



CONSUMER PROTECTION BILL

SUBMISSIONS BY BUSINESS UNITY SOUTH AFRICA (BUSA)

MAY 2006

BACKGROUND

Business Unity South Africa (BUSA) was created in October 2003 through the merger of the Black Business Council and Business South Africa. It began operating in January 2004. The merger created the first truly representative and unified organisation for business in South Africa.

BUSA is a confederation of chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations.

BUSA represents South African business (See attached list of members) on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As the principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC).

Internationally, BUSA is a member of the International Organisation of Employers (IOE), the Pan-African Employers' Confederation (PEC) and the Southern African Development Community (SADC) Employers' Group. BUSA is also the official representative of business at the International Labour Organisation (ILO), African Union (AU) Social Affairs Commission and World Trade Organisation (WTO).

INTRODUCTION

BUSA engaged extensively with other stakeholders in NEDLAC on the Consumer Protection Policy and now welcomes the opportunity to comment on the Consumer Protection Bill.

BUSA recognises the need for government to legislate to protect consumers, however, a balance should be maintained between consumer protection and the national economic imperatives in order to increase sustainably economic growth and create employment.

BUSA acknowledges that South Africa subscribes to the eight United Nations' guidelines for consumer protection and accepts that these rights should be incorporated into national legislation. However, it is not considered necessary by BUSA for every aspect of consumer protection to be contained in a single cumbersome and complex Act.

This submission comprises -

Detailed comments on the substance of the Bill
Areas requiring clarification
General comments on the Bill

The submission is confined to general comment and questions of clarity as, in the limited timeframe afforded to BUSA relative to the length and complexity of the Bill, it was not possible to include suggested alternative drafting in respect of certain sections of the Bill. BUSA is, however, keen to engage with the Department of Trade and Industry ("DTI") with a view to making alternative proposals in respect of the manner in which certain sections of the Bill have been drafted and the approach that has been taken to certain issues, both of an economic and legal nature, in the Bill.

In view of the comprehensive nature of the submission, the key areas of concern are summarised below for ease of reference.

HIGHLIGHTS FROM THE COMMENTS

The primary difficulty with the current sections of the Bill is the overlap between these sections and the provisions of existing legislation. The Bill is replete with sections that impose obligations or create rights that are already imposed or created, as the case may be, by existing legislation. In certain respects, the duplication causes unnecessary friction and conflict between the Bill and existing legislation. In other respects, however, the duplication gives rise to uncertainty and ambiguity in so far as interpreting the Bill is concerned.

More attention needs to be paid to the manner in which the Bill has been drafted. The emphasis, in this regard, should fall squarely on the manner in which the definitions have been drafted, in section 1 of the Bill, and the number of definitions that are required but have been excluded or omitted from the Bill.

Whilst BUSA does not necessarily wish to challenge the Bill, as a whole, or particular sections on the basis of the provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), it is difficult, if not impossible, to exclude the application of the Constitution when commenting upon certain sections of the Bill. Therefore, BUSA has elected to include references to certain sections of the Constitution. However, BUSA has adopted a cautious approach in so far as referring to the Constitution in the submissions, is concerned.

The Bill introduces significant and material obligations on primarily the suppliers of goods and services in South Africa. When viewed holistically, the aforementioned obligations amount to the imposition of severe economic and financial burdens on medium and small businesses in the Republic. In addition, the introduction of the

administrative structures, contemplated in the Bill, will contribute significantly to additional regulatory obligations that must be fulfilled by suppliers.

BUSA is of the view that the extent to which the Bill imposes significant additional burdens on business it is out of line with the commitment in ASGISA to reduce the cost of doing business.

FURTHER ENGAGEMENT

In view of the significant and potentially negative impact that the adoption of this Bill in its current form could have on the business community, BUSA reiterates its request to meet with the DTI to discuss areas of specific concern and in particular to obtain clarity on the legislator's intentions in a number of areas.

In view of the potentially high cost of implementing this legislation for both government and business, it is requested that this Bill be subjected to a Regulatory Impact Assessment, as envisaged in ASGISA for all new legislation.

The complexity of the Bill: both in respect of the language that it uses and the administrative structures that it creates do not further the very issue with which the Bill is purportedly concerned – consumer rights. The layperson will be confounded by the length of the Bill, the legalese with which the Bill is replete and the number of administrators who will be tasked with administering the Bill and championing consumer rights.

BUSA is particularly concerned about the extensive legislative and regulatory duplication in the Bill when considered in the context of current South African legislation and the numerous conflicts that exist between this Bill and other existing pieces of legislation. It is therefore recommended that before proceeding further with this Bill, detailed engagements are held by the DTI with other government departments. BUSA also engages with other government departments and will be raising concerns on this Bill as part of ongoing discussions.

BUSA is looking forward to constructive and meaningful engagement in NEDLAC and trusts that ultimately a Bill, which achieves the objectives of consumer protection without compromising achievement of the ASGISA goals, will become law.

Business Unity South Africa (BUSA) Members

1. African Minerals and Energy Forum (AMEF)
2. Agri SA
3. AHI
4. Association for the Advancement of Black Accountants of Southern Africa (ABASA)
5. Association of Black Securities and Investment Professionals (ABSIP)
6. Automotive Sector
 - Automobile Manufacturers Employers' Organisation (AMEO)
 - National Association of Automotive Component and Allied Manufacturers (NAACAM)
 - National Association of Automobile Manufacturers of South Africa (NAAMSA)
 - Retail Motor Industry Organisation (RMI)
7. Banking Association
8. Black Business Executive Circle (BBEC)
9. Black Information Technology Forum (BITF)
10. Black Lawyers Association (BLA)
11. Black Management Forum (BMF)
12. Business Leadership South Africa
13. Construction Sector
 - Master Builders South Africa (MBSA)
 - South African Federation of Civil Engineering Contractors (SAFCEC)
14. Casino Association of South Africa (CASA)
15. Chambers of Commerce and Industry South Africa (CHAMSA)
16. Chamber of Mines of South Africa (COM)
17. Chemical and Allied Industries' Association (CAIA)
18. Confederation of Associations in the Private Employment Sector (CAPES)
19. Congress of Business and Economics (CBE)
20. Insurance Sector
 - Insurance Institute of South Africa (IISA)
 - South African Insurance Association (SAIA)
21. Life Offices Association (LOA)
22. National African Federated Chamber of Commerce and Industry (NAFCOC)
23. National African Farmers Union of South Africa (NAFU)
24. National Black Business Caucus (NBBC)
25. National Federation of Building Industries (NAFBI)
26. National Industrial Chamber (NIC)
27. Retailers' Association (RA)
28. Road Freight Employers Association (RFEA)
29. South African Black Technical and Allied Careers Organisation (SABTACO)
30. South African Chamber of Business (SACOB)
31. South African Communications Forum (SACF)
32. South African Institute of Black Property Practitioners (SAIBPP)
33. South African Leisure & Tourism Association (SALTA)
34. South African Petroleum Industry Association (SAPIA)
35. Steel and Engineering Industries Federation of South Africa (SEIFSA)

This submission is also supported by

Plastics Federation of South Africa

Direct Marketing Association of South Africa
Consumer Credit Association of South Africa
South African Property Owners Association

**SUBMISSIONS TO THE CONSUMER PROTECTION BILL ON BEHALF OF
BUSINESS UNITY SOUTH AFRICA**

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SUBMISSIONS TO THE CONSUMER PROTECTION BILL ON BEHALF OF BUSINESS
UNITY SOUTH AFRICA

1 INTERPRETATION

1.1 In this submission, clause headings, if any, are for convenience and shall not be used in its interpretation.

1.2 The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings -

1.2.1 "the Administrative Act" – the Promotion of Administrative Justice Act No. 3 of 2000;

1.2.2 "the Bill" - the Consumer Protection Bill;

1.2.3 "the Commission" - the National Consumer Commission established in terms of section 94 of the Bill;

1.2.4 "the Companies Act" – the Companies Act No. 61 of 1973, as amended;

1.2.5 "the Constitution" - the Constitution of the Republic of South Africa, 1996;

1.2.6 "the Criminal Procedure Act" – the Criminal Procedure Act No. 5 of 1977;

1.2.7 "the EC Act" – the Electronic Communications Act No. 36 of 2005;

1.2.8 "the ECT Act" - the Electronic Communications & Transactions Act No. 25 of 2002;

1.2.9 "the Foodstuffs Act" - the Foodstuffs, Cosmetics & Disinfectants Act No. 54 of 1972 and the term "FCD Act" shall bear the same meaning;

1.2.10 "ICASA" – the Independent Communications Authority of South Africa;

1.2.11 "the Information Act" - the Promotion of Access to Information Act No. 2 of 2000;

1.2.12 "the National Credit Act" – the National Credit Act No. 34 of 2005;

- 1.2.13 "the Medicines Act" - the Medicines & Related Substances Act No. 101 of 1965, as amended, together with the Regulations promulgated in terms of that Act;
- 1.2.14 "the PPI" - the Protection of Personal Information Bill;
- 1.2.15 "this submission" - this document together with all of its annexures, as amended from time to time;
- 1.2.16 "Tribunal" – the National Consumer Tribunal established in terms of Section 26 of the National Credit Act.
- 1.3 Where any term is used in the submission and the term is defined in section 1 of the Bill, the definition applicable in section 1 of the Bill shall be applicable to the term as it is used in this submission.
- 1.4 Any reference to any statute, regulation or other legislation shall be a reference to that statute, regulation or other legislation as at the signature date, and as amended or substituted from time to time.
- 1.5 Where any term is defined within a particular clause other than this 1, that term shall bear the meaning ascribed to it in that clause wherever it is used in this agreement.

2 **SPECIFIC COMMENTS**

Section No.	Section or Extract of Section	Comment
1	Definition of "advertisement".	This definition is in conflict with the definition of "advertisement" as determined by the Code of Practice of the Advertising Standards Authority of South Africa, an organisation by which a significant number of business entities are regulated.
1	Definition of "agreement".	This definition includes intended and potential transactions. In so far as intended or potential transactions will be construed as valid and enforceable agreements, there is a conflict with a long-standing common law principle that one may not enter into an agreement to agree, alternatively, that such agreements shall be of no force or effect.
1	Definition of "confidential information".	<p>This definition is already dealt with in detail in terms of the Information Act, as amended, as well as in the ECT Act, as amended, and the National Health Act No. 61 of 2003.</p> <p>It is not clear how this definition will be dealt with in the context of a multiplicity of pieces of legislation that deal with it.</p> <p>No provision is made for the purposes of harmonising the apparent inconsistencies in various pieces of legislation. This issue is dealt with below under the heading "General Comments".</p>
1	Definition of "goods".	This definition is very broad and needs to be made specific in order to limit the application of the Bill to the goods as used in the Bill. The word "any" should therefore be deleted.

1	Definition of "historically disadvantaged person".	<p>This definition is not in line with the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("BBBEE Act"), which does away with the definition of "HDP" which is open to interpretation, in particular in relation to which natural persons would have been disadvantaged by unfair discrimination on the basis of race. The definition now found in the BBBEE Act refers to "black people" who are defined as meaning "Africans, Coloureds and Indians".</p> <p>The position is also reinforced in the Codes of Good Practice published in terms of the BBBEE Act where "black people" are defined as meaning "African, Coloured or Indian persons who are natural persons and</p> <ul style="list-style-type: none"> (a) are citizens of the Republic of South Africa by birth or descent; or (b) are citizens of the Republic of South Africa by naturalisation before the commencement date of the Constitution of the Republic of South Africa Act of 1993; or (c) became citizens of the Republic of South Africa after the commencement date of the Constitution of the Republic of South Africa Act of 1993, but who, but for the Apartheid policy that had been in place prior to that date, would have been entitled to acquire citizenship by naturalisation prior to that date;".
1	Definition of "importer".	This definition is dealt with in the Customs and Excise Act No. 91 of 1964, as amended. It is not

		clear how the two definitions shall be construed harmoniously, especially in so far as the Customs and Excise Act deals specifically with the import and export of various goods.
1	Definition of a "mark".	The South African common law deals with unregistered marks or trademarks in the realm of unlawful competition. It is not clear whether or not this definition purports to replace already developed common law principles of unlawful competition in so far as the definition of an unregistered trademark is concerned.
1	Definition of a "service".	This definition is very broad and needs to be made specific in order to clarify which services fall within the ambit of the Bill.
3(2)	<p>"The purposes, polices and provisions of this Act -</p> <p>(a) apply equally to all consumers in South Africa in respect of a transaction to which this Act is applicable in terms of section 5; and</p> <p>(b) as contemplated in section 9(3) of the Constitution, are intended in particular to protect and advance the interests of, and better assure the realization and enjoyment of consumer rights, by -</p> <ul style="list-style-type: none"> (i) historically disadvantaged persons; (ii) low income persons and communities; (iii) remote, isolated or low density populations and communities; (iv) minors, seniors and other similarly vulnerable consumers; and (v) consumers whose ability to read and comprehend advertisements, agreements, marks, instructions, labels, warnings or notices is limited by reason of low literacy, vision impairment, or limited fluency in the language in which any such text is produced, published or presented." 	<p>The purposes and policy of the Bill are set out in section 3(1). The Bill is concerned primarily with promoting the social and economic welfare of consumers in South Africa. This is to be achieved by implementing the objectives contained in subsections (1)(a) to (h) of section 3.</p> <p>In section 3(2)(a) the Bill is to apply to all consumers in South Africa in respect of a "transaction". The term "transaction" is defined in section 1 to mean "any interaction, or agreement to interact, in the ordinary course of business, between a supplier and a consumer concerning the supply or potential supply of any goods or services in an exchange for consideration, including any such supply or potential supply or goods or services in an exchange for consideration in terms of any public regulation".</p> <p>Section 5, which is dealt with in further detail below, sets out the particular types of transactions to which the Bill will be applicable.</p>

		<p>The difficulty with section 3(2)(a) is that the provisions in this section are trite. There is no reason why the Bill would not apply equally to all consumers in South Africa when one considers the definitions contained in section 1 as read together with the provisions of section 5. Section 3(2)(a) therefore appears to be superfluous. Section 3(2)(a) must be read together with subsection 3(2)(b) due to the use of the word "and" at the end of section 3(2)(a).</p> <p>Once again, the provisions of subsection (2)(b) appear to be superfluous in so far as the Bill will apply to all consumers and all transactions as defined in section 1 and section 5 of the Bill.</p> <p>In any event, the various categories of persons referred to in subsections (b)(i) to (v) are not referred to in section 9(3) of the Constitution. The Bill therefore attempts to introduce into the provisions of section 9(3) of the Constitution additional categories of persons against which discrimination, with which section 9 of the Constitution is concerned, is prohibited, as listed grounds.</p> <p>The distinction between discrimination on listed and unlisted grounds is an accepted principle in South African constitutional jurisprudence. The so-called "listed grounds" are those grounds set out expressly in section 9 of the Constitution. Should discrimination occur on any other basis, other than the listed grounds, then certain aspects of the discrimination must be approved in order for it to be shown that the differentiation that is being complained of in any particular set of</p>
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		<p>circumstances amounts to unfair discrimination.</p> <p>This distinction is important from the point of view of any litigant as he or she will be required to prove this aspect whereas should the discrimination be based on a listed ground, this aspect, of unfair discrimination, is presumed to exist and accordingly the discrimination is presumed then to be unfair. In the light of the foregoing, the use of the words "as contemplated in section 9(3) of the Constitution" are not understood in the context of the Bill or in the light of section 9(3) of the Constitution.</p> <p>It is also not clear why the Bill has singled out those categories of persons, referred to in subsections (b)(i) to (v), in so far as the Bill applies to all transactions and to all consumers in South Africa. In this regard, see the definition of "consumer" as read together with the definition of "transaction" in section 1 of the Bill. The term "consumer rights" is also not defined in section 1 of the Bill. It is therefore not altogether clear to what section 3(2)(b) is referring when it uses the term "enjoyment of consumer rights".</p> <p>Other terms that require a definition and are consequently overbroad include "low income persons and communities", "remote, isolated or low density populations and communities" and "similarly vulnerable consumers". The test that is to be applied when a consumer is considered to be a member of the class referred to in subsection (b)(v) also requires clarification.</p> <p>The reference to section 9 of the Constitution in subsection (2)(b) implies that there is unfair</p>
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		<p>discrimination currently occurring in the market place between groups of consumers by persons providing goods and services to the market place. It is not clear what the basis of this discrimination is or how it is to be described. It may therefore be preferable to consider the nature of the discrimination and amend the provisions of section 3 so as to address the discrimination directly and not in broad terms using language that is difficult to define and apply.</p> <p>It should be noted that no reference is included in the categories in subsections (i) to (v) of small and medium business enterprises or small business in general or the fact that consumers rights are already, to a large degree, protected by a number of non-governmental organisations, employer organisations and organised business organisations, the Advertising Standards Authority of South Africa and other statutory bodies that are already empowered to protect the consumer, for example the Medicines Control Council created in terms of the Medicines Act as amended.</p>
4(1)(a)	<p>"The National Consumer Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to take reasonable and practical measures, in a manner consistent with the principles and purposes of this Act, to -</p> <p>(a) promote and support the development, where the need exists, of a fair, transparent, sustainable, responsible, efficient, effective and accessible consumer market and industry generally, and in particular to meet the needs of persons contemplated in section 3 (2)(b) ..."</p>	<p>Once again, terminology is used in this section that is not clear: the scope and ambit of "reasonable and practical measures" is not understood within the context of the remaining provisions of the Bill, which apply to the powers of the Commission, and the phrase "where the need exists" is also unclear.</p> <p>In so far as it is contended by the Bill, more particularly in the long title to the Bill and section 3(1), that consumers generally have been faced historically with unfair practices, then these unfair practices have applied and affected consumers everywhere in the country equally. It is therefore not apparent how the National Consumer Council</p>

		<p>is going to identify where a particular need exists in light of the objects with which the Bill has been endowed.</p> <p>There appears therefore to be an inherent discrimination between what the National Consumer Council is empowered to do in section 4(1)(a) and the provisions of section 3. This inherent conflict may exacerbate the discrimination that the Bill presumes exists and not remedy it.</p> <p>It is also not clear what measures the National Consumer Council will be in a position to take in so far as such measures must, in terms of this section, be "fair, transparent, sustainable, responsible, efficient, effective and accessible". This appears to be an onerous set of criteria with which the Commission will be lumbered and against which any steps that it intends to take will be measured and possibly challenged in terms of South Africa administrative law.</p> <p>The list should therefore be deleted or severely curtailed in order to reduce the potential of consequent and expected challenges based on South African administrative law.</p>
4(1)(b)(iii)	The use of the term "consumer market".	<p>This term is not defined in section 1 of the Bill. It is not clear what the "consumer market" is especially in relation to the definitions of "transaction", "goods", "services" and "transaction". This term should be clarified either by a definition in section 1 or by appropriate amendments to the aforementioned terms so as to develop the idea by "consumer market" with reference to the conduct of transactions, in respect of the supply of goods and services, between consumers and the suppliers of those goods and</p>

		services, alternatively, the term "consumer market" should be deleted and replaced with an appropriate term.
4(2)	<p>"Any of the following persons may, in the manner provided in this Act, approach a court, the Tribunal, or the National Consumer Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:</p> <ul style="list-style-type: none"> (a) A person acting on their own behalf; (b) A duly authorised person acting on behalf of another person who cannot act in their own name; (c) A person acting as a member of, or in the interest of, a group or class of persons; (d) A person acting in the public interest; and (e) An association acting in the interest of its members." 	<p>This section appears to align itself with the locus standi provisions contained in section 38 of the Constitution. The potential class of complainants therefore, both in terms of the Bill and in terms of the provisions of South African law, has been expanded so as to include a significant number of persons who otherwise, in terms of the common law, would not have had the locus standi to institute proceedings, based on so called "consumer rights", in terms of South African law.</p> <p>The difficulty with expanding the locus standi provisions, as contemplated in section 4(2), means an increased capacity is required, from an administrative point of view, in order to deal with an increase in complaints. Both the Tribunal and the Commission will be required to deal with complaints by persons who may not necessarily be directly connected to a particular transaction as defined in section 1 of the Bill.</p> <p>In fact, due to the locus standi provisions contained in section 4(2), the pedantic definitions of "transaction" and "consumer" appear to be superfluous. Section 4(2) contemplates that any person may, on behalf of any other person, both of whom would be considered to be consumers for the purposes of the Bill, institute action or complain to a relevant authority as described in section 4(2).</p> <p>The section therefore appears to be somewhat superfluous in light of the broad nature of the term "transaction" in section 1 of the Bill.</p>

4(3)	<p>"In any matter brought before the National Consumer Tribunal or a court in terms of this Act, the Tribunal or Court, as the case may be -</p> <ul style="list-style-type: none"> (a) must promote the spirit, purpose and objects of this Act; (b) must develop the common law as necessary to improve the realization and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (2)(b); (c) if any provision of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realization and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (2)(b); (d) must strictly interpret any document prepared or published by or on behalf of a supplier or required to be produced by a supplier, to the benefit of the consumer — <ul style="list-style-type: none"> (i) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and (ii) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to the content of the document, the manner and form in which it was prepared and presented, and the circumstances of the transaction or agreement; (e) must make appropriate orders to give practical effect to the consumers' right of access to redress, including, but not limited to - <ul style="list-style-type: none"> (i) any order expressly provided for in this Act; and (ii) any innovative order that better advances, protects, promotes and assures the realization by consumers of their rights in terms of this Act." 	<p>This section materially affects the manner in which a number of contracts are drafted for purposes of supplying different services to consumers in South Africa. Extraordinary powers are afforded to both the Tribunal and a court for the purposes of interpreting both a contract, upon which a complaint or claim is based or instituted by a consumer, and applying the provisions of the Bill so as to clearly favour the consumer.</p> <p>The supplier of goods, who may also be a consumer, is then left in the unenviable situation of having his or her or its document interpreted outside of the current scope and ambit of the principles otherwise applicable to the interpretation of contracts in South Africa law.</p> <p>Whilst most of these principles are contained in the common law, which a statute is at liberty to override, the amount of uncertainty that will then be inserted into contractual relationships is highly undesirable. All and any contracts that make provision for the supply of goods and services in South Africa will then be subject to the interpretation principles now contained in section 4(3), which favours the consumer.</p> <p>In addition, the effect of this section will be that a contract will be drafted in such a manner so as to protect the rights of suppliers of goods and services by ousting the provisions of the Bill. This may have the opposite effect to the intentions, objectives and policies contained in the Bill.</p> <p>There is also no reason why a consumer, in a contractual provision, could not waive certain rights in relation to the manner in which a contract</p>
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		<p>will be interpreted for the purposes of the Bill.</p> <p>Subsection 4(3)(c) sets out a particular formula that must be applied for the purposes of interpreting the Bill. In so far as one is interpreting any provision of the Bill, the formula for interpretation differs if one falls into the category of persons referred to in section 3(2)(b) as opposed to circumstances in which one is not considered to be a member of that category.</p> <p>This enforces, to a degree, discrimination between groups of consumers albeit that all consumers are supposedly entitled to the same rights afforded to them by the Bill. The formulation of the interpretation principles, contained in section 4(3)(c), give rise to indirect unfair discrimination.</p> <p>The provisions of section 4(3)(e) interfere unduly with the separation of the powers of the State and the judiciary. The judiciary is independent and is tasked with the interpretation of legislation when such legislation is placed before it by two or more litigants. Directions concerning the order that a Tribunal or court "must make" are consequently unconstitutional.</p>
4(4)	<p>"In any dealings with a consumer or potential consumer in the ordinary course of business, a person must not —</p> <ul style="list-style-type: none"> (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purpose and policy of this Act; (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true." 	<p>It is not clear to whom reference is made with the use of the term "person" in light of the definition of "consumer" in section 1 of the Bill. The definition of the term "potential consumer" also requires clarification. It is not clear what is meant by a "potential consumer".</p> <p>Section 4(4) appears to create a number of offences for the purposes of the Bill. The nature of the offences is covered, to a large degree, by the Code of Conduct published by the Advertising</p>

		<p>Standards Authority of South Africa. Whilst the provisions of the Bill are much broader than the Code of Conduct of the Advertising Standards Authority, it is a duplication in so far as it is also impermissible, in terms of the Code of Conduct, to mislead the public in the context of an advertisement.</p> <p>Conceivably then, in so far if a person does commit the offence contemplated in subsection (4)(b), then the consumer or "potential consumer" will be in a position to complain to both the Advertising Standards Authority, a court and the Tribunal. This is an undesirable set of circumstances and merely encourages litigation.</p> <p>The definition of conduct that is "unconscionable" is also required as it is not clear what such conduct amounts to in relation to the provisions of section 3 of the Bill. Subsection (4)(c) appears to endorse a degree of defamation. In so far as a person believes that a particular representation is true notwithstanding the fact that the representation is in fact false, no offence would have been committed in terms of subsection (4)(c). This is untenable and unconstitutional in relation to the provisions of section 34 of the Constitution. It is not clear when any person would have reasonable grounds to believe that a falsehood is true. This section appears to be non-sensical and should be deleted in its entirety.</p>
4(5)	The use of the term "matter".	It is not clear what this term refers to in relation to the already defined terms of "transaction" and "agreement". In light of the foregoing, it is not clear how one is apply section 4 or 5 within the context of the Bill.

