overview of promotional activities in terms of the Consumer Protection Act in South Africa' 2015 *SA Merc LJ* 441; see also Van Heerden, 'The regulation of marketing under the CPA' in Naudé & Eiselen, (LexisNexis 2016).

138 Section 11(3) of the CPA.

139 Section 12 read together with reg 4 and Regulation Notice 'Prohibited time for contacting consumers'.

140 Section 12 read together with reg 4 and Regulation Notice 'Prohibited time for contacting consumers'.

141 25 of 2002 ('the ECT Act').

142 4 of 2013 ('the POPIA').

143 Preamble to the POPIA.

144 Preamble to the POPIA.

145 Section 1 of the POPIA refers to 'data subjects' being the persons to whom the personal information relates. In the context of this discussion this means the members of the trade union but could also include the personal information of family members.

146 See Ch 8: 'Rights of Data Subjects regarding Direct Marketing by means of Unsolicited Electronic Communications, Directories and Automated Decision Making.' See also Hamann & Papadopoulos, 'Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa' 2014 *De Jure* 42 at 42–62.

147 See Part A 'Processing of Personal Information in General' and Part B 'Processing of Special Information' of the POPIA.

148 Section 1 of the POPIA defines a 'responsible party' as a 'public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information'. For purposes of this contribution the 'responsible party' is the trade union or any other party who, in conjunction with the trade union, determines the purpose and means for processing the personal information of the trade union members.

149 Section 27 of the POPIA provides that the prohibition on processing personal information in terms of s 2 does not apply if : '(a) processing is carried out with the consent of a data subject referred to in section 26; (b) processing is necessary for the establishment, exercise or defence of a right or obligation in law; (c) processing is necessary to comply with an obligation of international public law; (d) processing is for historical, statistical or research purposes and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent; (e) information has deliberately been made public by the data subject; or (f) provisions of sections 28 to 33 are, as the case may be, complied with'.

150 Section 26 lists other special information of data subjects to include their religious or philosophical beliefs, race or ethnic origin, political persuasion, health or sex life or biometric information; or criminal behaviour.

151 Section 30(1) of the POPIA.

152 Section 30(2) of the POPIA.

153 Section 16(3) of the CPA.

154 Section 16(4)(a) of the CPA.

155 Section 16(4)(b) of the CPA.

156 Section 32(1) of the CPA.

157 Otto, 'Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming' (2012) *March LitNet Akademies* 23; Hamann & Papadopoulos, 2014 *De Jure* 42–62; Barnard & Scott, 2015 *SA Merc LJ* 441–477; Stoop, 'Artikel 29A van die Wet op Vervreemding van Grond' 2008 *TSAR* 744–756; De Stadler, 'Section 16' in Naudé and Eiselen, (LexisNexis 2016) 16–6.

158 Section 21 deals with the prohibition on and consequences of the supply of unsolicited goods and services. An in-depth discussion falls outside the scope of this contribution. See De Stadler, 'Section 21' in Naudé & Eiselen, (LexisNexis 2016) 21–1; Barnard, 'Ongevraagde goedere ingevolge die Wet op Verbruikersbeskerming in regsvergelykende perspektief' 2015 *TSAR* 268.

159 Section 29(1) of the CPA. Section 41 deals with false, misleading or deceptive representations. For a comprehensive discussion see Du Plessis, 'Section 41' in Naudé & Eiselen, (LexisNexis 2016) 41–1.

160 Section 29(2) of the CPA.

161 Section 43 of the ECT Act's list of required information to be provided by the supplier includes: full contact details and particulars of supplier; membership of any self-regulatory or accreditation bodies to which that supplier belongs; any code of conduct; sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction; full price and manner of payment including transport costs, taxes and any other fees or costs; guarantees; return or refund policy; and the consumer's cooling-off right in terms of s 44.

162 Section 44 of the ECT Act. See also Hamann & Papadopoulos, 2014 *De Jure* 42; Barnard, 'An appraisal of a consumer's cooling-off right in terms of section 16 of the Consumer Protection Act 68 of 2008' 2016 *THRHR* 1.