4(7)	<p>"The supply of any goods or services by a membership based group to any of its members is a transaction for all purposes of this Act irrespective whether the members are charged a price for any particular supply of those goods or services, unless -</p> <ul style="list-style-type: none"> (a) there is no charge or economic contribution demanded or expected in order to become or remain a member of the membership based group; (b) the goods or services are provided directly by the members to one another for their mutual benefit; or (c) the membership based group, or the supply of goods or services, are of a prescribed category that is exempted from the application of the Act." 	<p>The term "membership based group" is defined in section 1 as "club, trade union, association, society, or other collectively, whether corporate or unincorporate, of persons voluntarily associated and organised for a common purpose or purposes".</p> <p>The use of the word "or" at the end of subsection (7)(b), means that the exemption contained in subsection (7) is applicable to a membership based group if it complies with any one or more of subsections (7)(a) to (c). This appears to be incongruous with the objects of the Bill and the intention underlying section 5.</p> <p>In addition, it would appear that certain membership based groups will be exempt from the provisions of the Bill in terms of the provisions of subsection (7)(c). It would therefore appear that a membership based group will form a further exemption to the provisions of the Bill.</p> <p>The reasons why a membership based group would be exempt from the provisions of the Bill is unknown. It would therefore appear that the relationship between a member and a membership based group is an arms length transaction but for the exemption contained in subsection (7)(c).</p> <p>In addition, the express mention of a membership based group, in subsection (7), appears to exclude, based on the use of the eiusdem generis principle of the interpretation of statutes, any other organised relationship of persons from the provision of the Bill. In this regard, there are certainly associations that have been concluded</p>
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		<p>between persons in South African society that exist as groups with a defined membership but are not clubs, trade unions, associations, societies or other collectivities whether or not corporate or unincorporated.</p> <p>In this regard, a good example is persons who contribute a monthly amount to a charity or a fund and receive news letters or meet on a monthly or bi-annual basis in order to discuss the affairs of the concern to which they may be donating funds for example a religious congregation or association.</p>
5(1)	<p>"Subject to subsections (2) to (4) this Act applies to every —</p> <p>(a) transaction occurring within, or having an effect within, the Republic between parties dealing at arm's length, as described in subsection (3), except -</p> <p>(i) a transaction concerning services to be supplied under an employment contract; or</p> <p>(ii) a credit agreement, as defined in the National Credit Act, 2005 (Act No. 34 of 2005), irrespective whether that Act applies to that credit agreement;</p> <p>(b) offer or agreement to enter into a transaction contemplated in paragraph (a);</p> <p>(c) advertisement with respect to goods or services if those goods or services reasonably could be the subject of a transaction contemplated in paragraph (a) or an agreement contemplated in paragraph (b); and</p> <p>(d) the production, distribution, promotion, sale, or supply of goods, or similar incidental activities relating to a transaction contemplated in paragraph (a) or an agreement contemplated in paragraph (b)."</p>	<p>The fundamental principle of this section is that the Bill applies to every transaction having an effect within South Africa between parties dealing at arms length. Therefore contracts between a South African citizen and a foreigner, where the performance of the contract is to be carried out in South Africa, will be subject to the Bill and therefore the foreign entity subject to South African law.</p> <p>The Bill will also apply to a contract between a South African and a foreigner where the contract was signed in South Africa or is subject to South African law. Two exceptions are referred to in subsections (1)(a)(i) and (ii), which deal with employment and credit agreements, respectively. We suggest that the exemption referred to in subsection (1)(a)(ii) could very well be extended to all companies which are licensed under the Financial Advisory and Intermediary Services Act No. 37 of 2002.</p> <p>There appears to be a duplication in so far as the Code of Practice of the Advertising Standards</p>

		<p>Authority already deals with the subject matter contained in subsection (1)(c), being advertisements. In so far as parties do not deal at "arms length", the provisions of the Bill do not apply to the contract concluded between the parties. This appears to be an unnecessary and rather odd exemption. Parties may not be able to contract at arms length but nevertheless be in a position to conclude a lawfully enforceable contract.</p> <p>What meaning or definition should be attributed to the term "arms length" in such circumstances? For the purposes of the Bill and this section, this issue requires attention in the context of this section to the extent that the term "at arms length" should be deleted in its entirety.</p>
5(2)	<p>"Despite subsection (1), if the consumer in respect of any transaction, agreement or a category or series of potential transactions or agreement is -</p> <ul style="list-style-type: none"> (a) the state, or an organ of state; or (b) a juristic person, other than a juristic person which is a franchisee or potential franchisee of the supplier in respect of that transaction, if - <ul style="list-style-type: none"> (i) the asset value or annual turnover of that juristic person, combined with the asset value or turnover of any related person, at the time of the transaction equalled or exceeded the threshold value determined by the Minister in terms of section 6(1)(a); or (ii) the value of the particular transaction equalled or exceeded the threshold value determined by the Minister in terms of section 6(1)(b). <p>only Part A of Chapter 2, and section 70, together with any provisions relating to the interpretation, application or enforcement of those provisions, apply to that agreement or transaction."</p>	<p>There is a partial exemption from the Bill that has been afforded to the State. The reasons for this exemption appear to be unknown. In light of the emphasis already placed by the Bill on issues relating to equality, it is not clear why the State should be afforded any special exemption or treatment in terms of the Bill. The term "incidental activities", used in subsection (1)(d), requires clarification.</p> <p>It is not clear, in any event, whether "incidental activities" refers to the supply of goods or activities related to the production, distribution, promotion and sale or supply of such goods ie are we in fact talking about incidental activities that are themselves goods or incidental activities relating to the supply of goods?</p>
5(4)(c)	<p>"For greater certainty in applying subsections (1) and (2) ...</p> <ul style="list-style-type: none"> (c) in any of the following arrangements, the parties are not dealing at 	<p>In light of the provisions of section 5(1)(a), subsection (1)(c) applies to any transaction that</p>

	<p>arm's length:</p> <ul style="list-style-type: none"> (i) a transaction between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as supplier; (ii) a transaction between a juristic person, as supplier, and a person who has a controlling interest in that juristic person, as consumer; (iii) a transaction between natural persons who are in a familial relationship and - <ul style="list-style-type: none"> (aa) are co-dependent on each other; or (bb) one is dependent upon the other; and (iv) any other arrangement - <ul style="list-style-type: none"> (aa) in which the parties are not independent of one another and consequently either of them does not necessarily strive to obtain the utmost possible advantage out of the transaction; or (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length." 	<p>does not fall within the provisions of subsections (c)(i) to (iv). This appears to be unduly onerous especially in light of the fact that persons who are in a familial relationship are capable of concluding arms length transactions. The reason for the exclusion based on familial relationships is not clear.</p> <p>Subsection (4)(c) does not create an offence in relation to a contract that is not at arms length. The effect of subsection (4)(c) merely operates so as to exclude contracts to which section 5(1) is otherwise applicable. Contracts should be arms length, in accordance with the provisions of South Africa law, and therefore subsection (4)(c), as read together with section 5(1)(a) appears to be contra bonos mores. The use of the word "arrangement", in subsection (c)(iv) should be defined as this term is not defined in section 1. The use of this term merely perpetuates confusion in light of the terms that are defined, being "agreement" and "transaction".</p>
5(8)	<p>"For all purposes of this Act -</p> <ul style="list-style-type: none"> (a) a solicitation of offers to enter into a franchise agreement; (b) an offer by a potential franchisor to enter into such an agreement with a potential franchisee; (c) a franchise agreement or agreement supplementary to a franchise agreement; and (d) any supply of goods or services in terms of such an agreement by the franchisor as supplier, to the franchisee, as consumer, is a transaction at arm's length within the meaning of this Act." 	<p>The Bill appears to apply to "transactions", as defined, and certain transactions that occur at arms length. The element of an "arms length" transaction appears to be entrenched in section 5, which, as stated above, deals with the application of the Bill. The various subsections in section 5 then attempt to explain the concept of "arms length".</p> <p>However, in the process of explaining this term, it would appear that section 5 narrows the definition of "transaction" for the purposes of applying it to the Bill or, put differently, applying the Bill to the transactions as defined in section 1.</p>

		<p>In order for the Bill to apply to a particular commercial arrangement, defined otherwise as a "transaction", the transaction must be at arms length. The use expressly of terminology that is then found in section 5, to define "arms length", based on the existing principles of the interpretation of statutes in South African law, may operate to exclude certain contracts, albeit that they are concluded at arms length, from the application of the Bill. This exclusion appears to be arbitrary.</p> <p>By mentioning one of a class of things in an Act or statute, the legislation concerned may be interpreted to exclude similar things of that class as the legislature is presumed to have thought about what class of things the legislation is to be applied and in so far as a certain element of that class is excluded, this exclusion is presumed to be deliberate.</p> <p>Therefore, if one is going to define franchise agreements as being agreements that are concluded at arms length for the purposes of the Bill, what is one to do with the remaining contractual arrangements concluded on a daily basis that may otherwise fall within the definition of "transaction" in section 1?</p> <p>Section 5 is unduly pedantic, badly drafted and frustrates fundamentally the objectives of the Bill otherwise set out in sections 2 and 3. Section 5 should be revised and overhauled so as to exclude pedantic definitions and contrived explanations of terminology used in subsection (1).</p>
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7	<p>"A supplier of goods or services must not, in an unfairly discriminatory manner, or with an unfair discriminatory purpose or effect, offer or supply goods or services, or enter into an agreement to supply goods or services, by targeting particular communities, districts, populations, or market segments, for -</p> <ul style="list-style-type: none"> (a) unreasonably exclusive access to, exclusion from, or differential priority of access to, goods or services; (b) the supply of unreasonably different quantities of goods or services, or (c) unreasonable differential pricing of goods or services." 	<p>Clarification is sought on what would constitute an "unfairly discriminatory manner" and "unfair discriminatory purpose or effect" in the context of this clause. It can be inferred that discriminatory practices can therefore occur so long as they do not result in unfair discrimination and can be justified accordingly. Marketing by its very nature targets certain sectors of the population in that specialized products are targeted at specific sectors of consumers.</p> <p>The relevance of a product in terms of marketing is paramount. An example of this would be toiletries that are specifically designed for the needs of women; vitamins that are designed to aid HIV and AIDS sufferers; and hair care products, which is also sector specific. This cannot be regarded as unfair discrimination. In addition, marketing is aimed at certain communities taking into account the potential affordability of the goods being marketed.</p> <p>With regard to sub-sections (b) and (c) clarification is required as to what is regarded as unreasonable. Different quantities of goods and services are supplied to different sectors of the population or communities based on the supply and demand for such quantities. For example the quantities of electrical goods supplied to urban areas will not be equivalent to the supply of the same or similar products in areas where there is inadequate electrical facilities, such as rural areas.</p> <p>The provision also prohibits differential pricing for areas where the income per capita is much higher than other areas. Another reason for the differential pricing is that additional costs such as</p>
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		transportation and storage are built into the price of the product. In general, the clause is very subjective and its application, broad.
10	"In managing, underwriting or pricing any risk-based goods or services, or in pricing any other goods or services within a particular market, a supplier must not use any scoring or other evaluative mechanism or model that is unreasonably founded or structured upon a statistical or other analysis in which the primary or predominant basis of categorization, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution."	<p>The term "risk-based" and the nature of the risk is to be clearly defined. The impact of this clause should be assessed as it prohibits the scoring of candidates or any exclusions which would be discriminatory in terms of section 9(3) of the Constitution. It would prohibit exclusion for race, age, location, and possibly HIV and AIDS status. This is of particular relevance to any industries or businesses that deal with risk.</p> <p>With regard to the evaluative and/or risk-scoring models, it is suggested that suppliers formulate their own models and in so far as such models are structured upon a statistical or other analysis in which the predominant basis of categorisation, differentiation or assessment could potentially be discriminatory, justify such to the regulatory authority.</p>
11	<p>"(1) In respect of an alleged contravention of this Part, a consumer protection group or any person contemplated in section 20 (1) of the Promotion of Equity and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), may -</p> <p>(a) institute proceedings before an equality court in terms of Chapter 4 of that Act; or</p> <p>(b) file a complaint with the Commission, which must refer the complaint to the Equality court, if the complaint appears to be valid;</p> <p>(2) In any proceedings contemplated in this Part-</p> <p>(a) there is a presumption that any differential treatment contemplated in section 8(1) is unfair discrimination unless it is established that the discrimination is fair; and</p> <p>(b) a court may draw an inference that a supplier had discriminated unfairly if -</p>	<p>Section 11(2) creates for the presumption that the supplier has acted in a manner that has unfairly discriminated against the consumer. The evidential burden is therefore shifted onto the supplier who, in such a case, will be the defendant. This contradicts the common law position in civil litigation where the burden of proof rests with the plaintiff. This section provides that the consumer need only allege discrimination.</p>

	<ul style="list-style-type: none"> (i) the supplier has made a decision contemplated in section 8 (1)(a) through (j), with respect of that consumer or prospective consumer in a manner that constituted differential treatment compared to that accorded to another consumer; (ii) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination contemplated in section 8 (1); and (iii) the supplier has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment." 	
12	<p>"(1) Any person who, in terms of this Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer must protect the confidentiality of that information, and in particular, must-</p> <ul style="list-style-type: none"> (a) use that information only for a purpose permitted or required in terms of this Act, other national legislation, or applicable provincial consumer, legislation; and (b) report or release that information only to the consumer or prospective consumer, or to another person - <ul style="list-style-type: none"> (i) to the extent required by or in terms of this Act, other national legislation, or applicable provincial consumer legislation; or (ii) as permitted or directly by - <ul style="list-style-type: none"> (aa) the written consent or instructions of the consumer or prospective consumer; or (bb) an order of court or the Tribunal <p>(2) A person referred to in subsection (1) must report or release confidential information contemplated in subsection (1) in accordance with any written direction from the consumer or prospective consumer.</p> <p>(3) It is an offence for any person to refuse to comply with a compliance notice issued in terms of this Act, and in respect of this section."</p>	<p>The definition of "confidential treatment" is defined very widely. The current wording conflicts with the common law meaning of this expression where the term "confidential information" is understood to mean information of a private or proprietary nature held by a person under a duty of confidentiality and therefore logically excludes information already in the public domain.</p> <p>It is suggested that the definition be amended to allow for a balance of the right to privacy of private information and access to personal information normally found in the public domain.</p> <p>Clarification is sought of whether the consent is to be general or specific in nature.</p> <p>In terms of logistics it would be desirable and practical for the consent to be general. This right is also governed by the protection of the PPI, which is currently under consideration by the South African Law Reform Commission and, to some extent, the National Credit Act and the EC Act. In terms of the EC Act section 69(5)(c) ICASA may develop service charters that shall address amongst other issues, the protection of</p>

		<p>private user and subscriber information.</p> <p>Clarification is sought on whether "written consent" applies to all existing lists of customer information that have been legally collected and utilized over many years. This would have the effect of making the Bill retrospective in nature. At this point reference should be made to section 12(3) of the PPI, which refers to information collected in the past and where the purpose for which the information was being collected and the intended recipients of the information had been made known to the consumer. In that event there is no need for the consumer to again be made aware of the purpose and intended recipients of the information (provided that it pertains to the same information or information of the same kind) and whereby the purpose of collection and the intended recipients of the information remain unchanged.</p> <p>However section 51 of the ECT Act provides that the data collector must retain all personal information collected for one year. The information must be deleted when obsolete. In light of the ECT Act and the PPI, these provisions needs to be reconciled.</p> <p>The Bill refers to the written consent of the consumer. It does not make provision for voice logged consumer consent or instructions, which is used in telesales. It may be desirable for the Bill to incorporate other forms of electronic communication into this section. In the event that electronic communication of this kind will be included in this section, clarification would be required as to how one would go about the electronic storage of such data. The Bill refers to</p>
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		<p>a register, but only for written consents.</p> <p>It is suggested that there should be a "phasing in" period for, at the very least, companies whose entire business may be based on the use of customer lists gathered legally but without express consent of consumers.</p>
<p>13</p>	<p>"(1) A supplier must not use, direct or permit any other person to use, or supply to another person to use, any confidential information pertaining to a consumer or prospective consumer for, or in relation to, any promotional purpose, or direct mass distribution of messages, whether printed or by electronic communication, unless the consumer has consented to such a use in the manner contemplated in subsection (2).</p> <p>(2) When entering into any transaction or agreement for the supply of any goods or services, the supplier may present to the consumer a written statement in the prescribed form -</p> <p>(a) setting out the consumer's rights in terms of this section, and</p> <p>(b) inviting the consumer to permit the supplier to use the consumer's information contemplated in subsection (1) in any -</p> <p>(i) direct promotional activity that may be conducted by or on behalf of the supplier;</p> <p>(ii) direct mass distribution of messages by print, or electronic communication; or</p> <p>(iii) marketing or customer list that may be sold or distributed by the supplier to another person.</p> <p>(3) A supplier who requests and receives any consents from consumers in terms of subsection (2) must maintain a register in the prescribed manner and form all of such consents granted by consumer.</p> <p>(4) A person must not initiate, sponsor, promote or knowingly participate in any activity, scheme or communication that is primarily designed for the purpose of accumulating confidential or other identifying information concerning consumers, either surreptitiously or without their express consent."</p>	<p>This section makes reference to the supplier. Unlike section 12, which specifically refers to any person who receives, compiles, retains or reports any confidential information pertaining to the consumer. It is unclear whether or not it is intended for section 13 to apply solely to suppliers. In that respect it is unclear whether intermediary agencies are governed by this provision. It is also unclear whether or not a franchisee is included in the definition of "intermediary". This is to be clarified.</p> <p>Notwithstanding the above, in section 13(1) it states that the supplier may not use, direct or permit any other person to use confidential information of the consumer without the consent as stipulated in subsection (2). It is unclear whether or not the prescribed form will be an industry-wide standard. This shall be clarified once the regulations are published. This provision restricts internal distribution of information (within groups of companies) and the selling of information to third parties.</p> <p>Once again, the issue with regard to overlapping of legislation is raised as this provision is governed by numerous other pieces of legislation.</p> <p>With regard to section 13(2)(b)(iii), in section 12(1) of the PPI, the person collecting information must</p>

		<p>ensure that the consumer is aware of the purpose for which the information is being collected and the intended recipients of that information. Does this mean that the supplier must state each and every marketing agency or third person that the information will be given to?</p> <p>Section 54(2) of the PPI refers to codes of conduct. These shall prescribe how the information protection principles are to be applied or are to be complied with, given the particular features of the sector or sectors of society in which the bodies are operating. This Bill also makes provision for codes in section 91. Once again the sectors will be subject to the regulatory control of two regulatory authorities.</p> <p>Section 16(1) of the PPI refers to personal information. It should be noted that although personal information is defined even more widely in the PPI, it does include the definition of confidential treatment in this Bill. Under the PPI therefore the collecting party of any such information must notify the PPI Commission.</p> <p>This clause, if enforced, will severely impact on the way in which businesses are currently being conducted. Some businesses make use of lists obtained from "list brokers", to grow their consumer base. This will no longer be permissible. Businesses that have club members in particular, will be affected in that customer data that is used by their financial and other partners can no longer be distributed. Such practices are entrenched in the way business is conducted. The cost implications to change these practices are immense and it will directly affect customer acquisition and retention as well as prevent</p>
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		<p>businesses from offering value added services to their consumers.</p> <p>Administrative requirements such as the keeping of a registry of consent forms is very costly, as is having to amend account application forms on a nationwide scale. It is suggested that an opt-out clause (as has been approved in the ECT Act) be considered an alternative to the current requirement and it would ultimately achieve the same goals.</p> <p>This provision requires the onerous task of acquiring absolute consent for any use of confidential information for marketing activities. Owing to the nature of work done by intermediaries, it is not clear whether "consent" would have to include a declaration that the consumer's data may be held by an "agent" or intermediary of the supplier in order to have consent to utilise such services.</p> <p>With regard to section 13(2), the supplier has the discretion to present such to the consumer. Additional clarity is required on exactly how this should be interpreted.</p> <p>With regard to section 13(3), "prescribed manner and form" is not defined in the Bill. It is questionable whether or not section 106(e) is applicable. This is very impractical for companies with large numbers of customers. Clarification is sought on the storage of voice-logged consents, or electronic formatting.</p> <p>In section 13(4) of the Bill it seems that the effect hereof would be to stifle many data or list</p>
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		<p>accumulation activities. It should be noted that the business community has envisaged including such disclosures in their code of conduct for compliance with the PPI. The use of the word "primarily" is vital here. Many activities give rise to contact data as the by-product of the primary marketing activity, which may be a promotion or competition. In terms of the precise wording, this would still be acceptable.</p> <p>This section highlights the need for the regulation of data privacy to be regulated by one Minister and/or regulation body. There needs to be harmonisation across all legislation for the goal of simplicity and ease of compliance. Confusion will be created if privacy is legislated by the Justice Department under the PPI and the Information Act, the Trade and Industry Department under the Criminal Procedure Act and National Credit Act, and Communications Department under the ECT Act. This would hamper the ease of compliance. It is recommended that all privacy should be covered by the PPI and all other legislation should be amended to remove privacy requirements and be made subordinate to the PPI.</p>
14	<p>"(1) The right of every person to privacy includes the right to refuse to accept, or pre-emptive block, any electronic communication to that person if the electronic communication is primarily for the purpose of fundraising or marketing any goods or services.</p> <p>(2) To facilitate the realisation of each consumer's rights to privacy, and to enable consumers to efficiently protect themselves against the unwanted and intrusive activities contemplated in subsection (1), the National Consumer Commission may establish a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any electronic communication that is primarily for the purpose of fundraising or marketing any goods or services.</p> <p>(3) A person authorising, directly or conducting any activity contemplated</p>	<p>The issue is raised as to what should occur when the source of spam is international. Clarification is required as to what the Commission proposes to do in such cases.</p> <p>The question arises as to how the envisaged rights in section 13(1) are to be upheld if the registry has not yet been established. There is also a question of free speech and whether or not this provision is valid in terms of the limitation analysis provided for in the Constitution. There needs to be clarification as how this right will be enforced or upheld.</p>

	<p>in this section must not direct or permit any person associated with that activity to direct or deliver any electronic communication to, or otherwise contact, a person who has registered a relevant pre-emptive block in terms of subsection (2)."</p>	<p>Again there is an overlap of legislation with regard to this provision. Under the ECT Act, section 45 already stipulates that a consumer may be given the right to opt out of any unwanted communication: a person can simply cancel his or her subscription to the mailing list.</p> <p>It is to be noted that more often than not direct marketing or communication with the consumer has positive implications. The wording of subsection 2 creates an impression that all electronic communication is primarily for the purposes of fund-raising or marketing and is unwanted and intrusive. This is not the case. A recent Marketing survey indicated that only a small minority of persons have complained about direct marketing activities.</p> <p>With regard to the registry, the creation of which is discretionary, it would be preferential to have this privately operated even if it is to be statutorily mandated. The Bill makes no mention of how such a register would be maintained or distributed to ensure compliance. Also, from the time of promulgation, if the registry has not been established yet, how can the envisaged rights in section 13(1) be upheld?</p> <p>With regards to e-mail marketing, spam and unsolicited e-mails, many of these originate outside the Republic. The Bill is affording consumers a "right" to pre-emptively block such spam. How is it envisaged to enforce or uphold this right? Currently there is commercially available "spam blocking" software, but this entails an expense and technical know-how to acquire</p>
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		and operate it. If the State is making such functionality a "right", does it intend to make the software and know-how freely available? Will the State be forcing Internet service providers to freely offer this service? How will it distinguish between e-mail that is with consent as opposed to spam? This section raises many practical problems and issues despite it being "paved with good intentions". It is suggested that the provisions of the PPI and the ECT Act prevail with regards to this section.
15	<p>"(1) Supplier must not initiate any direct personal contact with consumer for any promotional purpose during a prohibited period prescribed in terms of this section, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.</p> <p>(2) In order to protect the privacy of consumers, the Minister may prescribe specific days, dates, public holidays, or times of days during which it is prohibited for a supplier to initiate direct personal contact with a consumer or prospective consumer for any promotional purpose."</p>	Clarification is sought as to the nature of the contact referred to in this section.
16	<p>"(1) A supplier must not require, as a condition of offering to supply, or as a condition of offering to enter into an agreement or transaction, that the consumer -</p> <p>(a) purchase any other goods or services from that supplier;</p> <p>(b) enter into an additional agreement or transaction with the same or another supplier; or</p> <p>(c) agree to purchase any goods or services from a designated third party, unless the supplier can show financial or other efficiency benefits to the consumer.</p> <p>(2) Without limiting the generality of subsection (1), a supplier requires a consumer to purchase additional goods or services if the supplier -</p> <p>(a) supplies the primary goods and any additional goods in a common package, and offers them for supply at a single price;</p> <p>(b) attaches to or inserts within, or in the packaging of, of any primary goods a promotional coupon, credit slip, voucher or</p>	<p>In this provision the onus lies with the supplier in ensuring that the tying together of products and/or services have financial and other efficiency benefits in favour of the consumer. This provision may coincide with section 8(d)(iii) of the Competition Act, No. 89 of 1998, in so far as it deals with dominant firms. The provision purports to prohibit practices whereby the consumer is compelled to, in addition to the purchase of primary goods, purchase extra goods or services.</p> <p>In general, business practices where suppliers offer additional products or services are beneficial to consumers. Many businesses have "two in one" or "buy in bulk" offers which are very popular and of great value to the consumers. It also benefits suppliers in that they can prevent an</p>

	<p>(c) similar device to be used as full consideration for the purchase of any additional goods or services, or installs within or encodes upon the primary goods, or any component of them, any additional goods but does not alternatively offer them for supply separately and at individual prices."</p>	<p>overstock of old goods.</p> <p>It is common for suppliers to make promotional offers of goods to consumers without charging an additional fee for such goods. An example would be samples. Sample products are given to consumers in a size or format that might not be offered for supply separately at individual prices (such as the cosmetic offers where a few samples are pre-packed with the main product or a gift is included, for no extra consideration).</p> <p>It is an unreasonable burden on the supplier to show financial or efficiency benefits to the consumer.</p> <p>Furthermore, it is not clear why a consumer would not want to receive coupons or vouchers that may be used as full consideration for the purchase of additional goods and services should the consumer so wish.</p> <p>The primary concern must be that secondary products are not used for the basis of increasing the price of the goods purchased. Therefore, based on this rationale, it is submitted that a supplier need not also offer the secondary prices on an individual basis, provided that secondary items does not increase the costs of the primary goods.</p> <p>Consider, for example the case of socks which are sold in packs of three for R15. A special offer of four pairs for the price of R15 should not be considered to be a prohibited transaction whereby the supplier requires that a consumer purchase additional goods and services as a condition of</p>
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		<p>entering the transaction.</p> <p>Consumers have also responded positively to the bundling of goods or services. Such bundling works well with products such as computers which can be bought with the software, as well as in the automotive industry where vehicles are sold together with maintenance plans. This section prohibits these practices which have given consumers a greater variety of choice and which have been economically beneficial to consumer and suppliers alike.</p> <p>The repacking of goods, in order to meet the requirements of this section, will be an added expense in relation to the suppliers. It would be extremely costly for the suppliers to bear the costs of the repacking of the goods.</p>
17	<p>"(1) This section applies to any transaction or agreement in terms of which a service provider supplies a repair or maintenance service to, or supplies or installs any replacement part or components in, any property belonging to or in the control of the consumer; if</p> <p>(a) the service provider has or takes possession of that property for the purpose contemplated in this subsection; or</p> <p>(b) in any other case, the consumer requests an estimate before any service goods are supplied.</p> <p>(2) A service provider to whom this section applies must not charge a consumer for the supply of any goods or services contemplated in subsection (1) unless -</p> <p>(a) the supplier or service has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or</p> <p>(b) the consumer, in writing has -</p> <p>(i) declined the offer of an estimate, and authorised the work; or</p> <p>(ii) pre-authorised any charges up to a specified</p>	<p>The provisions of this section are ambiguous and in particular section 17(2)(b)(i) refers to a consumer declining the offer of an estimate yet authorising the work. It is unlikely that the consumer can authorise the work after having declined the estimate offered by the supplier.</p> <p>With regard to subsection 2(1)(b), the requirement is that the consumer conveys the information referred to in the particular section, in writing. Most communication with the consumer is done telephonically which has proven to be the most effective and efficient means of communication for consumers. The consumer is able to pick up the phone and call, for instance, a plumber or a repairman, and as a result such a transaction can be concluded without the consumer having to be present when the repairs or the maintenance are being executed. It is impractical to ensure that the</p>

	<p>maximum, and the amount charged does not exceed that maximum.</p> <p>(3) A service provider must not charge a consumer for -</p> <p>(a) an estimate required in terms of subsection (1)(a), unless the service provider has disclosed the price for preparing that estimate, and the consumer has approved it; or</p> <p>(b) any diagnostic work, disassembly or re-assembly required in order to prepare an estimate, or for any damage to or loss of material or parts in the course of preparing an estimate, in addition to any estimate charge imposed in terms of paragraph (a).</p> <p>(4) The Ministry, by regulation, may exempt from this section any transactions or services referred to in subsection (1) that are below a prescribe threshold."</p>	<p>transaction is always put in writing. It is suggested, therefore, that the words "in writing" as written in subsection 2(1)(b)(i) be deleted.</p> <p>Subsection 4 refers to the making of regulations wherein transactions or services below a certain threshold are exempt. It is suggested that this process should be a consultative one, and the regulations should be subject to a Regulatory Impact Assessment.</p>
18	<p>"(1) If any goods are displayed in, or sold from, open stock, the consumer has the right to select or reject any particular item from that stock.</p> <p>(2) If the consumer has agreed to purchase goods on the basis of a description or sample of the goods it is an implied condition of the agreement that :</p> <p>(a) the goods delivered to the consumer must correspond with the description or sample; and</p> <p>(b) the goods must be free from any defect that would not be apparent from the description or on reasonable examination of the sample.</p> <p>(3) If the sale or lease is by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.</p> <p>(4) When the supplier tenders delivery of any goods to a consumer the supplier must, on request, allow the consumer a reasonable opportunity to examine the goods for the purpose of ascertaining whether they are in conformity with the transaction.</p> <p>(5) If goods are delivered to the consumer that the consumer has not previously examined, the consumer is deemed not to have accepted them until the consumer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the transaction."</p>	<p>Clarification is sought as what it is meant by "reasonable opportunity to examine the goods" as stated in section 18(4). Where the consumer has not previously examined the goods, the consumer is deemed not to have accepted them until such time as a reasonable opportunity has occurred for that purpose.</p> <p>It is of concern that acceptance is not based on delivery alone but rather on the consumer's acceptance of the goods once examined. The period given in the ECT Act (the cooling off period) is seven days: after the date of receipt or conclusion of the agreement. Clarification is required as to whether or not goods purchased over the Internet and other electronic transactions shall be governed solely by the ECT Act. Section 18(5) is potentially problematic and is open to abuse by consumers. It is difficult to regulate such a section and to determine whether a consumer is acting in good faith.</p>

		<p>Automotive businesses would have to give the consumer a reasonable opportunity to examine goods, failing which the consumer is deemed not to have accepted them. It is impractical for suppliers to allow consumers to drive around in brand new vehicles for example until such time as the consumer is satisfied that they have examined the vehicle. Products such as vehicles depreciate in value, thus allowing the consumer to have a "reasonable opportunity of examining" the product will result in financial losses. There are already mechanisms in place, such as test driving, which affords the consumer an opportunity to examine the product / goods.</p>
19	<p>"(1) Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods that -</p> <p>(a) the supplier is responsible to deliver the goods to the consumer</p> <p>(i) within a reasonable time;</p> <p>(ii) at the agreed place of delivery; and</p> <p>(iii) at the cost and risk of the supplier.</p> <p>(b) the agreed place of delivery is the supplier's place of business. If the supplier has one, and if not, the supplier's residence;</p> <p>(c) the goods remain at the supplier's risk until the consumer has accepted delivery.</p> <p>(2) The consumer has the right to require -</p> <p>(a) delivery of any goods at the date, time and place of the consumer's choice, but the supplier may require the consumer to pay the costs of delivery at any location other than as contemplated in subsection (1); or</p> <p>(b) performance of any service at the time agreed with the supplier.</p> <p>(3) If an agreement does not provide a specific time for delivery of any goods or supply of any service, the supplier must not require that the</p>	<p>This provision does not stipulate cases where a third party, and not the supplier is responsible for the delivery of goods to the consumer. It is unclear what is meant by an "reasonable time" as stipulated in section 19(3). When read with section 18 section 19(1)(c) is understood to mean that the risk pertaining to the goods lie with the supplier until such time as the consumer examines the goods. Provision needs to be made for the use of third parties in delivering the goods. The term "reasonable" in subsection 1(a)(i) is to be defined, taking into account the fact that there are many factors that influence delivery. With regard to subsection 1(b), should the section be referring to the supplier and not the consumer? This may be a typographical error.</p> <p>Many businesses utilise courier companies to deliver goods to consumers. The delivery of the goods is therefore beyond the control of the suppliers. How can it be reasonably expected for a supplier to know the exact time of delivery to a third party when factors such as location, force majeure, and generally unforeseen circumstances</p>

	consumer accept delivery or performance of the services at an unreasonable time."	come into play? It is totally impractical to contract to an exact time. In addition the ECT Act has a similar provision with regard to the delivery of goods in an electronic transaction. Section 43(1)(l) of the ECT Act refers to the delivery of goods or services to be rendered. It does not refer to specific time periods that the supplier must adhere to when such has been agreed upon by the parties.
20	<p>"(1) The consumer is deemed to have accepted any goods when -</p> <p>(a) The consumer expressly or implicit communicates to the supplier that the consumer has accepted them;</p> <p>(b) the goods have been delivered to the consumer, and the consumer does any act in relation to them that is inconsistent with the supplier's ownership of the goods; or</p> <p>(c) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected them.</p> <p>(2) If the supplier delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may accept the goods and</p> <p>(3) If the supplier delivers to the consumer some of the goods the supplier agreed to sell mixed with goods of a different description not contemplated in the agreement, the consumer may</p> <p>(a) accept the goods that are in accordance with the agreement and reject the rest, or</p> <p>(b) reject the whole."</p>	Clarification is sought of the meaning of "reasonable time" in the context of this provision. Section 20(1)(b) is vague as to what acts are referred to. The provision does not take into account current and standard practices practised by suppliers such as the requisite display of a proof of purchase and the acceptance of goods in their original condition. A distinction also needs to be made between perishable goods and others as these require different time frames.
21	<p>"(1) A consumer is not required to pay a supplier for any goods or service supplied to the consumer unless the consumer-</p> <p>(a) has implicitly requested the supplier to supply those particular goods or services by tendering payment for them, or by other conduct that could reasonably lead the supplier to believe that the consumer has requested the supplier to supply those particular goods or services;</p>	Clarity is sought with regard to the meaning of "other conduct" as referred to in section 21(1)(a). The question arises of the benefits offered to members of a club membership. It is extremely costly and impractical to ensure that members are consulted or advised whenever a benefit is altered or changed from time to time.

	<p>(b) has expressly requested the supplier to supply those particular goods or services before they are supplied to the consumer; or</p> <p>(c) is a party to an agreement with the supplier in terms of which the supplier has undertaken to supply goods or services of that particular class from time to time to the consumer without further approval or specific request.</p> <p>(2) If a consumer is a party to an agreement contemplated in subsection (1)(c) and, during the course of that agreement, the supplier introduces goods or services that are materially different from and in substitution for the goods or services previously supplied, the new goods or services must be regarded as being unsolicited from the time of the material change, unless the consumer has expressly consented to the material change."</p>	<p>This section shall impose huge financial burdens on suppliers. Benefits that are considered to be unsolicited cannot be charged for, notwithstanding the overall benefits, both financial and otherwise, that the consumer may enjoy. Can a supplier not show financial or some other efficiency benefit that will be enjoyed by the consumer as an alternative?</p>
23	<p>"(1) A consumer has the right to cancel any advance booking or reservation for a service to be supplied, subject to subsections (2) and (3)</p> <p>(2) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date -</p> <p>(a) may require payment of a deposit in advance, not exceeding the prescribed amount or prescribed percentage of the cost of the goods or services that have been reserved; and</p> <p>(b) may impose a reasonable charge for cancellation of the order or reservation.</p> <p>(3) For the purposes of this section, a cancellation charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to -</p> <p>(a) the nature of the service that was reserved or booked;</p> <p>(b) the length of notice of cancellation provided by the consumer; and</p> <p>(c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the notice, and the time of the cancelled reservation.</p> <p>(4) If a consumer is unable to carry out a reservation or advance booking because the consumer has died, the supplier -</p>	<p>Clarity is required of the prescribed amount or percentage of the cost that will be determined for a deposit of any payment. Section 23(3)(b) can be interpreted to mean that there are to be different tiers of charges according the length of notice of the cancellation.</p> <p>The section also makes provision for the event that the consumer dies before carrying out a reservation or booking that has been made in advance. There may be huge financial implications if the supplier is forced to pay the total deposit back into the estate of the consumer. No provision is made for charges and costs incurred or lost by the supplier in confirming or making a reservation or booking.</p>

	<ul style="list-style-type: none"> (a) may not impose any cancellation fee in respect of the reservation or booking; and (b) must refund to the administrator of the consumer's estate any deposit paid by the consumer in respect of the reservation or booking. <p>(5) Section 22(3), read with the changes required by the context, applies in respect of a cancellation in terms of this section."</p>	
24	<p>"(1) The provisions of this section are in addition to and not in substitution for any right to return goods and receive a refund that may otherwise exist in law between a supplier and consumer.</p> <p>(2) A consumer may rescind a transaction or an agreement or renewal of an agreement -</p> <ul style="list-style-type: none"> (a) within 10 business days after delivery of goods to be supplied in terms of the agreement, if - <ul style="list-style-type: none"> (i) the agreement or transaction arises as a result of - <ul style="list-style-type: none"> (aa) direct, distance or electronic marketing by the supplier as contemplated in sections 38 or 39, and contemplates the delivery of goods to the consumer; or - (ii) any other marketing in circumstances in which the consumer is unable to choose or examine goods as contemplated in section 18; (b) within 5 business days after entering into the agreement or transaction if the agreement - <ul style="list-style-type: none"> (i) arises as a result of direct, distance or electronic marketing by the supplier as contemplated in sections 38 or 39, but does not contemplate the delivery of goods to the consumer; or (ii) concerns the purchase of a time-share interest. <p>(3) At any time, by giving one month notice to the supplier or fundraiser concerned, a consumer may cancel without penalty an agreement -</p> <ul style="list-style-type: none"> (a) for the supply of a continuous service, other than an agreement contemplated in section 46; (b) to purchase any goods or services on a periodic recurring basis by subscription; or 	<p>With regard to section 24(2)(a)(i)(aa), reference is made section 44 of the ECT Act where a consumer can cancel, without reason and without penalty, within seven days after the date in which goods are received or with regard to services, cancel within seven days after the conclusion of the agreement. Section 44 is also to be read with section 42(2) of the ECT Act that exempts certain electronic transactions from the cooling-off period.</p> <p>These include financial services, insurance services, supply of perishables, services that began with the consumer's consent before the end of the cooling-off period, goods or services that are dependent on fluctuations in the financial market and that cannot be controlled by the supplier, goods that are made to the consumer's specifications or are personalised and cannot by reason of their nature be returned as well as goods that are likely to deteriorate or expire rapidly, sale of newspapers, magazines, books, and audio or video recording equipment or computer software goods that have been unsealed by the consumer.</p> <p>With regard to section 24(4), the right of a consumer to rescind a transaction or agreement within one year, where the supplier has not been properly licensed or has contravened any provision of the Act, in respect of the transaction is</p>