163 Section 45 of the ECT Act.

164 Section 46 of the ECT Act.

165 Section 33(2) of the CPA.

166 Section 33(3) of the CPA. The information includes the full particulars and contact details of the supplier; sales record information required by s 26 of the CPA; the currency in which amounts under the agreement are payable; the supplier's delivery arrangements, including the identity of the shipper; the mode of transportation; and the place of delivery to the consumer; the supplier's cancellation, return, exchange and refund policies, if any; the manner and form in which a complaint may be lodged; and any other prescribed information.

167 Van Eeden, *Consumer Protection Law in South Africa* (LexisNexis 2013) 128.

168 Van Heerden, 'Section 33' in Naudé & Eiselen, (LexisNexis 2016) 33–2.

169 Van Heerden in Naudé & Eiselen, (LexisNexis 2016) 33–5.

170 Van Heerden in Naudé & Eiselen, (LexisNexis 2016) 33–5.

171 Section 50(3) of the CPA: 'If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed.'

172 Van Zyl, 'Section 13' in Naudé & Eiselen (LexisNexis 2016) 13–3.8.

173 Van Zyl, in Naudé & Eiselen, (LexisNexis 2016) 13–5.

174 Van Zyl, in Naudé & Eiselen, (LexisNexis 2016) 13–5.

175 Section 35(4)(d) of the CPA.

176 Section 35(4)(e) of the CPA.

177 Section 35(4)(f) of the CPA.

178 Section 35(4) of the CPA.

179 Section 35(5) of the CPA.

180 Section 35(6) of the CPA.

181 Section 35(6) of the CPA.

182 Section 35(6) of the CPA.

183 See also Van Heerden, 'Section 35' in Naudé & Eiselen, (LexisNexis 2016) 35–1.

184 Sections 105 and 106 of the POPIA list the unlawful acts by the responsible party or a third party in connection with an account number.

185 Section 54(1)(a)–(d) of the CPA.

186 Section 54(2)(a) of the CPA.

187 Section 54(2)(b) of the CPA.

188 De Stadler, 'Section 54' in Naudé & Eiselen, (LexisNexis 2016) 54–3.

189 De Stadler, 'Section 54' in Naudé & Eiselen, (LexisNexis 2016) 54–2.

190 De Stadler in Naudé & Eiselen, (LexisNexis 2016) 54–1.

191 Nagel et al, *Commercial Law* (LexisNexis 2015) paras 9.09, 12.42 and 39.60; *Christie's Law of Contract* (LexisNexis 2016) 447–448.

192 CPA s 54(1)(b) and (c).

193 Section 65: supplier to hold and account for consumer's property; s 67: Return of parts and materials after the performance of a service.

194 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; Otto, Van Heerden & Barnard, 'Redress in terms of The National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in terms of an Instalment Agreement' 2014 *SA Merc LJ* 247; De Stadler, 'Section 55' and 'Section 56' in Naudé & Eiselen (LexisNexis 2016) 55–1 and 56–1; Loubser & Reid, 'Section 53' and 'Section 61' in Naudé & Eiselen, (LexisNexis 2016) 53–1 and 61–1; Van Eeden, (2013 LexisNexis) Ch 11.13.

195 Section 53(1) of the CPA definition of 'defect'.

196 Section 55(2) of the CPA. Section 55 does not apply to goods bought at an auction.

197 Section 55(4) and (5) has been discussed at great length, including the interpretational issues which affect the accurate interpretation thereof depending on the particular goods and circumstances surrounding the supply — Barnard, 2012 *De Jure* 455; Otto, Van Heerden & Barnard, 'Redress in terms of the National Credit Act and the Consumer Protection Act for Defective Goods Sold and Financed in terms of an Instalment Agreement' 2014 *SA Merc LJ* 247; De Stadler, 'Section 55' and 'Section 56' in Naudé & Eiselen, (LexisNexis 2015) 55–2 and 56–1.

198 See Barnard, 2012 *De Jure* 471–577; De Stadler, *Commentary* (LexisNexis 2016) 55–26–55–30; Van Eeden, (LexisNexis 2013) Ch 11. See also *Vousvovakis v Queen Ace CC T/A Ace Motors* 2016 (3) SA 188 (ECG); *Makkink v Accordian Investments (Pty) Ltd and National Consumer Commission* NCT/8473/2013/75(1).