	<p>(c) to make a donation on a periodic recurring basis.</p> <p>4) Despite the time limits set out in subsection (2), a consumer may rescind a transaction or agreement as contemplated in that subsection within 1 year after the transaction or agreement if the supplier -</p> <p>(a) was required to be licensed or registered in terms of any public regulation, and was not so licensed or registered; or</p> <p>(b) contravened any provision of this Act in respect of the transaction.</p> <p>(5) The expense and risk of return is borne by -</p> <p>(a) the supplier if goods are unacceptable;</p> <p>(b) otherwise by the consumer.</p> <p>(6) A supplier -</p> <p>(c) must return any payment received from a consumer within 5 business days after receiving notice of the rescission of a transaction in terms of this section or an agreement or renewal of an agreement; and</p> <p>(d) must not attempt to collect any payment in terms of a rescinded donation or transaction or an agreement or renewal of an agreement.</p> <p>(7) This section does not apply with respect to -</p> <p>(e) an agreement contemplated in section 46, or</p> <p>(f) an agreement or transaction in terms of which any goods have been delivered to the consumer, if -</p> <p>(i) any public regulation prohibits the return of those goods to a supplier once they have been supplied to, or at the direction of, a consumer; or</p> <p>(ii) after having been supplied to, or at the direction of, the consumer, the goods have been -</p> <p>(aa) partially or entirely eaten, consumed, depleted or destroyed, unless the consumer was reasonably unable to determine that the goods were unfit for the intended purpose without partially eating, consuming, depleting or destroying them; or</p>	<p>too broad and onerous on a supplier and clearly needs to be defined. This section is silent as to whether or not the consumer may retain the goods, but no mention is made of amounts that have not been paid to the supplier. With regard to section 24(6)(c), the use of the words "any payment" needs to be clarified as this could mean any payment made up to the date of rescission which, if read with subsection (4), could mean payment made up to one year for certain transactions or agreements. In the event of a renewal of agreement, this could mean that all payments made in respect of that agreement are to be returned to the consumer.</p> <p>Included in section 24(7)(f), the return of goods should be on terms currently utilized by suppliers. More specifically, the goods should be in their original condition, in the original packaging and should be accompanied with a proof of purchase. This section, as it now stands, is open to abuse. A consumer will be able to utilize the goods, for example CDs, which can be copied, and may then return the goods on the basis that they were unfit for their intended purpose. There is a need for measures to be implemented in terms of which the consumer will have to prove that the goods were unsuitable. Currently, it is business practice that merchandise that has been guaranteed can be returned and consumers will be offered a replacement item or a refund.</p> <p>The section does not take into account goods that are durable and goods where used, albeit limited in nature, render it unmarketable. Make-up products would be a prime example. Lipstick that has been used and returned by virtue of this provision cannot be resold. Another prime</p>
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	<p>(bb) partially or entirely disassembled, physically altered, or affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property."</p>	<p>example would be lingerie and swimwear. It is established business practice that these garments cannot be returned to the supplier in a bid to protect the hygiene of other consumers. It is therefore suggested that the exclusions include the wearing or use of goods of a personal nature.</p> <p>Therefore the depreciation of goods must be taken into account. In reference to subsection 2(b) therefore, the five day period is potentially problematic. So too, the use of a vehicle and its return (where there is no defect) results in its depreciation. Should this section be enforced, the supplier will have to carry these costs.</p> <p>Subsection 7 needs to be qualified to include products that cannot be returned due to personal hygiene, health and other reasons.</p>
25	<p>"(1) A person must not carry on business, advertise, promote, offer to supply or supply any goods or services, or enter into a transaction or agreement with a consumer under any name except -</p> <p>(a) the person's name, as -</p> <p>(i) recorded in an identity document or any other recognised identification document, in the case of an individual; or</p> <p>(ii) registered in terms of a public regulation, in the case of a juristic person; or</p> <p>(b) a name registered to, and for the use of, that person in terms of Chapter 5 or any other public regulation.</p> <p>(2) A person doing anything contemplated in subsection (1) must include the following particulars on any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account that the person issues:</p> <p>(a) the name, title or description under which the business is</p>	<p>Clarification is sought as to what is to occur in the event of advertisements broadcast by electronic means.</p> <p>The section makes reference to the registered name of the supplier. Many suppliers do not advertise or liaise with consumers under their registered names. Provision should be made for the use of trading names when undertaking the activities referred to in subsection 1.</p>

	<p>carried on;</p> <p>(b) a statement of the place at which, or from which, the business is carried on; and</p> <p>(c) if the activity is carried on under a name contemplated in subsection (1)(b), the name of the person to whom that name is registered."</p>	
26	<p>"(1) An intermediary must -</p> <p>(a) disclose all prescribed information to -</p> <p>(i) any person whom the intermediary solicits or agrees to represent with respect to the sale of any property or services, or from whom the intermediary accepts any used property for the purpose of offering it for sale; and</p> <p>(ii) any person from whom the intermediary solicits an offer, or to whom the intermediary offers to supply, or supplies, -</p> <p>(aa) any service to be performed by a third person; or</p> <p>(bb) any goods or property belonging to a third person; and</p> <p>(b) must keep the prescribed records of all relationships and transactions contemplated in this section.</p> <p>(2) Subsection (1)(a)(i) does not apply to -</p> <p>(a) the executor or other administrator of a deceased's estate, or the liquidator of an insolvent estate, in respect of any property of that estate; or</p> <p>(b) a trustee in respect of any trust property.</p> <p>(3) The Minister may prescribe -</p> <p>(a) the information, including the manner and form of delivery of any such information, that an intermediary, or different categories of intermediary, must provide in terms of this section; and</p> <p>(b) any records, including the form and content of any such records, that an intermediary, or different categories of intermediary, must keep in terms of this section.</p>	<p>This provision requires further clarification in order fully to understand and assess the impact of this clause. Would relationships with third party service providers be included in this provision? In some businesses, business partners are regarded as intermediaries according to the definition in the Bill. It is impractical that such intermediaries should be required to keep record of the relationships and transactions when the supplier, keeps such records.</p> <p>The section also highlights the duplication of legislation as can be seen by the definition of intermediary under Financial Advisory and Intermediary Services Act No. 37 of 2002 and Financial Intelligence Centre Act No. 38 of 2001.</p> <p>In respect of section 26(4)(a), the requirement of the disclosure of compensation in respect of a transaction is not reflected in the Financial Advisory and Intermediary Act No. 37 of 2002 and, in particular, the General Code of Conduct.</p> <p>The Bill does not define the term "compensation". The term could therefore have a meaning which goes further than the aforementioned Act to include a "refund of expenses". A genuine refund for expenses incurred on behalf of a supplier is no business of a consumer, and legal opinion to hand appears to this view.</p>

	<p>(4) Regulations contemplated in subsection (3)(a) must include, at least the requirement that an intermediary disclose to each person with whom the intermediary enters into a transaction -</p> <p>(a) the basis on which the intermediary gains, profits or is compensated or rewarded for that transaction; and</p> <p>(b) any relationship between the intermediary and any party to the transaction."</p>	<p>An illustration of the difficulties in not defining the word "compensation" can, for example, be seen in a short-term insurance industry where an underwriting manager and, more specifically, an administrator will have arrangements with an insurer which includes the refund of expenses incurred for services rendered on behalf of the insurer. It is therefore recommended that the word "compensation" be replaced with "remuneration", which is in line with section 7(1)(c)(vi) of the aforementioned Act in respect of the General Code of Conduct.</p>
27	<p>"(1) A supplier must not display any goods for sale, or offer to supply any prescribed services without displaying a price in relation to those goods or services, unless, in the case of goods, the display is -</p> <p>(a) in an area within the supplier's premises to which the public does not ordinarily have access; and</p> <p>(b) designed and intended predominantly as a form of advertisement of the supplier, or of goods or services.</p> <p>(2) For the purposes of this section, -</p> <p>(a) a price is displayed in relation to particular goods if it is -</p> <p>(i) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf, or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;</p> <p>(ii) published in relation to the goods in a catalogue available to the public if-</p> <p>(aa) a time is specified in the catalogue as the time after which the goods may not be sold at that price, and that time has not yet passed; or</p> <p>(bb) in any other case, the catalogue may reasonably be regarded as not out of date;</p>	<p>Subsection 1(b) refers to the display of price of the product in advertisements. The fact that advertising does not include the price is not prejudicial to the consumer. The reasons, thereof, are linked to marketing strategies, which in most instances are value based as opposed to price based and some marketing strategies may exist for a few months. In addition, the brand and not particular units are advertised. It would be impractical, for example, for a car manufacturer to advertise the price for all cars under their brand or for clothing retailers to display the cost of each and every item worn by the models in the advertisement.</p> <p>Clarification is sought of what is meant by "reasonably be regarded as not out of date" as referred to in section 27(2)(ii)(bb). The definition of a supplier seems to be inadequate when read with this section especially with reference to franchise operations. Agreements between the franchisor and franchisee are governed in terms of the Bill with the franchisor as the supplier and the franchisee as the consumer. Also included is an offer of a franchisor to a franchisee. The</p>

	<p style="text-align: center;">or</p> <p>(iii) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services; and (b) a price is not displayed in relation to any goods if -</p> <p>(i) it is in relation to goods originating outside the Republic, and is expressed in a currency other than the currency of the Republic; or</p> <p>(ii) the display of that price is fully covered and obscured by a second displayed price.</p> <p>3) If a supplier displays any goods or offers to supply any services in relation to which more than one price is concurrently displayed, the supplier must not sell those goods or services at a price higher than the lower or lowest of the prices so displayed.</p> <p>(4) Subsection (4) does not apply in respect of the price of any goods or services if the price of those goods or services is determined by any public regulation.</p> <p>(5) If a supplier has provided an estimate for any service, or goods and services, as contemplated in section 17, the price for that service, or goods and service, must not exceed the estimate, unless -</p> <p>(a) the service provider has informed the consumer of the additional estimated charges; and</p> <p>(b) the consumer has authorized the work to continue."</p>	<p>franchisee can also be a supplier.</p> <p>Section 27(a)(ii) imposes an obligation on the suppliers to insert dates on all of their catalogues. Administratively, this is burdensome in that suppliers will not be able to advertise new models without giving a timeframe as to when exactly the models will be available to the public. In addition, prices can be changed, and cannot, therefore, be specified at all times. Prices of goods, especially goods that are imported or exported, are affected by circumstances beyond the control of the supplier such as the changing gold price, as well as other facts that may be within the "control" of suppliers but nevertheless affect the pricing such as human or computer error in marketing goods/products.</p> <p>With regards to subsection (3), there are instances where an identical or similar product is marked at different prices. Retailers often price goods that are near their sell by date at a cheaper price. This practice is popular with consumers and should not be excluded. The consumer has access to the sell by date and is therefore not unduly prejudiced.</p> <p>With regard to section 27(2)(b)(ii), the section implies that where a sale price is placed over the regular price the price shall not be displayed. Sale items are always marked down by placing the revised price over or next to the regular price, as this enables the consumer to see the difference in price. Is it the intention that this is no longer permitted? Furthermore, this section could be open to manipulation and abuse because it will be difficult to determine whether the consumer him or herself has altered the display of the price.</p>
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		<p>With regard to section 27(3), it is of great concern that the Bill no longer makes provision for regional pricing. Issues pertaining to this section are covered by public ordinances and even provincial legislation. This could have vast effects on the ability of businesses to operate profitably.</p> <p>With regards to 27(5), clarity is required of the use of the "term estimate". The very nature of an estimate is that it is not to be regarded as accurate.</p>
28	<p>"(1) A supplier of goods must not display, offer to supply or supply any goods, other than goods that are exempt in terms of subsection (4), unless a trade description of those goods is -</p> <ul style="list-style-type: none"> (a) applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods; (b) displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description; or (c) is contained in any sign, advertisement, invoice, wine list, business letter, business paper, or other commercial communication on the basis of which a consumer may request or order the goods. <p>(2) A trade description applied to goods must address all of the matters contemplated in -</p> <ul style="list-style-type: none"> (a) subparagraphs (a)(i), (ii), and (iii) of the definition of trade description in section 1; and (b) section 29. <p>(3) A supplier of goods must -</p> <ul style="list-style-type: none"> (a) not offer to supply, display, or supply any goods if the supplier knows, reasonably could determine, or has reason to suspect, that - <ul style="list-style-type: none"> (i) a trade description applied to those goods is likely to mislead the consumer as to any matter implied or 	<p>Clarification is sought of the purpose of including , the number, quantity, measure, weight or gauge of any goods as well as the ingredients thereof as provided for in the definition of trade description on any advertisement, invoice, business letter, business paper.</p> <p>Further clarification is required as to the categories of goods that the Minister may prescribe as well as the inclusion of the trade descriptions referring to the place or country of origin of the goods, the mode of manufacturing or producing of any goods, which is likely to be an onerous task, and the goods being the subject of any patent, or copyright.</p>

	<p>expressed in that trade description; or</p> <p>(ii) a trade description or trade mark applied to those goods has been altered as contemplated in subsection (5); and</p> <p>(b) with respect to any goods within that person's control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a).</p> <p>(4) The Minister, by regulation, may -</p> <p>(a) prescribe categories of goods, in respect of which the trade description applied, must address the matters contemplated in subparagraphs (a)(iv), (v) and (vi) of the definition of trade description in section 1 and the manner in which these matters may be addressed;</p> <p>(b) exempt particular goods or categories of goods from the application of subsection (1) and (2) if -</p> <p>(i) those goods, or that category of goods, are subject to regulation in terms of any public regulation other than this Act, and the Minister is satisfied that the regulatory scheme provides for adequate disclosure of information to the consumer to achieve the purposes of this section; or</p> <p>(ii) the information required in terms of this section is self-evident given the nature of the goods, and the manner and circumstances in which they are customarily made available for supply to the public; or</p> <p>(c) prescribe circumstances of displaying or selling particular goods or categories of goods, which if satisfied, would exempt those goods from the application of this section.</p> <p>(5) It is an offence for a person to-</p> <p>(a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description;</p> <p>(b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers; or with respect to any goods within that</p>	
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	<p>person's control; or</p> <p>(c) fail to take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or (b)".</p>	
29	<p>"(1) In addition to the requirements of section 28, a person who packages any prescribed goods, or imports any such goods, for supply to consumers must display on or in association with that packaging or those goods, a notice in the prescribed manner and form that -</p> <p>(a) discloses the presence, nature and extent of any-</p> <p>(i) genetically modified ingredients or components of those goods; or</p> <p>(ii) ingredients or components that have been determined to present a chemical or biological hazard to humans, relative to their concentration in those goods;</p> <p>(b) discloses the estimated energy requirements per hour of use, if the operation of the goods requires the utilization of energy other than muscle power;</p> <p>(c) discloses the nature and intensity of any potentially harmful energy radiation, if the goods, or any component of the goods, emit any such radiation; and</p> <p>(d) discloses the need for special handling, or waste disposal, of the goods, any component of them or any material in which the goods were packaged, if such special handling or waste disposal is -</p> <p>(i) required in terms of any public regulation; or (ii) is advisable in the interests of personal or public health or safety.</p> <p>(2) A person who, in connection with the supply of any services to a consumer, -</p> <p>(a) supplies to that consumer any goods that prescribed in terms of subsection (1), must-</p> <p>(i) inform the consumer of any relevant information contemplated in subsection (1) before supplying those goods; and</p> <p>(ii) after complying with sub-paragraph (i), obtain the consumer's express consent to install any goods that</p>	<p>With regard to subsection 1(b), it is impractical to accurately meet this requirement. The term "muscle power" needs to be defined.</p> <p>The implications of this section and subsections 1(b) and (c) in particular are potentially far reaching and cannot be extensively commented upon until such time as the goods referred to in subsection 1 have been made known.</p> <p>It may be difficult to meet the requirements in subsection 1(b) and (c) in that there may be different "estimated energy requirements" abroad, and the South African distributors of the imported goods (the supplier) has restricted knowledge, if any, of the "nature and intensity of any potentially harmful energy radiation", which may apply in respect of such goods.</p> <p>In the event that such information referred to above is incorrect, who shall be liable?</p> <p>With regard to section 29(3), the meaning of a "substantially similar label or notice" is to be clarified. Further it would be advisable to exempt certain goods that are already regulated by existing pieces of legislation and/or agreements currently in place between government and industry.</p> <p>It is to be clarified as to how a supplier is to reconcile the exemption contained here and that</p>

	<p>are the subject of a notice required by subsection (1), before supplying those goods.</p> <p>(3) Subsection (1) does not apply to any goods or services in respect of which a substantially similar label or notice has been applied or provided in terms of any other public regulation.</p> <p>(4) Section 28 (3) and (5), each read with the changes required by the context, apply in respect of a label or notice required by this section."</p>	contained under section 50.
31	<p>"(1) A supplier of goods or services must provide a written record of each transaction to the consumer to whom the goods or services are supplied, including in that record at least the following information:</p> <p>(a) The supplier's name, or registered business name, and VAT registration number, if any;</p> <p>(b) The address of the premises at which or from which the goods or services were supplied;</p> <p>(c) The date on which the transaction occurred;</p> <p>(d) A name or description of any goods or services supplied or to be supplied;</p> <p>(e) The unit price for each good or service supplied or to be supplied</p> <p>(f) The quantity of each good or service supplied or to be supplied</p> <p>(g) The total price of the transaction, before any applicable taxes;</p> <p>(h) The amount of any applicable taxes; and</p> <p>(i) The total price of the transaction, including any applicable taxes.</p> <p>(2) The Minister, by notice, may exempt categories of goods or services, or circumstances of trade, from the application of subsection (1)."</p>	<p>With regard to subsection 1(b), clarification is required of the address referred to. It is the branch, store, or principal place of business?</p> <p>This provision places an administrative burden on small businesses and enterprises, which do not have the resources to meet such requirements. Many of these business conclude verbal agreements / transactions with consumers.</p>
32	<p>"(1) This section applies only to a continuous service agreement, or other prescribed categories of agreement.</p> <p>(2) The supplier must deliver, without charge to the consumer, a copy of a document that records an agreement, transmitted to the consumer in a paper form, or in a printable electronic medium.</p> <p>(3) The Minister may prescribe -</p>	<p>This section restricts the flexibility of consumer's ability to enter into oral agreements.</p> <p>The administrative implications and logistics in adhering to this section are far reaching. Details are required of the nature of the specific wording that may be described by the Minister in such</p>

	<ul style="list-style-type: none"> (a) categories of additional agreements to which this section applies; and (b) any specific wording to be included in such an agreement to give full effect to the purposes of this Act. <p>(4) Regardless whether or not a particular written agreement is required in terms of this section -</p> <ul style="list-style-type: none"> (a) any written agreement between a supplier and consumer must satisfy the requirements of sections 33 and 34; (b) any change to a document recording a written agreement, or an amended agreement, after it is signed by the consumer, if applicable, or delivered to the consumer, is void unless - <ul style="list-style-type: none"> (i) the change reduces the consumer's obligations or liabilities under the agreement; or (ii) after the change is made, the consumer signs or initials in the margin opposite the change; and (c) if the parties to a written agreement agree to change its terms, the supplier must deliver to the consumer a document that reflects their amended agreement within 20 business days after the date of the agreement to amend." 	<p>agreements.</p> <p>The requirement pertaining to changes to the documents as provided by section 32(4)(b), are problematic. It should be taken into account that the numbers of consumers in certain categories are vast and it is near impossible to ensure that every consumer signs or initials the changes to the document. The section does not take into account the fact that not all consumers have access to e-mail or postal services. An alternative is to be supplied.</p>
33	<p>"(1) Subject to subsection (2), a consumer has a right to receive any document required in terms of this Act in an official language, as determined by the supplier or other person required to produce the document.</p> <p>(2) Despite subsection (1), if the Minister has prescribed any document in terms of subsection (3), a supplier or other person who is required to produce that document must -</p> <ul style="list-style-type: none"> (a) determine two official languages in which the supplier will make that document available, having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the supplier; (b) offer each consumer an opportunity to choose which of those two languages the consumer prefers; and (c) provide each such document to the consumer in the official language chosen by the consumer in terms of paragraph (b). <p>(3) The Minister, by regulation, may prescribe the documents or</p>	<p>Details are required of which document/s shall be covered by section 33(2) and (3). The cost implications herein are extensive given that the factors such as circumstances, needs and preferences of the consumers are to be taken into account. This provision is too wide and onerous to implemented by the suppliers. With regard to goods or services that are imported into South Africa, the logistics of duplicating such documents in two or more official languages are far reaching and burdensome.</p> <p>It is difficult to see how this section will be implemented in a manner that assists all consumers. By way of example, a scenario may arise where a supplier in Durban makes documents available in Zulu and English taking</p>

	categories of documents that are subject to the requirements of subsection (2)."	into account the two chief languages in the region. A consumer who is Venda or Afrikaans speaking will not understand such documents. The system as applied will be prejudicial even though this is not the intention.
34	<p>"(1) The producer of a document that is required to be delivered to a consumer in terms of this Act, must provide that document -</p> <p>(a) in the prescribed form, if any, for that document, or;</p> <p>(b) in plain language, if no form has been prescribed for that document.</p> <p>(2) For the purposes of this Act, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance, and import of the document without undue effort, having regard to -</p> <p>(a) the context, comprehensiveness and consistency of the document;</p> <p>(b) the organization, form and style of the document;</p> <p>(c) the vocabulary, usage and sentence structure of the text; and</p> <p>(d) the use of any illustrations, examples, headings, or other aids to reading and understanding.</p> <p>(3) The National Consumer Commission may publish guidelines for methods of assessing whether a document satisfies the requirements of subsection (1)(b)."</p>	The definition of "producer" in section 1 of the Bill refers to a producer of goods and places the onus on that producer to provide documents in the prescribed form, alternatively in plain language. What is to occur in the event that a manufacturer of the document is an international entity. Furthermore clarification is required as to what constitutes "average literacy."
35	<p>"A manufacturer, producer, importer, distributor, or supplier of any goods or services must not promote any goods or services -</p> <p>(a) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of-</p> <p>(i) the nature, properties, advantages or uses of the goods or services;</p> <p>(ii) the manner in or conditions on which those goods or services may be purchased, leased or otherwise acquired;</p> <p>(iii) the price at which the goods may be acquired, or the</p>	This section, like many of the others, provides criteria that are based on a subjective basis. Hence, the criteria set out in this provision needs to be defined further. Section 35(e)(1), for instance, refers to promotions that are set out in a degrading manner. However, these are subjective to the particular consumer; what is degrading to one may not be so to another.

	<p>existence of, or relationship of the price to, any previous price, or competitors price for comparable or similar goods or services;</p> <p>(iv) the sponsoring of any event; or (v) any other material aspect of the goods or services.</p> <p>(b) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 51;</p> <p>(c) if those goods or services are unlawful, or if the supply, purchase, sale or possession of them is unlawful;</p> <p>(d) to be supplied in a manner that is inconsistent with any law; or</p> <p>(e) in a manner that -</p> <p>(i) is degrading to the dignity of any person;</p> <p>(ii) depicts, simulates, suggests, represents or reasonably appears to promote a use or application of those goods or services that is inconsistent with any law; or</p> <p>(iii) implies or expresses a preference for any particular group of prospective consumers distinguishable from the general population on the basis of a prohibited ground of unfair discrimination set out in section 9 (3) of the Constitution, except to the extent that particular goods or services are reasonably intended or designed to satisfy specific needs or interests that are common to or uniquely characteristic of the particular group of prospective consumers."</p>	
36	<p>"(1) Subject to subsection (2), a supplier must not advertise any goods or services as being generally available at a particular place and price for a particular period, unless the supplier reasonably anticipates having a quantity of those goods, or capacity to supply those services, sufficient to satisfy the reasonably anticipated demand on that date and at that place and price, from the market to which the advertisement is targeted.</p> <p>(2) Despite subsection (1), a supplier may advertise particular goods or services as being available -</p>	<p>If enforced, one of the consequences of this provision is that the advertising of new models and the testing of new products on the market is prohibited because, in such cases, it is a usual consequence that consumer demand may not be immediately satisfied. In automotive businesses, for example, new models are advertised in advance and there are often waiting lists for orders. The pre-supply advertising may be beneficial to consumers in that they are able to</p>

	<p>(a) in a specified limited quantity at a specified price;</p> <p>(b) on a specified date and at a specified time; and</p> <p>(c) for a specified limited duration, or until the specified quantity is exhausted.</p> <p>(3) A supplier who has advertised goods or services as being generally available at a particular place and price for a particular period as contemplated in subsection (1) -</p> <p>(a) must make those goods or services available for supply for that period at that place and for that price; and</p> <p>(b) during that period and at that place, must not offer to supply any similar or comparable goods or services to any consumer at a higher price than the price at which the advertised goods were offered.</p> <p>(4) It is a defence to an alleged failure to comply with subsection (3)(a) if -</p> <p>(a) the supplier offered to -</p> <p>(i) supply or procure another person to supply the consumer with goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; or</p> <p>(ii) immediately supply, or procure another person to supply within a reasonable time, equivalent goods or services in a reasonable quantity, and at the advertised price;</p> <p>(b) the consumer accepted such an offer; and</p> <p>(c) the supplier has supplied or procured another person to supply the goods or services so offered and accepted."</p>	<p>ascertain changes in the market (knowledge of new models) before the changes are effected, and can plan accordingly. The term "reasonably anticipates" may need to be clarified.</p> <p>This provision impacts negatively on economic and marketing principles of supply and demand that are imperative in the introduction of new products into the marketplace. In addition, the provision does not provide for circumstances that are beyond the control of the supplier and this aspect needs to be clarified.</p> <p>The wording in section 36(4) is vague and ambiguous and needs to be clarified. As a consequence of this provision, suppliers will have to insert the words "whilst stocks last", "limited stock", and "limited edition" to all advertisements of goods and services. Clarification is required in the use of the phrase "supply any similar or comparable goods or services", as referred to in section 36(3)(b). This provision shall result in huge discrepancies as it prohibits for an example a sale on a certain brand of goods where the brands of other similar or comparable goods are not on sale.</p> <p>With regard to section 36(4)(a)(ii) reference is made to the EC Act concerning to broadcasters. Section 55 of EC Act states that broadcasting service licensees must adhere to the Code of Advertising Practice as determined by the Advertising Standards Authority of South Africa. Non-members of the Advertising Standards Authority of South Africa will have complaints against them adjudicated by the Complaints and Compliance Committee irrespective of whether or not broadcasting service licensees are the</p>
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		Advertising Standards Authority of South Africa members, the Independent Communications Authority of South Africa will deal with such complaints under provisions of the ECT Act.
38	<p>"(1) Whenever a person is marketing any goods or services in person at any residential premises, or performing any services for a consumer at any residential premises, or delivering any goods to, or installing any goods for, a consumer, the person must -</p> <ul style="list-style-type: none"> (a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or (b) provide suitable identification to the consumer. <p>(2) Any prescribed standards contemplated in subsection (1) must require at least the following elements for an identification badge:</p> <ul style="list-style-type: none"> (a) the name and a photograph of the wearer; (b) the name of any person on whose behalf the person wearing the badge is performing any service; and (c) the business licence or registration number, if any, of any person contemplated in paragraph (a) or (b). <p>(3) A person who is marketing any goods or services by telephone must orally provide suitable identification to the consumer, if the consumer so requests.</p> <p>(4) A person who is marketing any goods or services as contemplated in this section, and who concludes a transaction or agreement with a consumer, must inform the consumer of the right to rescind that agreement, as set out in section 24."</p> <p>(5) If a person who has marketed any goods as contemplated in subsection (1)</p> <ul style="list-style-type: none"> (a) left any goods with the consumer without requiring payment for them; or (b) left any goods with, or delivered any goods to, the consumer in terms of a concluded transaction or agreement, which the consumer has subsequently rescinded, and the person has not recovered those goods within 5 business days after receiving the notice of rescission, those goods are unsolicited goods, to which section 21 applies." 	Confirmation is required of whether or not this provision refers to third parties who deliver the goods or services to the consumer, for example courier companies.

39	<p>"(1) This section applies to an agreement for the supply of goods or services that is not entered into in person, including an agreement concluded -</p> <ul style="list-style-type: none"> (a) telephonically, if the contact is initiated by the consumer, (b) by postal order, fax, or internet transaction, (c) in any other manner in which, with respect to goods, the consumer does not have the opportunity to inspect the goods that are the subject of the transaction before concluding the agreement, but does not apply to a agreement or transaction contemplated in section 38. <p>(2) A supplier must disclose the following information to a consumer, in an appropriate manner, having regard to the manner in which the supplier and consumer communicate in concluding the transaction, before concluding an agreement or transaction:</p> <ul style="list-style-type: none"> (a) The supplier's name, and licence or registration number, if any; (b) The address of the supplier's physical business premises; and related contact details; (c) The supplier's electronic mail address, if applicable; (d) a trade description of the goods or services to be supplied under the agreement, including the information required by section 28(2), and any relevant technical or system specifications; (e) the information required by section 31; (f) the currency in which amounts under the agreement are payable; (g) the supplier's delivery arrangements, including the identity of the shipper, the mode of transportation and the place of delivery to the consumer; (h) the supplier's cancellation, return, exchange and refund policies, if any; (i) manner and form in which a complaint may be lodged; and (j) any other prescribed information. <p>(3) Before concluding a transaction in electronic form, a supplier must</p> <ul style="list-style-type: none"> (a) make the information required under subsection (2), and a 	<p>This section states that the information required in section 39(2) must be made available before concluding the transaction. Accordingly, section 31 is to be clarified to state that this information will be provided in a pro-forma format and will only be final upon conclusion of the transaction.</p> <p>The ECT Act (section 42 (2)(a)-(j)) governs services provided electronically from which a consumer may not rescind during 7 day's cooling period. This Bill, however, gives the consumer a blanket right to rescind after 10 days if a copy of the document detailing the transaction or agreement has not been delivered to them. The overlapping of legislation, once again, is to be clarified.</p>
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	<p>copy of any further agreement arising out of the transaction, available in a manner that requires the consumer to access the information and a copy of any such agreement, and</p> <p>(b) provide a consumer with an express opportunity</p> <ul style="list-style-type: none"> (i) to correct errors in the information or any agreement; (ii) to accept or decline any agreement; (iii) to confirm the details of the transaction; and (iv) to accept and print or copy, or decline the transaction and any agreement <p>(4) Within 10 business days after concluding an agreement with a consumer other than as contemplated in subsection (3), the supplier must deliver a dated copy of the agreement to the consumer, in an appropriate manner, having regard to the manner in which the supplier and consumer communicated in concluding the transaction.</p> <p>(5) A consumer may rescind, without penalty, a transaction or an agreement, if a copy of an agreement contemplated in subsection (4), has not been delivered to the consumer within a period contemplated in that subsection."</p>	
<p>42</p>	<p>"(1) In this section -</p> <p>(a) "promoter" means a person who directly or indirectly promotes, sponsors, organizes or conducts a promotional competition, or for whose benefit such a competition is promoted, sponsored, organized or conducted;</p> <p>(b) "participant" means a person who expressly or implicitly enters into a promotional competition.</p> <p>(2) A person must not directly or indirectly inform a consumer, or prospective consumer that the consumer has -</p> <p>(a) won a competition, if -</p> <ul style="list-style-type: none"> (i) no competition has in fact been conducted; (ii) the consumer has not expressly or implicitly entered into such a competition, or has not in fact won the competition; (iii) the prize for that competition is subject to a previously undisclosed condition; or (iv) the consumer is required to offer further 	<p>Clarification is required as to how this section shall be interpreted and applied. The provision refers to promotional competitions and is unclear whether it includes promotional items. The definition of the word "promote" in section 1 includes conduct "that may reasonably be construed to be an inducement or attempted inducement" and may include the common practice of, for example, inviting the potential consumer to open an account and receive free vouchers in return, or giving consumer a gift if they purchase goods to the value of a stipulated amount. The definitions of the word "promote" and "prize" are broad.</p> <p>Section 42(3) requires onerous compliance by suppliers and monitoring by the Commission. It is recommended that, as an alternative, a code of practice for competitions is adopted and that the</p>

	<p>consideration for the prize, after the results of the competition have been announced; or</p> <p>(b) has a right to a prize or benefit -</p> <p>(i) that the consumer has not solicited or to which the consumer does not in fact have a right;</p> <p>(ii) if the prize or benefit was generally available or offered to all similar prospective consumers or class of prospective consumers; or</p> <p>(iii) if, before becoming eligible to receive the prize or benefit, the consumer is required to offer further consideration for the prize or to purchase any particular goods or services.</p> <p>(3) The promoter of a promotional competition -</p> <p>(a) must not require any consideration to be paid by or on behalf of any participant in the promotional competition;</p> <p>(b) must file an abstract of the competition rules in the prescribed manner and form with the Commission no later than the date on which consumers are first able to participate in the competition</p> <p>(c) make the competition rules available on request and without cost to any participant;</p> <p>(d) must not award a prize in a competition to -</p> <p>(i) a winner of the competition if it is absolutely unlawful to supply those goods or services to the prize winner, but this sub-paragraph does not preclude awarding a prize to a person merely because that person's right to possess or use the prize is or may be restricted or regulated by, or otherwise subject to, any public regulation; or</p> <p>(ii) to any person who is a director, member, partner, employee or agent of, or consultant to,-</p> <p>(aa) the promoter or any other person who directly or indirectly controls, or is controlled by, the promoter; or</p> <p>(bb) a supplier of goods or services in connection with that competition.</p>	<p>requirement pertaining to advance notification be disposed of.</p> <p>Section 42(4)(a) prohibits the paying of consideration by the participant. If enforced, this section will affect competitions whereby the participants enter via sms, email or telephone because in that instance, the participant "pays" to enter the competition and, in the case of short message services, the costs involved are substantially higher.</p> <p>It is impossible to predict and/or predict the odds as referred to in section 42(5)(d). Incorrect statistical information may be provided unintentionally. The section is silent as to the implications in that event.</p> <p>In terms of section 42(11)(b), it needs to be clarified as to how the minimum odds for prizes is to be guaranteed when the number of entries into a competition cannot be predicted.</p> <p>Further to the above, we note that the Bill repeals section 54 of the Lotteries Act No. 57 of 1997 ("Lotteries Act") as referred to in section 2(1)(a) of Schedule 2 to the Bill. In the main, section 54 of the Lotteries Act would appear to adequately deal with promotional competitions.</p>
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	<p>(4) For greater certainty in applying subsection (3)(a), a promoter must be regarded as having required or received consideration in respect of a promotional competition if</p> <ul style="list-style-type: none"> (a) the participant is required to pay any consideration, directly or indirectly for the opportunity to participate in the promotional competition, for access to the competition, or for any device by which a person may participate in the competition; or (b) participation in the promotional competition requires the purchase of any goods or services, and the price charged for those goods or services is more than the price, excluding discounts, ordinarily charged for those or similar goods or services without the opportunity of taking part in a promotional competition. <p>(5) An offer to participate in a promotional competition must be in writing, and must fully and clearly state -</p> <ul style="list-style-type: none"> (a) the benefit or competition to which the offer relates; (b) the steps required by a person to accept the offer or to participate in the competition; (c) the basis on which the results of the competition will be determined; (d) the maximum number of potential participants in the competition, and the odds of winning any particular prize in that competition; (e) the medium through or by which the results of the competition will be made known, if any; and (f) any person from whom, any place where, and any date and time on or at which the successful participant may receive any prize. <p>(6) The requirements of subsection (5) may be satisfied either -</p> <ul style="list-style-type: none"> (a) directly on any medium through which a person participates in a promotional competition; (b) on a document accompanying any medium contemplated in paragraph (a); or (c) in any advertisement that - <ul style="list-style-type: none"> (i) is published during the time and throughout the area 	
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	<p style="text-align: center;">in which the promotional competition is conducted; and</p> <p style="text-align: center;">(ii) draws attention to and is clearly associated with the promotional competition.</p> <p>(7) The right to participate in a promotional competition is fully vested in a person immediately upon -</p> <p>(a) complying with any conditions that are required to earn that right; and</p> <p>(b) acquiring possession or control of any medium through which a person may participate in that promotional competition.</p> <p>(8) The right to any benefit or right conferred on a person as a result of that person's participation in a promotional competition is fully vested immediately upon the determination of the results of the competition.</p> <p>(9) A right contemplated in subsection (7) or (8) must not be -</p> <p>(a) made subject to any further condition; or</p> <p>(b) contingent upon a person -</p> <p style="padding-left: 40px;">(i) paying any consideration to the promoter for the prize; or</p> <p style="padding-left: 40px;">(ii) satisfying any further requirements than those stipulated in terms of subsection (5).</p> <p>(10) Section 40 (1), read with the changes required by the context, apply in respect of any prize or right to a prize conferred on a person as a result of that person's participation in a promotional competition.</p> <p>(11) The Minister may prescribe -</p> <p>(a) a monetary threshold for the purpose of excluding competitions with low value prizes from the definition of "promotional competition";</p> <p>(b) minimum odds for prizes or categories of prizes offered in terms of any promotional competition;</p> <p>(c) minimum standards and forms for keeping records associated with promotional competitions; and</p> <p>(d) audit and reporting requirements in respect of promotional competitions."</p>	
44	"A person must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the	Clarification is required as to what the intention of the section is and who the beneficiaries are. The

	<p>consumer will receive a rebate, Commission, or other benefit if the consumer subsequently-</p> <ul style="list-style-type: none"> (a) gives the supplier the names of prospective consumers; or (b) otherwise assists the supplier to supply goods or services to other consumers, if that rebate, Commission, or other benefit is contingent upon an event occurring after the consumer agrees to the transaction." 	<p>section will prohibit "member get member" incentive programmes (where members are encouraged to introduce new customers to the supplier) and the like. The ECT Act provides consumers with an option to opt out of any at any stage.</p>
45	<p>"(1) Subject only to subsection (3), every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that -</p> <ul style="list-style-type: none"> (a) in the case of a sale or lease, the supplier or lessor has the legal right to sell or lease the goods; (b) in the case of an agreement to sell or lease, the supplier or lessor will have a legal right to sell or lease the goods at the time when the title to those goods is to pass to the consumer, or the lessee is to take possession of the leased goods; (c) that the goods are free from any charge or encumbrance in favour of any third party; and (d) that the supplier guarantees that the consumer or lessee is to have and enjoy undisturbed possession of the goods. <p>(2) Despite any other any law to the contrary, the supplier is liable, and the consumer is not liable, to any third party whose rights or claims in respect of any goods supplied or leased as contemplated in subsection (1) have been infringed or compromised by that transaction, except to the extent that the supplier and consumer have colluded to defraud the third party.</p> <p>(3) This section does not apply in respect of used goods or immovable property."</p>	<p>The word "any" before the word "law" in the first sentence of subsection (2) must be deleted.</p> <p>We suggest that the provisions of section 1(c) to be made capable of being varied by notice in writing from the supplier. It may well be that a supplier leases goods to a consumer which are subject to an encumbrance in favour of another party and such supply is with the consent of that other party.</p> <p>It is necessary to clarify the role of intermediaries who "supply" goods on behalf of another party. The definition of a "supplier" would include such intermediary and it is suggested that subsection (a) be amended to state that such a supplier "has the legal right, or is alternatively authorised thereto by the legal owner" to supply the goods.</p> <p>It is not clear why it is necessary to distinguish between a "supplier" and a "lessor". In our view, the definition of a "supplier" in section 1 of the Bill would include a "lessor".</p> <p>The provisions of subsection (1)(d) are superfluous in so far as this remedy is also available at common law to a purchaser of goods (ie. the warranty against eviction).</p>

		The reason for excluding immovable property and used goods from the ambit of this section needs to be understood.
46	<p>"(1) This section applies in respect of any agreement in terms of which a supplier agrees to provide a consumer -</p> <p>(a) a service to be delivered at a certain future date, or at periodic intervals during a specified period; or (b) a continuous service.</p> <p>(2) An agreement for a continuous service -</p> <p>(a) to be supplied by a public supplier may be for an unlimited duration; or</p> <p>(b) to be supplied by a private supplier -</p> <p>(i) may be rescinded by the consumer within 5 business days after concluding or renewing the agreement;</p> <p>(ii) must not exceed the prescribed period for the category of services to be provided;</p> <p>(iii) is renewable only if the consumer expressly accepts the renewal, in writing, within 40 business days before, or 20 business days after, the end of the expiring agreement period; and</p> <p>(iv) may be cancelled by the consumer with 20 business days notice at any time; and</p> <p>(v) may be subject to a cancellation penalty of no more than 5% of the amount that would have been payable by the consumer during the unexpired period of the agreement, if -</p> <p>(aa) such a penalty is disclosed to the consumer before the agreement is entered into; and</p> <p>(bb) is set out in the written agreement required by section 32.</p> <p>(3) If, in terms of an agreement to which this section applies, the consumer agrees to pay -</p> <p>(a) a membership fee or similar charge or amount; or</p> <p>(b) any amount in respect of services or access to services to be provided at a date more than 25 business days after the payment is made the supplier must hold that payment in trust for the benefit of the consumer, in accordance with</p>	<p>Clarity is required on what the prescribed periods and categories of services referred to in subsection (2)(b)(ii) are likely to be before the effect that this clause is likely to have can be completely understood.</p> <p>This section will almost administratively be impossible to manage as there is a presumption against retrospective applicability of legislation in South Africa. One would assume that defined periods will only be applicable to new agreements concluded with the consumer.</p> <p>The definition of "continuous service" is difficult to understand and need to be clarified on what is meant by the definition.</p> <p>Where a consumer rescinds an agreement, clarity is required on whether the consumer has the obligation to return the goods and/or make good the services rendered to him or whether the consumer may keep those goods rendered. If the consumer is allowed to keep the products and/or not have the duty to make good the goods and/or services supplied, this will operate harshly on the supplier as the consumer may consume the goods within the period of five days and rescind the agreement as the supplier does not have the protection of the law.</p> <p>The agreement must only be renewed by the consumer before the expiry date of the agreement as it does not make practical sense for a consumer to renew the agreement after the expiry of the agreement. This section may lead to</p>

	<p>section 74, and the supplier may make a charge against that trust once each month in advance for the pro-rata portion of the amount so held, as required to pay the ensuing month's cost of the membership or service.</p> <p>(4) If a supplier intends to close a facility to which the supplier has committed to provide future access in terms of an agreement with a consumer, the supplier must -</p> <p>(a) give written notice of that intention to each such consumer at least 40 business days before the intended date of closure; and</p> <p>(b) no later than five business days after closing that facility, refund to each such consumer the balance of any money held in trust for that consumer in terms of this Act.</p> <p>(5) Subsection (4)(b), read with the changes required by the context, applies equally in respect of any involuntary closing of a facility contemplated in this section.</p> <p>(6) Any money that is owed to a consumer as a refund in terms of this section is trust property held by the supplier, or the supplier's estate, for the benefit of the consumers concerned, and is subject to section 74."</p>	<p>confusion in the business industry on whether or not an agreement is in existence or not until a period of twenty days has expired.</p> <p>In addition, clarity is required on whether the supplier must continue to supply the goods and/or services to the consumer after the expiry of the agreement but before the twenty day period has expired.</p> <p>The Bill overrides the terms of the agreement in relation to contracts for continuous services, for instance, section 46(2)(b)(i) and (iv) in respect of the proposed consumer's rights.</p> <p>The rights given to the consumer in terms of this section make it difficult for a supplier to quote in respect of continuous services if the consumer is entitled to terminate the agreement at any time. On an initial interpretation, it would appear that motor vehicle manufacturers maintenance plans would fall within the ambit of the definition of "continuous service" agreement.</p> <p>The intention of this section must be explained in respect of subparagraph (3) and the section needs to deal with interest accruing on the money that is placed in trust. Clarity is required to whom shall the interest accrue to.</p> <p>As part of a membership fee a consumer may have access to certain services, such as an electrician, plumber and locksmith as and when the consumer may need such services. It is surely not the intention of the legislature that in this case, such portion of monthly membership fees be held in trust in the event that the entire fee is not required to be held in trust. Clarity is required on what is meant by "membership fee" in the context</p>
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		<p>of this section. Surely this must be in respect of a lump sum annual membership fee as opposed to a monthly membership or subscription fee.</p> <p>The views expressed in respect of section 21 are applicable in this section. Clarity is required on whether section 42(2)(b)(ii) refers to existing prescribed periods for the category of services or are such prescribed periods for the category of services still to be determined and if so, by whom and when.</p> <p>It will be difficult to adhere to this section in practice as this will lead to information about the trust for each consumer being kept by each supplier separately. This will lead to a huge cost implications for the suppliers to administratively adhere to this section.</p> <p>The terms "read with the changes required by the context" in subsection (5) as well as "involuntary closing" must be defined in the section.</p>
49(1) and (2)	<p>"(1) A supplier must not accept payment or other consideration for any goods or services if the supplier -</p> <ul style="list-style-type: none"> (a) has no reasonable basis to assert an intention to supply those goods or provide those services; or (b) intends to supply goods or services that are materially different from the goods or services in respect of which the payment or consideration was accepted. <p>(2) If a supplier makes a commitment or accepts a reservation to supply goods or services on specified date or at a specified time, and on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must -</p> <ul style="list-style-type: none"> (a) refund to the consumer any amount paid in respect of that commitment or reservation, together with interest at the 	<p>This section does not take into account the manner in which goods and/or services are generally provided and sold by businesses in South Africa. A supplier is not always able to predict how many consumers wish to purchase goods or services offered and it may take a long period of time to obtain stock which is not in demand at that particular time.</p> <p>The section does not take into account factors which are outside of the control of the supplier and may affect the supply of goods or services, such as industrial action.</p> <p>The following example illustrates the significant</p>