199 Section 56(2) of the CPA.

200 Section 56(2) of the CPA.

201 Section 56(3) of the CPA.

202 Section 56(4) of the CPA. See also the warranty in respect of repaired goods in terms of s 57 of the CPA.

203 Van Eeden, (LexisNexis 2013) 242–249.

- 204 De Stadler, (LexisNexis 2016) 56–1–56–16.
- 205 *Vousvoukis v Queen Ace CC T/A Ace Motors* 2016 (3) SA 188 (ECG); *Makkink v Accordian Investments (Pty) Ltd and National Consumer Commission* NCT/8473/2013/75(1); *Bothma v Car King* 3 NCT/26816/2015/75(1)(b)(P); *Wicam Accounting Services CC v Mobile Phone Choice CC t/a Epirus* NCT/31174/2015/75(1) where a refund was granted. See also *Petro Byleveld v Motor City and The NCC* NCT/10686/2013/75(1). Decisions by the CGSO: Defect: Consumer unable to provide proof of purchase: refund (201388163) [2013] ZACGSO 3 (28 August 2013); Damage to wedding gown by drycleaner: Restore if possible (2014114294) [2014] ZACGSO 13 (23 May 2014); Defect material; Consumer entitled to refund (2013611175) [2013] ZACGSO 4 (16 August 2013) — <http://www.saflii.org/za/cases/ZACGSO/toc-D.html> accessed on 18 August 2017.
- 206 Van Eeden, (LexisNexis 2013) Ch 12; Loubser & Reid, *Product Liability in South Africa* (LexisNexis 2012); Loubser & Reid, 'Section 53' and 'Section 61' in Naudé & Eiselen, (LexisNexis 2016) 53–1 and 61–1. See also *Eskom Holding Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA), where the court found Eskom not liable in terms of s 61 of the CPA.
- 207 Damages listed in terms of s 61(5) include the death of, or injury to, any natural person; an illness of any natural person; any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and any economic loss.
- 208 Section 61(4) provides that liability of a particular person (including a trade union) will not arise if: The harm is attributable to compliance with any public regulation; the defects, hazard or failure did not exist at time of supply; it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or the claim has prescribed. The trade union will have to prove that s 61(4) applies.
- 209 See para IV (a) above.
- 210 Section 1 definition of 'ombudsman with jurisdiction': 'in respect of any particular dispute arising out of an agreement or transaction between a consumer and a supplier who is- (a) subject to the jurisdiction of an 'ombud', or a 'statutory ombud', in terms of any national legislation, means that ombud, or statutory ombud; or (b) a 'financial institution', as defined in the Financial Services Ombud Schemes Act, 2004 (Act 37 of 2004), means 'the ombud', as determined in accordance with section 13 or 14 of that Act.'
- 211 The NCC may recommend that a scheme of alternative dispute resolution may be accredited as an 'accredited industry ombud' in terms of s 82(6). This can happen if two requirements are met: a proposed industry code provides for a scheme of alternative dispute resolution; and the NCC considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation.
- 212 Section 1 definition of 'consumer court': 'A body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation.'
- 213 Section 1 definition of 'alternative dispute resolution agent': 'an ombud with jurisdiction; (b) an industry ombud accredited in terms of section 82(6); 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.'
- 214 This refers to any civil court, a magistrate's or a High Court that has jurisdiction to hear a matter. Jurisdiction refers to both monetary and geographical jurisdiction. This does not include a consumer court (s 1 of the CPA).
- 215 Van Heerden & Barnard, (2011) 6/3 *JJCLT* 131; Van Heerden, 'Section 69' and 'Section 70' in Naudé & Eiselen, (LexisNexis 2016); Du Plessis, 'Towards better service delivery by consumer courts' 2008 *SA Merc LJ* 47; Mupangavanhu, 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' 2012 *PELJ* 320; Sharrock, 'Judicial control of unfair contracts terms: The implications of the Consumer Protection Act' 2010 *SA Merc LJ* 295; Van Eeden, (LexisNexis 2013) 385.
- 216 Van Heerden & Barnard, (2011) 6/3 *JJCLT* 131–144; Van Heerden, (LexisNexis 2016 LexisNexis) 69–8.
- 217 Woker, 'Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress' 2017 *SA Merc LJ* 1.
- 218 Sharrock, 2010 *SA Merc LJ* 295.
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