	<p>prescribed rate from the date on which the amount was paid until the date of re-imbursement; and</p> <p>(b) must in addition compensate the consumer for -</p> <p>(i) breach of contract in an amount equal to the full contemplated price of the goods or services that were committed or reserved; and</p> <p>(ii) consequential damages in an amount equal to the total of any economic loss, and loss of anticipated use or enjoyment, sustained by the consumer as a consequence of the supplier's breach of the contract."</p>	<p>negative implications of such provisions: An agreement is concluded between a motor car dealership and a consumer wishing to pay a deposit in order to reserve a new series of motor vehicle to be launched in the near future. The vehicle is not delivered to the dealer timeously as a result of factors outside of the dealer's control. In terms of subsection (2)(b), the dealer would be required to compensate such consumer by paying the consumer the value of the car ordered. Such a result is ludicrous and would mean that suppliers would never reserve goods for consumers and the like for fear of being liable for material amounts to a consumer under subsection 2(b). This would be to the detriment of consumers.</p> <p>Placing liability on the supplier as contemplated under subsection (2)(b)(ii), in terms of which the supplier's liability could in effect be unlimited, is not acceptable and would be extremely detrimental to businesses and doing business in South Africa.</p> <p>It is not clear what is meant by the imposition of interest "at the prescribed rate".</p>
50	<p>"(1) If an agreement is in writing, or is subject to a written notice, any provision in that agreement or notice that purports to limit in anyway the risk or liability of the supplier or any other person, purports to constitute an assumption of risk or liability by the consumer, purports to impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or purports to be an acknowledgement of any fact by the consumer, is of no force or effect unless -</p> <p>(a) the fact, nature and effect of that provision is drawn to the attention of the consumer before the consumer enters into the agreement;</p> <p>(b) the provision is in plain language, as described in section 34;</p>	<p>This section presupposes that transactions are concluded between suppliers and consumers in person. This section does not take into account transactions concluded telephonically, electronically or by similar means nor the fact that a transaction or agreement may be concluded between a person as an agent or representative of a consumer.</p> <p>It is difficult to understand how a supplier concluding a transaction telephonically could comply with the requirements of subsection (4).</p>

	<p>and</p> <p>(c) if the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it.</p> <p>(2) If a transaction, written or unwritten agreement, participation in an activity, or access to any facility, is subject to any provision of a kind contemplated in subsection (1), that provision is of no force or effect unless the fact, nature and effect of that provision is drawn to the attention of the consumer -</p> <p>(a) before the earlier of the time at which the consumer -</p> <p>(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or</p> <p>(ii) is required or expected to offer consideration for the transaction or agreement; and</p> <p>(b) in a conspicuous manner and form that -</p> <p>(i) is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and</p> <p>(ii) is in plain language, as described in section 34.</p> <p>(3) In addition to the consequences of subsection (1) or (2), a provision contemplated in either of those subsections in respect of any activity or facility that is subject to any -</p> <p>(a) unusual hazard;</p> <p>(b) hazard of which the consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate in the circumstances; or</p> <p>(c) hazard that could result in serious injury or death,</p> <p>is of no force or effect unless the supplier has specifically drawn the fact, nature and potential effect of that hazard to the attention of the consumer in a form and manner that meets the requirements of subsection (2), and the consumer has signed or initialled that provision indicating acceptance of it, or otherwise acted in a manner consistent with acknowledgement of the notice, awareness of the hazard and acceptance of the provision.</p> <p>(4) If, in any circumstances contemplated in this section, the supplier knows, or reasonably ought to perceive, that a particular consumer is</p>	<p>How would the supplier "reasonably ought to perceive" that the consumer is unable to read a provision or notice. Furthermore the interpretation and application of these provisions are extremely subjective. It is difficult to understand how a court would be able to assess whether a supplier has complied with these requirements.</p> <p>All transactions and agreements are not necessarily concluded in writing. The provisions of subsection (2)(b) assume this to be the case. To require all transactions and agreements to be evidenced in writing would be impractical and would raise the costs of business significantly.</p> <p>Furthermore, the provisions of subsection (1)(c) places an onerous obligation on all suppliers who conclude transactions telephonically or electronically to require a consumer to sign physically a written document. We assume that the onus would be on the supplier to make investigations as to whether the document has been signed in writing by the consumer. This would involve significant cost and expense to suppliers to follow-up with all consumers.</p> <p>If a supplier has standard terms which are available on a website and/or posted to a consumer, it is submitted that if the consumer has concluded the transaction telephonically or by similar means, the supplier should merely be required to send the consumer a copy of the agreement or refer the consumer to the website.</p> <p>The practical application of this section causes further difficulties as a supplier may be unclear as to whether it should cancel a transaction or cease</p>
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	<p>unable to read a provision or notice as a result of impaired vision, limited literacy, or inability to comprehend any language in which the notice or provision is written, the notice or provision is of no force or effect with respect to that consumer unless the supplier has taken reasonable and appropriate steps in the circumstances to -</p> <ul style="list-style-type: none"> (a) bring the nature, content and effect of the notice or provision to the attention of that consumer in a manner that overcomes the consumer's reading impediment; and (b) the consumer has expressly or by necessary implication assented to the notice or provision. <p>(5) The Minister may make regulations prescribing the form, manner and minimum standards for bringing provisions, hazards and other matters contemplated in this section to the attention of consumers."</p>	<p>to supply a consumer unless the consumer has signed the written document as required by this section. For example, in the insurance industry insurance cover is often granted immediately upon conclusion of the transaction telephonically. Would the insurer in such circumstances be required to cease providing insurance cover to the insured if it is unable to determine if the requirements of subsection (1)(c) have been complied with?</p> <p>Moreover, the application of subsection (1) will cause a significant administrative burden for suppliers. For example, a motor vehicle manufacturer would be required to explain each and every relevant aspect of a sale agreement. Furthermore, this subsection would conceivably cover standard instruction manuals, pamphlets and inserts which are provided by manufacturers and which accompany certain goods. Would it be necessary for a person selling an iron to unpack the product, review the package insert (which would constitute a "written notice" and may include an exclusion of liability) and require the consumer to initial this?</p> <p>It is difficult to understand how a supplier should determine what constitutes an "ordinary alert consumer" as referred to in subsection (2)(b)(i). This should be clarified.</p> <p>The provisions of subsection (3) conflict with provisions contained in other existing legislation. For example, a manufacturer of medicines is obliged to insert information on a package which meets the prescribed requirements. We assume that such manufacturer would also be obliged to comply with these provisions. This is duplicitous</p>
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		<p>and would result in unnecessary expense to such persons. (Please also see our comments below with regard to hazardous goods and the like.)</p> <p>The same comment applies in respect of various industries in terms of which the disclosure of information is already prescribed, such as in terms of the Foodstuffs Act.</p> <p>The requirements of subsection (3) would entail very retailer of, say for example, paint, to specifically draw the nature and extent of the "hazards" associated with such product to the consumer and to require the consumer to sign or initial that it has accepted such risk. This would cause an acceptable burden on all suppliers.</p> <p>The requirement to keep all records at the point of sale (or duplicates thereof), will impose a significant administrative burden and cost on all suppliers.</p> <p>In addition, a significant burden is placed on all suppliers to train their staff members and other representatives.</p> <p>Subsection 4)(b) is vague. It is unclear what is meant by consent by a consumer by "necessary implication". This must be clarified.</p> <p>Further information in relation to the proposed regulations referred to in subsection (5) is required. It is submitted that such regulations should be drafted on such a basis to ensure that there is no duplication between these and existing laws and regulations, for example under the</p>
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		<p>Foodstuffs Act.</p> <p>The application of this section to "exemption of liability notices" in parking garages, public stadiums and similar, needs to be considered. These would prima facie constitute "written notices" which limit a consumer's liability as contemplated in subsection (1). The supplier in such case is unable to ensure that every person accessing or using such facility is aware of such limitation of liability before it accepts payment for the transaction or agreement. For example, it is not possible to draw such to the attention of the purchaser of tickets for a soccer match before the person enters the stadium, even though the consumer may have paid for the tickets as contemplated in (2)(a)(ii). To require otherwise would be completely impractical.</p>
52	<p>"A supplier must not supply or agree to supply any particular goods or services to a consumer if the supplier knows, or reasonably ought to have known, or recognised from the interaction between the supplier and the consumer, -</p> <p>(a) that the goods or services are materially unsuitable for the purpose to which the consumer intends to apply them, irrespective whether the goods are of good quality or reasonably fit for their customary intended purpose; and</p> <p>(b) that the consumer is unlikely to be able to make such a determination, having regard to the nature of the goods or services, and the consumer's apparent age, education, experience, familiarity with such goods or services, and general consumer sophistication."</p>	<p>This sections assumes all such transactions are concluded between suppliers and consumers in person. This section does not take into account transactions concluded telephonically, electronically or by similar means nor the fact that a transaction or agreement may be concluded between a person as an agent or representative of a consumer.</p> <p>It is unreasonable to place an obligation on a supplier to determine the manner in which the consumer intends to use the goods. How would a supplier know if the goods or services are suitable for the purpose to which the consumer intends to apply them without engaging in extensive discussion with a consumer, especially when goods are purchased over-the-counter. These requirements are completely impractical.</p>

		<p>The application of this section may inadvertently result in unlawful discrimination against consumers, and at the least may be insulting and offend the consumers. For example, a supplier may determine that an electronic item, for instance, a heater, is unsuitable for a consumer that lives in an informal settlement.</p> <p>Another example would be if a consumer purchases a large quantity of a particular item, for instance, furniture, the onus is placed on the supplier to determine why the consumer is buying so many items and the reason therefor. This would offend against a consumer's right to privacy.</p>
53(1) and (2)	<p>"(1) A supplier must not -</p> <p>(a) offer to supply, supply, or enter into an agreement to supply, any goods or services at a price or on terms that are unfair or unjust; or</p> <p>(b) market any goods or services, or negotiate, enter into or administer an agreement for the supply of any goods or services, in a manner that is unfair or unjust, having regard to the fair value of the goods or services, the circumstances of the agreement, the nature of the parties to that agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position.</p> <p>(2) Without limiting the generality of subsection (2), a transaction is unfair or unjust if -</p> <p>(a) the transaction is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;</p> <p>(b) the terms of the transaction are so adverse to the consumer as to be inequitable; or</p> <p>(c) the consumer relied upon a false, misleading or deceptive representation, or statement of opinion, provided by or on behalf of the supplier, to the detriment of the consumer."</p>	<p>In order to apply this section, it is necessary to understand what would constitute an "unfair" or "unjust" agreement as specifically referred to in subsection (2). The rationale underpinning this section needs to be understood. As currently drafted these provisions suggest that a court or the like has the ability to dictate, regulate or influence prices charged by retailers. Surely this offends against general free market principles where prices are determined taking into account various factors, such as supply and demand, logistics, costs of supply and the like?</p> <p>Further, the provisions of subsection (1) suggest that a supplier may be required to have different pricing structures depending upon, for example, the "sophistication" of a consumer.</p>
54	"(1) A person must not use physical force, coercion, undue influence,	This section can easily be abused by a consumer

	<p>pressure or harassment, unfair tactics or any other conduct, in connection with any -</p> <ul style="list-style-type: none"> (a) marketing of any goods or services; (b) supply of goods or services to a consumer; (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; (d) demand for, or collection of, payment for goods or services by a consumer; or (e) the recovery of goods from a consumer. <p>(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier to take advantage of the fact that a potential consumer was substantially unable to protect the consumer's own interests because of disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor."</p>	<p>who can claim that he was taken advantage of on the basis that he did not understand the agreement. However, at the time of the transaction he could very well have indicated that he understood the transaction and all of its implications. The consumer will be able to invoke the provisions of this section in order to rescind from transactions or agreements that he may simply no longer wish to be of force. This therefore operates unfairly against the supplier as agreements may be rescinded at any time.</p>
55	<p>"(1) In any circumstances contemplated in sections 53 to 55, if this Act does not otherwise provide a remedy sufficient to correct the relevant injustice or unconscionability, the Tribunal or a court may -</p> <ul style="list-style-type: none"> (a) declare the transaction or agreement, or any aspect or provision of it, to be unreasonable, unfair, unjust or unconscionable; and (b) make any further order the Tribunal or court considers just and reasonable in the circumstances, including, but not limited to, an order - <ul style="list-style-type: none"> (i) to restore money or property to the consumer; (ii) to compensate the consumer for losses or expenses relating to - <ul style="list-style-type: none"> (aa) the agreement; or (bb) the proceedings of the Tribunal or the court; and (iii) requiring the supplier to alter or cease any practice, introduce a practice, or amend any form or document, as required to avoid a repetition of the supplier's conduct. <p>(2) In any matter contemplated in this section, the National Consumer Tribunal or a court -</p>	<p>The grounds in which the Tribunal or a court may declare a transaction or agreement to be unreasonable, unfair, unjust or unconscionable must be stated in the Bill so that the parties to the agreement can be able to know what is meant by this section.</p> <p>All the remedies that may be ordered by the Tribunal or court are in favour of the consumer and not one remedy is in favour of the supplier. We understand that this legislation is for the protection of the consumers, but some form of protection should be afforded to the suppliers in order to guard against unscrupulous consumers.</p>

	<p>(a) may have regard to -</p> <ul style="list-style-type: none"> (i) the relative strengths of the bargaining positions of the supplier and consumer, and the conduct of each of them; (ii) whether there was any opportunity for negotiation between the supplier and consumer, and if so, the extent of that negotiation; (iii) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with any condition that was not reasonably necessary for the legitimate interests of the supplier; <p>(iv) whether any documents relating to the transaction satisfied the requirements of sections 33 and 34; and</p> <p>(v) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and</p> <p>(b) must consider -</p> <ul style="list-style-type: none"> (i) only those circumstances that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made; and (ii) the principles, purposes and provisions of this Act irrespective whether this Act was in force at that time." 	
56	<p>"(1) Subject to subsection (2), an agreement for the supply of any goods or services is unlawful if-</p> <p>(a) at the time the agreement was made the consumer was an unemancipated minor, or was subject to -</p> <ul style="list-style-type: none"> (i) an order of a competent court holding that person to be mentally unfit; or (ii) an administration order referred to in section 74(1) of the Magistrates' Court Act, 1944 (Act No. of 1944), and the administrator concerned has not consented to the agreement, <p>and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order;</p> <p>(b) the agreement results from an offer prohibited in terms of</p>	<p>Given the impact this section is proposing to have on agreements with minors, it is submitted that the age of majority urgently needs to be reviewed and reduced to eighteen years.</p> <p>Agreements with minors should be voidable but not void. A parent should have the right to ratify an agreement entered into by a minor. A minor, upon emancipation or attainment of the age of majority, too shall have the right to ratify the agreement.</p>

	<p>section 37 (1);</p> <p>(c) a court concludes that the agreement is unreasonable, unfair, unjust or unconscionable in terms of section 52 to 55, in which case the agreement is unlawful only to the extent ordered by the court;</p> <p>(d) the supplier was subject to a notice or an order in terms of any public regulation requiring the supplier -</p> <p>(i) to stop offering, making available or supplying any such goods or services; or</p> <p>(ii) to stop offering, making available or supplying any such goods or services under the particular form of agreement used by the supplier,</p> <p>and no further appeal or review is available in respect of that notice or order.</p> <p>(2) Subsection (1)(a) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission -</p> <p>(a) induced the supplier to believe that the consumer had the legal capacity to contract; or</p> <p>(b) attempted to obscure or suppress the fact that the consumer was subject to an order contemplated in that paragraph.</p> <p>(3) To the extent that an agreement is unlawful in terms of this section, that agreement is void as from the date was entered into, despite any provision of common law, any other legislation, or any provision of an agreement to the contrary."</p>	<p>Subsection 3 as currently drafted would mean that a supplier may not be able to recover goods provided or moneys in respect of services rendered, in terms of an agreement. A consumer may be unjustly enriched in such circumstances. This section should provide that such goods/moneys are recoverable in circumstances where a consumer would be unjustly enriched.</p> <p>It is unclear if subsection (3) could be interpreted to apply retrospectively. This provision should not apply retrospectively in respect of agreement prior to the commencement of the legislation.</p>
57	<p>"(1) An agreement for the supply of any goods or services, whether or not it is in writing, must not contain an unlawful provision or be subject to an unlawful condition.</p> <p>(2) A provision of a agreement, or a condition to which an agreement is subject, is unlawful if -</p> <p>(a) its general purpose or effect is to -</p> <p>(i) defeat the purpose and policy of this Act as set out in sections 3 and 4;</p> <p>(ii) mislead or deceive the consumer; or</p> <p>(iii) subject the consumer to fraudulent conduct;</p> <p>(b) it directly or indirectly purports to -</p> <p>(i) waive or deprive a consumer of a right set out in this</p>	<p>Clarity is required on the meaning of subsection (2)(e)(i) and its application.</p>

	<p>Act;</p> <ul style="list-style-type: none"> (ii) avoid a supplier's obligation or duty in terms of this Act; (iii) set aside or override the effect of any provision of this Act; (iv) authorize the supplier to - <ul style="list-style-type: none"> (aa) do anything that is unlawful in terms of this Act; or (bb) fail to do anything that is required in terms of this Act; <ul style="list-style-type: none"> (c) the provision results from an offer prohibited in terms of section 37(2); (d) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection 5(a); (e) it expresses an acknowledgement by the consumer that - <ul style="list-style-type: none"> (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer, and that have or has not in fact been delivered or rendered to the consumer; (f) it expresses an agreement by the consumer to forfeit any money to the supplier if the consumer - <ul style="list-style-type: none"> (i) exercises the right of rescission in terms of section 24; (ii) fails to comply with a provision of the agreement before the consumer receives any goods or services in terms of the agreement; (g) it expresses, on behalf of the consumer - <ul style="list-style-type: none"> (i) an authorization for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the 	
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	<p>agreement relates; or</p> <ul style="list-style-type: none"> (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective whether such documentation is complete or incomplete at the time it is signed; or (iii) a consent to a pre-determined value of costs relating to enforcement of the agreement except to the extent that is consistent with this Act; <p>(h) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;</p> <p>(i) it expresses a Transport Contract agreement contemplated in Notice 31 in terms of the Consumer Affairs (unfair business practices) Act; or</p> <p>(j) it expresses an agreement by the consumer to -</p> <ul style="list-style-type: none"> (i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or (ii) provide a personal identification code or number to be used to access an account. <p>(3) In any agreement for the supply of any goods or services, a provision that is unlawful in terms of this section is void as from the date that the agreement took effect, or in the case of a provision added or altered by an amendment to an agreement, the date that the amendment took effect.</p> <p>(4) In any matter before it respecting an agreement that contains a provision contemplated in subsection (2), a court must -</p> <ul style="list-style-type: none"> (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect; (c) and make any further order that is just and reasonable in the circumstances with respect to that unlawful provision, or 	
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	<p>entire agreement, as the case may be.</p> <p>(5) A supplier must not -</p> <p>(a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in a primary agreement;</p> <p>(b) request or demand a consumer to -</p> <p>(i) give the supplier temporary or permanent possession of an instrument referred to in subsection (2)(j)(i) other than for the purpose of identification, or to make a copy of the instrument;</p> <p>(ii) reveal any personal identification code or number contemplated in subsection (2)(j)(ii); or</p> <p>(c) direct, or knowingly permit, any other person to do anything referred to in this section on behalf or for the benefit of the supplier."</p>	
58	<p>"(1) In determining whether a term of a contract is unfair or unreasonable, a court must have regard to all the circumstances of the case and in particular to the following:</p> <p>(a) the bargaining strength of the parties to the contract relative to each other, taking into account -</p> <p>(i) the availability of equivalent goods or services; and</p> <p>(ii) suitable alternative sources of supply;</p> <p>(b) whether the consumer received an inducement to agree to the term, or, in agreeing to the term, had an opportunity of -</p> <p>(i) acquiring the goods or services; or</p> <p>(ii) equivalent goods or services,</p> <p>from any source of supply under a contract that did not include that term;</p> <p>(c) whether the consumer knew or ought reasonably to have known of the existence and extent of the term, having regard to any custom of trade and any previous dealings between the parties; and</p> <p>(d) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of</p>	<p>Clarity is required on what is meant by subsection (1)(b) and what this subsection seeks to address.</p> <p>Subsection (1)(c) may be difficult to apply in practice as the consumer might not know what the custom of trade for every business is. We therefore suggest that this clause be explained on its application.</p>

	<p>the buyer.</p> <p>(2) If a court, after having considered all the circumstances contemplated in subsection (1), is of the opinion that a term of contract is unfair or unreasonable, it may:</p> <p>(a) rescind or amend the contract or a term of contract; or</p> <p>(b) make any other order as may be necessary to prevent the effect of the contract being unfair or unreasonable to any of the parties,</p> <p>notwithstanding the principle that effect must be given to the contractual terms agreed upon by the parties."</p>	
59	<p>"(1) A person must not initiate, sponsor, promote or knowingly participate in the distribution of any communication that -</p> <p>(a) offers to supply, or enter into an agreement to supply, any goods or services, or offers to enter into a transaction, or invites offers to enter into a transaction; and</p> <p>(b) falsely states, implies or represents that -</p> <p>(i) the communication is authorised by another person; or</p> <p>(ii) the author of the communication represents another person.</p> <p>(2) A person must not directly or indirectly promote, or knowingly join, enter or participate in -</p> <p>(a) a fraudulent currency scheme, as described in subsection (3);</p> <p>(b) a fraudulent financial transaction, as described in subsection (4);</p> <p>(c) a fraudulent transfer of property or legal rights, as described in subsection (5); or</p> <p>(d) any other scheme declared by the Minister in terms of subsection (8);</p> <p>or cause another person to do so.</p> <p>(3) An arrangement, agreement, practice or scheme is a fraudulent currency scheme if it involves a person -</p> <p>(a) with the intent to defraud another person, representing that</p>	<p>Clarity must be given on what is meant by a "fraudulent currency scheme" and how one is expected to know if a scheme is a fraudulent one. It is suggested that in order to comment on this Bill in greater detail the Minister must declare the schemes which are referred to in subsection (2)(d) in order for us to know which schemes are being referred to. Terms used in this section must be defined, for instance, "washing", "dipping", "chemical substance" and "juju".</p> <p>Clarity should also be given in relation to what is meant by the term "fraudulent financial transaction" and how is one expected to know if a scheme involves this transaction. Further, the Bill must define what is meant by "proceeds of a specified unlawful activity".</p>

	<p>the first person is capable of -</p> <ul style="list-style-type: none"> (i) producing currency by washing, dipping or otherwise treating any substance that is not currency with a chemical substance, or exposing it to an electrical charge, or to radiation of any kind; or (ii) producing currency, or increasing a sum of money, through scientific means, invocation of any juju or use of other invisible medium; or <p>(b) making or issuing any currency, or making representations as being capable of doing so, unless the person is an unauthorized producer of that currency.</p> <p>(4) An arrangement, agreement, practice or scheme is a fraudulent financial transaction if it involves -</p> <ul style="list-style-type: none"> (a) any proceeds of a specified unlawful activity; <ul style="list-style-type: none"> (i) with intent to promote the carrying on of a specified unlawful activity; and (ii) is designed in whole or in part to - <ul style="list-style-type: none"> (aa) conceal or disguise the nature, location, source of ownership or control of the proceeds of a specified unlawful activity; or (bb) avoid a lawful transaction; or <p>(5) An arrangement, agreement, practice or scheme is a fraudulent transfer of property or legal rights if it involves a person, by false pretence and with the intent to defraud another person, -</p> <ul style="list-style-type: none"> (a) obtaining any property from that person or any third person; or (b) inducing that person or any third person to - <ul style="list-style-type: none"> (i) deliver property at the direction of the first person; or (ii) confer a benefit of any kind on any person at the direction of the first person on the understanding that the benefit has or will be paid for. <p>(6) A person must not directly or indirectly represent, by false pretence or with the intent to defraud another person, to the effect that the first person -</p> <ul style="list-style-type: none"> (a) is in possession of - 	
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	<ul style="list-style-type: none"> (i) any property; or (ii) information relating to the whereabouts of any property or relating to any legal rights or potential legal claims; or (iii) has the ability to effect the transfer of any property or to locate or determine the whereabouts of an individual. <p>(7) A person must not -</p> <ul style="list-style-type: none"> (a) invite another person to participate for a fee in assisting to effect a transfer of any property that the first person is not authorized to transfer; or (b) seek, demand or accept any consideration from another person in connection with any unlawful activity contemplated in this section. <p>(8) The Minister, by regulation published in accordance with section 148, may declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (1)(d), if it is similar in purpose or effect to a scheme contemplated in that subsection."</p>	
61(1)(b) and (c)	<p>"Unless the consumer has been expressly informed and expressly agreed to accept, or knowingly acted in a manner consistent with accepting particular goods in the specific condition in which they are offered, the consumer has a right to receive goods that -</p> <ul style="list-style-type: none"> (b) are of good quality, in good working order and free of defects; (c) will be usable and durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply or lease;" 	<p>Section 61 provides that a consumer may expressly agree to "opt out" of the protections afforded under section 61(1). Assuming a consumer makes such an election, it is difficult to understand how this would apply in light of the provisions of section 61(3) of the Bill. For example, section 61(1)(b) provides that a consumer is entitled to receive goods that are of a good quality, in good working order and free from defects, unless the consumer has been expressly informed otherwise and expressly consented thereto. However, section 61(3) of the Bill provides that a consumer has an unconditional right to receive goods which are free from defects.</p> <p>This results in ambiguity and uncertainty when interpreting these sections and may mean that it is never possible for a consumer to agree to the exclusion of implied warranties (such as those</p>

		<p>relating to the suitability of products) nor warranties and representations made during the process of negotiations. This would have significant implications for many businesses, such as automobile manufacturers.</p> <p>The provisions of section 61(1)(c) are difficult to interpret and apply. This section refers to the goods being "usable and durable for a reasonable period of time". It is difficult to understand what would constitute a "reasonable period" of time and this may lead to uncertainty and this may depend upon the individual consumer and circumstances of supply.</p>
61(3)	<p>"The consumer of any goods has a right to receive goods that are free of any product failure, defect or hazard that would render the utility, practicability or safety of that good to be less than persons are generally entitled to expect, having regard to all the circumstances of its supply, including but not limited to -</p> <ul style="list-style-type: none"> (a) the manner in which, and the purposes for which, that good has been marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of that good; (b) the range of things that might reasonably be anticipated to be done with or in relation to that good; (c) the time when the good was manufactured and supplied." 	<p>The provisions of this section, as read with the provisions of section 61(4) need to be considered in light of the common law relating to the sale of goods, in particular the common law remedies available for latent and patent defects. It is submitted that the common law provides adequate protection to a purchaser of goods.</p> <p>It is difficult to understand how this section would apply in a case where the "goods" are immovable property (as per the definition in section 1 of the Bill), especially the provisions of section 61(3)(b).</p>
61(4)	<p>"For greater certainty in applying sub-section (3) -</p> <ul style="list-style-type: none"> (a) it is irrelevant whether a product failure, defect or hazard was latent or patent, or whether it could have been detected by a consumer before taking delivery of the good;" 	<p>In terms of section 20 of the Bill, a consumer is deemed to have accepted goods when the consumer expressly or implicitly communicates to the supplier that it has accepted them. The provisions of section 61(4)(a) seem to suggest that despite the fact that a consumer may have accepted goods under section 20, the consumer may subsequently reject goods by applying the rights afforded under section 61(4)(a). Moreover, a consumer would seem to have no duty to reject goods if there is a patent defect which is noticed</p>

		<p>by the consumer but the consumer may, in terms of this section, conceivably later reject such goods. This may lead to abuse by consumers.</p> <p>It is suggested that the provisions of section 24(5)(a) (goods referred to as being "unacceptable") be applied with specific reference to section 61 (ie, in interpreting section 24(5)(a), the criteria set out in section 61 would be required to apply).</p>
61(5)	<p>"A person must not produce or distribute an unsafe good, or knowingly supply such a good to a consumer."</p>	<p>It is noted that sections 61, 62, 63, 64, 66, 67, 69 and 71 apply to "producers", "manufacturers", "importers", "suppliers", "distributors" and "service providers". Some of these terms are defined, others not. In order to avoid uncertainty and ambiguity, it is necessary to define all such terms and apply these consistently having regard to the categories of persons to whom it is intended that these provisions should apply.</p> <p>Furthermore, certain provisions apply to certain such categories of persons whereas others do not. These distinctions seem to be arbitrary. See for example, section 61(5) which applies to a person who "produces or distributes" unsafe goods, whereas section 62 imposes an implied warranty upon the "manufacturer, importer or other producer, the distributor and the supplier" that the goods meet the requirements of section 60 [should reference to section 61?] ie, that the goods are "safe" under section 61(3).</p> <p>It is furthermore suggested that there should be a definition of "unsafe goods" included in section 1 of the Bill. Conceivably numerous types of goods, for example a motor vehicle, could be regarded as being "unsafe" on a literal interpretation. Please</p>

		<p>also see further our comments in relation to hazardous and dangerous goods as set out below.</p> <p>Clarity is required on whether the terms "unsafe" and "hazardous" or "dangerous" goods have the same meaning or not.</p> <p>This section imposes strict liability on any person that "produces" or "distributes" goods ie, irrespective of any knowledge or fault on their part in relation to an "unsafe" good being distributed, they would be liable. This is unduly onerous and the imposition of no-fault liability has various negative implications, as referred to further below.</p> <p>The application of this section also arbitrarily draws a distinction between a person who "produces" or "distributes" an "unsafe good" and a person who "supplies" an "unsafe good". The former is subject to no fault liability (strict liability) whilst the latter is not.</p> <p>Furthermore, to "distribute" is not defined in section 1 of the Bill whilst to "supply" is. A "distributor" is defined as a "person who supplies ...". It is not clear what distinction, if any, should be drawn between a person that "supplies" and one that "distributes" in the context of, inter alia, this section.</p>
62(1)	<p>"In any transaction or agreement in respect of the supply of goods to a consumer there is an implied that the manufacturer, importer or other producer, the distributor and the supplier each warrant that the goods comply with the requirements and standards contemplated in section 60, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the manufacturer, importer or other producer, the distributor or the supplier, as the case may be."</p>	<p>We assume that reference to "section 60" should be reference to "section 61". The section should be amended accordingly.</p> <p>The ambit of this section is unduly broad and would place an obligation upon a distributor or supplier to verify that a manufacturer, importer or</p>

		<p>other producer of goods complies with the requirements of section 60 [we assume this should be reference to section 61]. This places an onerous burden on such persons and it may well be impossible for such persons to ensure compliance with these provisions.</p> <p>We note that point 12 of the United Nations Guidelines for Consumer Protection, 2003 provides that persons responsible for bringing goods to market, in particular suppliers, exporters, importers, retailers and the like, should ensure that while in their care goods are not rendered unsafe through improper handling or storage and do not become hazardous through in improper handling or storage. It is submitted that this section is overly broad and should be confined to such principles as aforesaid.</p> <p>The interpretation of this section as read with the right of a consumer to "opt-out" under section 61, is unclear. Would this section apply notwithstanding the fact that a consumer may have exercised its rights under section 61(1).</p>
63	<p>"A service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of six months after the date of installation."</p>	<p>It is suggested that the warranty contained in section 63(1) should be defined specifically. It is not clear what aspect is warranted and we suggest that this be clarified.</p> <p>In certain instances suppliers may warrant the repair for a longer duration, or the nature of other goods may necessitate a shorter warranty period. Prescribing a warranty period is not practical and in certain circumstances may deprive a consumer of a longer warranty period. Each repair should offer a warranty applicable to that type of product, bearing in mind the nature of the repair.</p>

64(1)	<p>"The supplier of any activity or facility that is subject to any -</p> <ul style="list-style-type: none"> (a) unusual hazard; (b) hazard of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or (c) hazard that could result in serious injury or death, <p>must specifically draw the fact, nature and potential effect of the hazard to the attention of consumers in a form and manner that meets the standards set out in section 50(2) to (5)."</p>	<p>The terms "activity" and "facility" have not been defined in section 1 of the Bill. It is, therefore, not clear what is contemplated by these terms, particularly in light of the fact that the Bill predominantly deals with "goods" and "services".</p> <p>It is necessary to clarify what is meant by an "unusual hazard" in section 64(1)(a). We note that an "unusual hazard" is obviously a hazard that is distinct from the hazard referred to in section 64(1)(b) or section 64(1)(c). In this regard, section 64(1)(b) deals with hazards "of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate". In addition, the hazard referred to in section 64(1)(c), is a hazard that could result in serious injury or death. Therefore, an "unusual hazard" is neither one that could not reasonably be expected to have been foreseen or that results in serious injury or death. However, this does not clarify the meaning of "unusual hazard".</p> <p>The meaning of "ordinarily alert consumer" is not clear, especially in light of the provisions of section 50(4), which refers to consumers that are "unable to read a provision or notice as a result of impaired vision, limited literacy, or inability to comprehend any language in which the notice or provision is written".</p> <p>The reference in this section to the requirement for the supplier to "specifically draw the fact, nature and potential effect of the hazard to the attention of consumers in the form and manner that meets the standards set out in section 50(2) to (5)" does not clarify whether or not "specifically" refers to</p>
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		<p>"expressly". The reference to section 50(2) to (5) does not aid the interpretation of section 64(1) in so far as sections 50(2) to (5) referred to "transaction" and "agreement", which is not the subject matter of section 64(1).</p> <p>We also refer you to point 12 of the United Nations Guidelines for Consumer Protection, 2003 in particular point 12, which requires that "vital safety information should be conveyed to consumers by internationally understandable symbols wherever possible". It is submitted that the provisions of this section should comply with these requirements.</p>
64(2)(b)	<p>"A person who packages any prescribed goods for supply to consumers -</p> <p>(b) that contain any ingredients or components that have been determined to present a chemical or biological hazard to humans or the environment, relative to their concentration in those goods, must display on or within that packaging, a notice that meets the prescribed standards informing the consumer of the appropriate steps to -</p> <p>(i) contain those ingredients or components so as to inhibit human exposure and minimise the risk of human or environmental contamination;</p> <p>(ii) remedy or mitigate the effects of those ingredients or components in a case of human or environmental exposure to them; and</p> <p>(iii) safely dispose of those goods, ingredients or components at the end of their useful life."</p>	<p>Insofar as the "chemical or biological hazard to humans or the environment" referred to in this section is concerned, it is not clear to what degree the hazard must exist in relation to humans or the environment considering, <i>by way of example</i> in terms of section 28 of the National Environmental Management Act No. 107 of 1998, that reference is made to "significant pollution or degradation" and substances are classified in accordance with the group classification system in the Hazardous Substances Act with reference to the potential hazards that these particular substances pose to humans or the environment.</p> <p>Is one therefore required to rely on the provisions of the aforementioned legislation in order to determine the nature of the hazard for purposes of the labelling that must occur as contemplated in this section? Insofar as this is the case, the section remains silent and its interpretation and enforcement requires clarification.</p>
64(3)	<p>"Sub-section (2) does not apply to any goods or services to the extent that a substantially similar label or notice has been applied in terms of any other public regulations."</p>	<p>Section 64(3) creates an exemption in respect of section 64(2) but is stated to apply in so far as "goods or services" are concerned as opposed to</p>

		"prescribed goods" with which section 64(2) is concerned. It is therefore unclear how sections 64(2) and (3) are to interact for the purposes of enforcing the exemption provisions contained in section 64(3).
64(4)	"A person who installs any goods contemplated in sub-section (2) for a consumer must give the consumer the original copy of - (a) any document required in terms of that sub-section; or (b) any similar document applied to those in terms of another public regulation."	It is not clear to what goods this section refers in light of the definitions already contained in section 1 of the Bill.
65	"If any public regulation prohibits the disposal or deposit of any particular goods, or any components, remnants, containers or packaging of any goods, into a common waste collection system - (a) any person who, in the ordinary course of business supplies goods of that kind to consumers, must accept the return of any such goods, components, remnants, containers or packaging from any consumer, without charge to the consumer; and (b) any person who, in the ordinary course of business, manufactures, imports, sells or distributes any such goods as part of the supply chain by which those goods reach the consumer, must in turn accept the return of any such goods, components, remnants, containers or packaging from the person to whom they are ordinarily delivered as part of the supplier chain."	It is not clear what would constitute "hazardous" or "dangerous products or components" as contemplated in this header to this section.
66(1), (3) and (5)	"(1) The manufacturer or importer of any prescribed goods must maintain a register identifying each original consumer of those goods, together with the consumer's contact details". "(3) The Commission must publish an annual report in which it compiles the information reported to it in terms of this section." "(5) The provisions of this section, and of section 67 – 69, are in addition to, and not in substitution for, any other legal obligation or duty on a manufacturer or an importer of goods, whether at common law or in terms of any public regulation."	It is difficult to provide any meaningful comment in relation to this section without understanding the nature of the goods which may be prescribed by the Minister for purposes of this section. Further information is requested in relation to the proposed report referred to in section 66(3) - will the importer or manufacturer be named in such report? With regard to section 66(5) we refer you to the

		remarks set out above concerning the conflicting provisions of the Bill with existing legislation. These comments apply equally in respect of section 66(5).
67(1)	"(1) If a manufacturer or importer of any goods that have been prescribed in terms of section 65 has detected or identified any previously undetected or unrecognised potential danger to the public from the use of or exposure to those goods, the manufacturer or importer must - ..."	<p>The reference to section 65 is not clear – should this rather be reference to section 66?</p> <p>This section makes reference to "potential danger", which appears to be distinct from a "hazard" or "unusual hazard" as referred to in sections 50 and 64 of the Bill. It is not clear how one is to interpret the aforementioned terms, however it is clear that the legislature intends that different meanings be attributed to the terms as should the legislature have intended that section 67 apply to the same subject matter, the consistency in the use of terminology would have been appropriate.</p>
68(1)	<p>"(1) If, after conducting an investigation in terms of section 67, a manufacturer or importer concludes that there is a potential danger to the public from the continued use of or exposure to the goods, the manufacturer or importer must -</p> <p>(a) promptly notify each registered consumer, if applicable, of the nature, extent and risk for the product failure, defect or hazard contributing to that danger; and</p> <p>(b) submit to the Commissioner a plan for -</p> <p>(i) notifying the public generally of the nature, extent and risks of that danger; and</p> <p>(ii) remedying the product failure, defect or hazard contributing to that danger."</p>	<p>Please see our comments set out above in relation to the use of the term "potential danger" in this section.</p> <p>Reference is made to a "registered consumer". It is not clear what constitutes a "registered consumer" in light of the definition of "consumer" contained in section 1 of the Bill.</p> <p>Is it the intention to assign powers to the Commission that duplicate existing powers or other regulations, such as the South African Bureau of Standards?</p> <p>This section may be impractical to comply with because where goods are considered to be "dangerous", the supplier would ordinarily seek to remedy the position. There may be insufficient</p>

		<p>time to first notify consumers.</p> <p><i>Product recall should be recognised and the provision made for urgent product recall.</i></p> <p>Furthermore the South African Bureau of Standards should be involved in clarifying goods which are dangerous/hazardous.</p>
70	<p>"(1) If the National Consumer Commission has reasonable grounds to believe that any goods prescribed in terms of section 66 may be hazardous, and the producer of those goods has not taken any steps required by sections 67 or 68, the Commission, by written notice, may require that the producer to -</p> <ul style="list-style-type: none"> (a) conduct an investigation contemplated in section 67(1); (b) make a proposal contemplated in section 67(3); or (c) carry out a programme of notice and repair and replacement as contemplated in section 68, on any terms required by the Commission. <p>(2) A manufacturer or importer affected by a notice issued in terms of this section may advise the Tribunal to set aside the notice in whole or in part."</p>	<p>We assume that the reference to the "National Consumer Commission" should be reference to the "Commission", as per the definitions contained in section 1 of the Bill.</p> <p>Sections 67 and 68 make reference to a manufacturer and importer whereas this section makes reference to a "producer". It is not clear, therefore, how these sections should be interpreted together. We note that the term "manufacturer" is not defined in section 1 of the Bill and it is not clear whether this term is intended to mean something different to a "producer".</p> <p>Please see our comments above with regard to defining the term "hazardous".</p> <p>This section makes specific reference to the goods prescribed under section 66 which are "hazardous". It is not clear whether all the goods which may be prescribed under section 66 would be "hazardous" or whether a producer would be required to make the determination having regard to the lists of goods prescribed under section 66 if a particular good is "hazardous" or whether the Commission would make this determination.</p> <p>Our query set out above in respect of the powers</p>

		<p>to be granted to the Commissioner under section 69, apply equally to this section.</p> <p>Moreover, it is not clear the extent of the Commission's powers in terms of section 70(1)(c). We assume these powers would be limited to the standards set under the Bill, which may conflict with the standards prescribed under other legislation and in respect of which the Commission would have no power.</p> <p>The reference in section 70(2) to a "manufacturer" or "importer" is ambiguous as section 70(1) refers to a "producer". This needs to be clarified.</p>
71(1) and (2)	<p>"(1) Any producer, distributor or supplier of a good is strictly liable for any damage, as described in subsection (2), caused solely or partly as a consequence of a product failure, defect or hazard in a good, or as a result of inadequate instructions or warnings provided to the consumer, and if in a particular case, more than one person is liable in terms of this section, their liability is joint and several.</p> <p>(2) Subject to subsection (3), damage for which a person may become liable in terms of this section includes, but is not limited to -</p> <ul style="list-style-type: none"> (a) the death or injury of any natural person; (b) loss of, or damage to, any property, irrespective of whether it is movable or immovable; and (c) the economic loss that results from a loss contemplated in paragraphs (a) or (b)." 	<p>Section 71(1) creates strict liability for damage caused which is related to a "product failure, defect or hazard in a good, or as a result of inadequate instructions or warnings provided to the consumer". Issues concerning liability in respect of certain goods regulated by alternative pieces of legislation, as referred to previously, apply equally to the provisions of section 71 in so far as the provisions of section 71(4) provide that "the liability of any person in terms of this section is in addition to, and not in substitution for, any other liability of that person in terms of any law".</p> <p>Strict liability is based upon the principle that a defendant (a producer, distributor or supplier in this case) may be held liable even though there is no fault or negligence on its part. The common law currently regulates the liability of manufacturers and sellers. This attempt to place no-fault liability in such manner on all producers, distributors or suppliers, in addition to liability for consequential losses (economic loss) will be extremely detrimental to business.</p>

		<p>Imposing strict liability gives rise to claims which will potentially increase litigation against producers, distributors and suppliers and which in turn will raise the costs of insurance.</p> <p>Furthermore, our common law applies to various tests and factors (such as fault, causation, limitation of liability to patrimonial loss) aimed at limiting liability. Our courts have on various occasions stated that it would be undesirable and extremely problematic to allow for damages in circumstances where liability may be limitless. Section 71 contemplates a scenario which may result in limitless liability especially in respect of economic loss and does not contain any such limiting factors.</p> <p>This section significantly changes the current South African law.</p> <p>It should be noted that in the United States, businesses have sought relief from State legislatures and Congress regarding strict liability, and in some States, laws have been passed which provide that manufacturers will have the right to defend themselves by showing that their products meet generally acceptable safety standards when they were made.</p> <p>In addition, this section is overly broad in so far as it applies to "producers, distributors and suppliers". It may be literally impossible for a "distributor" or "supplier" to determine whether adequate instructions or warnings have been given in respect of a product. For example, a supplier would be required to unpack all medicines to determine whether the relevant package insert</p>
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		<p>contains adequate instructions and warnings. Alternatively, the supplier would be required to duplicate these requirements by making its own warning statements and the like. This would place a significant obligation on distributors and suppliers and which would have significant cost implications.</p> <p>Our comments in relation to point 12 of the United Nations Guidelines for Consumer Protection set out in relation to section 62 apply equally to this section.</p> <p>It is not clear which person would be the beneficiary of the duty of care under section 71(1). Who would be able to exercise such rights?</p>
<p>72(1), (2) and (5)</p>	<p>"(1) If a supplier makes an agreement to sell particular goods to a consumer, to accept payment for those goods in periodic instalments, and to hold those goods until the consumer has paid the full price for the goods -</p> <ul style="list-style-type: none"> (a) each amount paid by the consumer is held by the supplier in trust for the benefit of the consumer, as a deposit subject to section 74; and (b) the particular goods remain at the risk of the supplier until the consumer takes possession of them. <p>"(2) If a supplier is unable to deliver possession of any goods contemplated in sub-section (1) when the consumer has paid the full price for the goods, the supplier must either, at the option of the consumer -</p> <ul style="list-style-type: none"> (a) supply the consumer with an equivalent quantity of goods that are comparable or superior in description, design or quality; or (b) refund to the consumer - <ul style="list-style-type: none"> (i) the money paid by the consumer, with interest at a legal rate, if the inability to supply the goods is due to circumstances beyond the supplier's control; or 	<p>The provisions of section 72(2)(b)(i) are vague in that it is not clear what is meant by "interest at a legal rate". Section 72(2)(b)(ii) refers to payment of double the amount paid by the consumer as an alternative to payment of the amount in section 72(2)(b)(i). It is not clear how these sections are to be applied - in the alternative?</p> <p>We are unable to provide comments in relation to the proposed limitation on a cancellation penalty as contemplated in section 72(5), without having any further information as to what is intended here. For example, would this be capped as a percentage of the transaction value?</p>

	<p>(ii) double the amount paid by the consumer, as compensation for breach of contract."</p> <p>"(5) The Minister may prescribe a maximum amount for a cancellation penalty contemplated in sub-section (3)."</p>	
73	<p>"(1) This section applies to any transaction in which a supplier -</p> <p>(a) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and</p> <p>(b) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it.</p> <p>(2) A supplier contemplated in sub-section (1) -</p> <p>(a) must hold all consideration paid in exchange for all such certificates, cards, credits, vouchers or similar devices in trust in accordance with section 74; and</p> <p>(b) may make a charge against that trust only when, and to the extent that, a certificate, card, credit, voucher or similar device is presented as consideration for goods or services supplied or to be supplied to or on behalf of a consumer.</p> <p>"(3) Any person in possession of a certificate, card, credit, voucher or similar "device contemplated in this section is a beneficiary of the trust imposed by sub-section (2), to the extent of the unused value of that certificate, card, credit, voucher or similar device."</p>	<p>Is this section intended to apply to prepaid airtime vouchers?</p> <p>Various companies' gift cards and vouchers have expiry dates for control purposes. This section implies that it would not be permissible to have such expiry dates – see in particular the obligation contained in terms of section 73(2)(a).</p> <p>The requirement to hold money in trust subject to the provisions of section 74, whenever a person purchases a gift card or the like, creates an additional complexity to business systems and accounts and, hence increases the cost of doing business. Typically, gift cards and the like are electronically issued and the value of the gift card is recorded on a magnetic strip or similar.</p> <p>No details are recorded regarding the purchaser of such card. In order to make the purchaser a beneficiary of trust referred to in section 73(3), one would assume that all of the purchaser's personal information would need to have been recorded. This has the effect of turning a simple transaction into a far more complex, time consuming and costly transaction.</p> <p>If one reads the provisions of section 73(3) in conjunction with section 74, in particular section 74(2)(b), this implies that businesses are required to hold in trust for an indefinite period of time the cash value equal to the unused portions</p>

		under a gift card or the like and that interest will be payable on that amount if the amount is held by the supplier for at least forty business days, as referred to in section 74(2)(b). This would seem to be unduly onerous and costly to businesses, particularly if one takes into account that the section currently imposes no time limits in relation to these requirements.
74(1)	"When a supplier has possession of any property belonging to or ordinarily under the control of the consumer, that property is held by the supplier in trust for the benefit of the consumer and is subject to the Trust Property Control Act, 1988 (Act No. 57 of 1988)."	It is necessary to consider in further detail the practical application of the Trust Property Control Act as contemplated in this section. It is ambiguous to merely state that the Trust Property Control Act shall apply. Rather, the relevant sections of such Act which are applicable should be identified and for purposes of applying these provisions, it would be necessary for the property contemplated in section 75(1) to be "trust property" for purposes of such provisions.
75(1)	"The Minister may make regulations establishing a minimum or maximum deposit but a supplier must or may require the consumer to pay in respect of the return of a bottle, container, pallet, reel or similar object used in respect of the packaging or delivery of any goods."	We are unable to provide any comment in relation to these sections without having further information relating to the proposed amounts to be regulated under this section.
77(2)	"If an agreement, or any provision of such an agreement is, in terms of this Act, declared to be unlawful, or is severed from the agreement, the supplier who is a party to that agreement must not, in response to that decision - <ul style="list-style-type: none"> (a) directly or indirectly penalise another party to that agreement when taking any action contemplated in section 7(1); (b) alter the terms or conditions of any other transaction or agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or (c) take any action to accelerate, enforce, suspend or terminate another agreement with another party to the impugned agreement." 	For the sake of certainty, we suggest that this section is referenced specifically to section 57(4) of the Bill. In other words, an agreement would be "unlawful" or a provision "severed" therefrom, if a court makes such determination pursuant to the provisions of section 57(4). The reference to section 7(1) of the Bill would seem to be incorrect. We assume this should be reference to section 77(1)? The reference to "the impugned agreement" should be clarified.
78	"A person referred to in section 4(2) may seek to enforce any right in terms of	The reference to "is" in the first line should rather

	<p>this Act or in terms of a transaction or agreement to by -</p> <ul style="list-style-type: none"> (a) attempting to resolve any dispute with a supplier through alternative dispute resolution in accordance with section 79; (b) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court; (c) filing a complaint with the Commission in accordance with section 81; or (d) approaching a court with jurisdiction over the matter." 	<p>be "in".</p> <p>The word "to" should be deleted in the second sentence.</p> <p>A hierarchy of the enforcement structure needs to be clarified. We suggest that in the first instance, a dispute must be referred by the consumer to the supplier in order to attempt to resolve the dispute. If such mechanism does not succeed within a specified period of time, which period must be stated, then the dispute must be referred to the relevant ombud and thereafter to the Commission and Tribunal.</p>
79(1)	<p>"As an alternative to filing a complaint with the National Consumer Commission in terms of section 81, a person may refer a matter that could be the subject of such a complaint as follows: -</p> <ul style="list-style-type: none"> (a) If the supplier concerned is a participant in an authorized or recognised ombud scheme, the matter may be referred to the ombud with jurisdiction. (b) If there is no ombud with jurisdiction as contemplated in paragraph (a), the matter may be referred to either - <ul style="list-style-type: none"> (i) a consumer court, for resolution in accordance with this Act and any applicable provincial consumer legislation; or (ii) a provincial consumer protection authority or a consumer protection group, for resolution by conciliation or mediation, if those services are offered by that authority or group." 	<p>We suggest that the term "ombud scheme" be defined.</p> <p>Further it is suggested that the procedure for resolving a dispute should follow the steps referred to above.</p>
79(3)	<p>"In respect of any dispute between a supplier and a consumer that could be the subject of an application to the Tribunal in terms of this Act, the consumer or supplier, before either may apply directly to the Tribunal, -</p> <ul style="list-style-type: none"> (a) must attempt to resolve that matter directly between themselves; and (b) if unable to do so, must refer the matter to an entity as contemplated in subsection (1)." 	<p>In order to ensure that matters are dealt with expeditiously, it is suggested that time periods within which the consumer and supplier would have to resolve the dispute as contemplated in subsection (a), be included.</p>

81	<p>"(1) Any person may file a complaint with the National Consumer Commission in the prescribed manner and form, alleging that any person has acted in a manner inconsistent with this Act.</p> <p>(2) A complaint may be initiated directly by the National Consumer Commission on its own motion, on the request of a provincial consumer protection authority or request of a consumer group accredited in terms of section 83.</p> <p>(3) A consumer or supplier who has unsuccessfully attempted to resolve the dispute directly with the other party and through alternative dispute resolution in terms of section 79, may file an application contemplated in this Act at any time within -</p> <p>(a) 20 business days after the failure of the attempted alternative dispute resolution; or</p> <p>(b) such longer time as the Tribunal may allow on good cause shown."</p>	Confirmation is required on whether the Minister will prescribe the manner and form in which a complaint may be made.
82(1)	<p>"In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may -</p> <p>(a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;</p> <p>(b) make any order specifically contemplated in this Act; and</p> <p>(c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid to any person and on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act."</p>	Section 82(1)(c) will be difficult to enforce in so far as the Uniform Rules of the High Court and the Rules of the Magistrate's Court have not been amended so as to make provision for litigation by way of class action.
86(1)	"A person may apply to the Registrar, either directly or through a provincial consumer protection authority, in the prescribed manner and form to register a business name that is different from the name of the person."	The words "to register a business name that is different from the name of the person" is nonsensical as it is not clear to whom this section is referring.
86(2)(a)	<p>"The Registrar, or a provincial consumer protection authority must register a business name in accordance with the application, unless that name</p> <p>(a) is the same as, or confusingly similar to, a name –"</p>	In the previous Business Names Act 27 of 1960 ("the Business Names Act"), there was never an obligation placed upon the Registrar of Companies to determine whether or not a name was "confusingly similar" to a company name already registered in the Companies Office. This provision now places an obligation on the Registrar to make

		<p>a determination, in his discretion, whether or not a name is "confusingly similar".</p> <p>Previously, in Section 5 of the Business Names Act, the Registrar would only prohibit the use of certain business names "upon the application in writing of any aggrieved person". Clearly, it would be useful for the Registrar to apply his mind in respect of the registration of a company name. However, the Registrar's terms of reference in making a determination as to what is "confusingly similar" is unknown.</p> <p>This section appears to envisage that a provincial consumer protection authority will have the authority to "register" a business name. However, it is not clear what the nature is of the body or entity that will exercise these powers.</p>
86(2)(a)(ii)	"(ii) registered for use by any other person in terms of this section;"	It is unclear as to what is meant by "registered for use". Is this a reference to a registration of a "defensive name" in terms of Section 43 of the Companies Act.
86(2)(b)(iv)	<p>"(b) falsely implies or suggests, or could reasonably mislead the public to believe, that the business -</p> <p>(iv) is owned, managed or conducted by persons having any particular educational designation or professional qualifications, standards, skills or capacity; or"</p>	The purpose of this section is unclear. Clarity is required on whether or not this section prohibits the Registrar or a provincial consumer protection authority from registering a company name which has the connotation of being "educational" or part of a "professional body".
86(c)(ii)	<p>"includes any words or expression that, in isolation or in context within the name, -</p> <p>(ii) may reasonably be considered to offend persons of a particular race, ethnicity, gender or religion."</p>	Again, the Registrar will be required to make a "judgment call to consider whether or not a particular name may "reasonably be considered to offend persons of a particular race, ethnicity, gender or religion". The Registrar's terms of reference are again unknown.
87(1)(b)	"(1) Subject to subsection (2), the Registrar may refuse to register a	This section does not refer to "Close Corporations" as was done in Section 86(2)(a)(i).

	business name if the name or amended name of that company (b) is reserved in terms of the Companies Act for use by another person."	
88(1)	"(1) For a period of two years immediately following the registration of a business name, any person may apply to the High Court to review the decision of the Registrar to register that name, solely on the grounds that the name –"	Due to the value and goodwill that may be attached to a specific business name, a period of two years may be prejudicial to businesses. The period of review of the Registrar's decision to register a name is for two years. This seems to be a fairly lengthy period of time, in particular when one has regard to the necessity for certainty in trading that company's business subsequent to the registration of a business name. It is suggested that the period be one of six months. In Section 5(3) of the previous Business Names Act, a period of 60 days was required within which to review the decision of the Registrar.
88(1)(a)	"(a) was reserved for the use of the applicant in terms of the Companies Act at the time of the Registrar's decision;"	There is no reference to the Close Corporations Act.
90(4)(b)	"(4) A provincial consumer protection authority, or the National Consumer Commission, as the case may be, may - (b) refuse an application if the applicant has not supplied any information required in terms of paragraph (a) within the prescribed time."	"Prescribed time" is not defined and remains unclear.
91	"(1) In this section- "Industry code" means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. (2) The Minister, by regulation, may: (a) prescribe an industry code, or specified provisions of an industry code, for a specific industry; (b) declare the industry code to be a mandatory industry code or a voluntary industry code; and (c) in respect of a voluntary industry code, specify the method by which a supplier agrees to be bound by the code and the method by which a supplier ceases to be so bound.	It is highly recommended that prior to any formalisation of industry codes in terms of this Bill, a thorough and consultation process is initiated by the Minister with the relevant industry stakeholder.

	(3) A supplier must not, in the ordinary course of business, contravene an applicable industry code."	
92(1)(a)	"As contemplated in section 41(2) of the Constitution, the Minister must consult with the responsible Member of any relevant provincial Executive Council - (a) to co-ordinate and harmonise the functions to be performed by the National Consumer Commission, and one or more provincial consumer protection authorities".	It is not clear how the Commission and the provincial consumer protection authorities are going to function harmoniously together. This is so, especially in light of the fact that no regulations have, as yet, been proposed. Notwithstanding the foregoing, however, the functions and powers of these bodies would have to be guided and interpreted in terms of the Administrative Act, as amended for the purposes of ensuring procedural fairness, reasonableness and the right to be furnished with reasons for decisions.
92(1)(b)	"As contemplated in section 41(2) of the Constitution, the Minister must consult with the responsible Member of any relevant provincial Executive Council - (b) as necessary, to facilitate the settlement of any dispute between the National Consumer Commission, and one or more provincial consumer protection authorities".	In the absence of regulations published in terms of the Bill, it is impossible to comment adequately on the scope and extent of the lawfulness of the functions, powers and duties conferred on the Commission and the provincial consumer protection authorities.
92(2)(a)& 92(2)(b)	"If this Act requires the several provincial consumer protection authorities to perform a particular function within their respective provinces, and (a) within a particular province, no provincial consumer protection authorities has been established; or (b) within a particular province, no provincial consumer protection authorities has been established; or (c) the Minister concludes on reasonable grounds that the provincial consumer protection authority within a particular province is unable to perform that function effectively, the Minister must consult with the responsible Member of the Executive Council of that province determine the steps be taken to ensure the fulfilment of that statutory obligation."	There are grammatical difficulties in interpreting this extract. It is not clear in what circumstances the Bill does or will in fact require a provincial consumer protection authority to perform certain duties and functions. In addition, the powers, duties and functions of provincial consumer authorities are not specified. Therefore, it is unclear what criteria shall be used by the Minister to determine whether or not the relevant provincial consumer authority is or is not fulfilling its statutory obligation. The decision of the Minister in this regard would have to be in line with the provisions of the Administrative Act.
93(1)(a)	"A provincial consumer protection authority has jurisdiction within its province	It is not clear what is meant by the term "direct

	<p>to -</p> <p>(a) consider applications for, and issue, licences to direct marketers as required in terms of this Act".</p>	<p>marketers" and whether or not direct marketers include persons whose duties and functions include transmitting direct electronic communications to consumers. In the absence of regulations governing how applications for licenses will be determined, it is difficult to even comment on the administrative justice implications and lawfulness of such a procedure.</p>
93(1)(b)	<p>"A provincial consumer protection authority has jurisdiction within its province to -</p> <p>(b) to register, on behalf of the Registrar, a business name as applied for by any person resident, or carrying on business exclusively, within that province".</p>	<p>This section conflicts with the duties and functions of the Registrar in terms of the Companies Act. In this regard, there may be a possibility of a multiplicity of several office-bearers regulating over similar functions. It is not clear to what extent the duties, functions and powers of the Registrar in terms of this Bill shall be harmonised with those of the Registrar appointed in terms of the Companies Act.</p>
93(1)(c)	<p>"A provincial consumer protection authority has jurisdiction within its province to -</p> <p>(c) issue compliance notices in terms of this Act on behalf of the National Consumer Commission to any person carrying on business exclusively within that province".</p>	<p>This section does not take into account the fact that most commercial transactions and agreements cater for dispute resolution mechanisms such as arbitration clauses within such agreements. However, this section contemplates a situation where the Commission shall exercise mandatory and directory powers directing a party to an agreement to comply with its order. The difficulty with this section is that it potentially does away with the well-founded legal principle of caveat subscriptor ie the freedom to contract.</p>
93(1)(d)	<p>"A provincial consumer protection authority has jurisdiction within its province to -</p> <p>(d) facilitate the mediation or conciliation of a dispute arising in terms of this Act between or among persons resident, or carrying on business exclusively within that province."</p>	<p>Same as above</p>
93(1)(e)	<p>"A provincial consumer protection authority has jurisdiction within its province to -</p> <p>(e) refer a dispute contemplated in paragraph (d) to the</p>	<p>The difficulty with this section is that it does not provide for an instance where a provincial consumer court may be absent in a certain</p>

	provincial consumer court within that province if there is one".	province. In addition, it is not clear whether or not the consumer protection court ousts the jurisdiction of the South African High Courts.
93(4)	"A provincial consumer protection authority must, on request from another such authority, provide a copy of all prescribed information in its possession concerning a licensee".	This section conspicuously lacks a proviso in so far as protecting confidential information of a licensee. In this regard, the Bill is silent on the issue of whether or not the obligation to keep information as confidential exempts consumer protection authorities.
93(5)	"The Minister, by regulation in accordance with section 148, may prescribe the timing, manner and form, and content of information to be provided in terms of this section".	It is not clear whether or not the Minister shall also be obliged to abide by the provisions dealing with confidential information.
94(1)(c)	"There is hereby established a body to be known as the National Consumer Commission, which - (c) is independent and subject only to the Constitution and the law".	This section must be construed in light of the provisions of the Administrative Act.
95	"The National Consumer Commission is governed by a Board consisting of - (a) a member designated by the Cabinet member responsible for social development, to serve until substituted by that Cabinet member; (b) a member designated by the Cabinet member responsible for education, to serve until substituted by that Cabinet member; (c) a member designated by the Cabinet member responsible for transportation, to serve until substituted by that Cabinet member; (d) a member designated by the Cabinet member responsible for housing, to serve until substituted by that Cabinet member; (e) a member designate by the Cabinet member responsible for health, to serve until substituted by that Cabinet member; (f) a Chairperson appointed by the Minister; and (h) not more than six members appointed by the Minister".	The independence of the Board is questionable as all the members of the Board are to be appointed by various cabinet members from various State departments.
95(3)(d)	"The Board is responsible to - (d) provide advice to the Chief Executive Officer concerning the	The issue of independence is of relevance in this section as the Chief Executive Officer is appointed

	exercise of the functions and powers of the National Consumer Commission".	by the Minister in terms of section 99 of the Bill. In this regard, the independence of the Chief Executive Officer is questionable in light of his or her appointment by the Minister.
96(2)(a)	"A person may not be a member of the Board if that person - (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature".	This section purports to deal with the issue concerning the independence of the Board. However, it does not do so convincingly as a member is capable of being devoid of independence regardless of that member's political affiliation.
97(1)	"A member of the Board must promptly inform the Minister in writing after acquiring an interest that is, or is likely to become, an interest contemplated in section 96(2)(b)".	This section does not deal with penalties or any enforcement procedure in an instance where a member of a Board fails to disclose his or her interest.
97(3)(b)	"If, at any time, it appears to a member of the Board that a matter before the Board concerns an interest of that member referred to in subsection (2)(b), that member must - (b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter".	It is not clear what criteria shall be used by the members of the Board to determine whether or not a member should withdraw from proceedings in any matter. However, as mentioned above, the functions, powers and duties of the Board must be construed against the backdrop of the provisions of the Administrative Act, as amended.
101(1)	"The Chief Executive Officer may appoint any suitable employee of the National Consumer Commission, or any other suitable person employed by the State, as an inspector".	There are concerns based on issues around the independence of the regulatory bodies founded in terms of this Bill and a potential for an arbitrary appointment of an inspector on the basis that he or she is a person employed by the State.
101(4)	"When exercising powers in terms of this Act, an inspector is a peace officer as defined in section 1 of the Criminal Procedure Act, 1997 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law".	This section does not deal adequately and specifically with the scope and extent of the powers, functions and duties of an inspector. In this regard, the fact that an inspector in terms of this Bill will be conferred with powers of a peace officer in terms of the Criminal Procedure Act, may result in a legal challenge that a Chief Executive Officer in terms of this Bill is acting ultra vires his or her powers and functions by appointing an inspector and conferring wide powers on him or

		her.
104(2)	"In respect of a particular matter within its jurisdiction of responsibility, the National Consumer Commission may exercise its responsibility by way of an agreement contemplated in section 110(4)(b)."	This section purports to deal with a possibility of the multiplicity of governing or regulatory bodies in so far as jurisdiction is concerned. However, this section does not prescribe the manner in which the multiplicity of such functions will be dealt with practically.
110(4)(b)	"The National Consumer Commission may - (b) negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over consumer matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act".	This section only confers the power to negotiate these agreements on the Commission. In this regard, it is advisable that this power to negotiate agreements is extended to various interested groups, corporate and business associations and regulatory authorities in order to ensure uniformity and the harmonious interpretation and application of various pieces of legislation.
112(a)	"The National Consumer Commission is responsible to enforce this Act by - (a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute".	This section is in direct contradiction and conflict with section 92(b) mentioned and commented on above.
112(i)	"The National Consumer Commission is responsible to enforce this Act by - (i) referring alleged offences in terms of this Act to the National Prosecuting Authority."	It is not clear under what circumstances and based on what criteria will the Commission refer the alleged offences to the National Prosecuting Authority.
113(4)(a) & (b)	"At any time during an investigation, the National Consumer Commission may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject - (a) to appear before the National Consumer Commission to be interrogated at a time and place specified in the summons; or (b) to deliver or produce to the National Consumer Commission any book, document or other object referred to in paragraph (a) at a time and place specified in the summons."	This section contemplates that the Commission shall perform judiciary functions and powers normally conferred by, inter alia, the Supreme Court Act No. 59 of 1959, as amended and the Uniform Rules of the High Court. In this regard, it may be argued that the powers of the Commission may be in conflict with the powers of the judiciary. In addition, the nature of the powers contemplated in this section is usually dealt with in the context of subpoenas executed only by our courts.
114(3)(a) & (b)	"If, in respect of a matter contemplated in subsection (2)(a), there is no consumer court within the applicable province, the National Consumer	This section contemplates that the Commission has the powers to overlook existing statutory

	<p>Commission may refer the matter to either -</p> <p>(a) a consumer court in another province, if the balance of convenience or interests of justice so permit; or</p> <p>(b) the Tribunal."</p>	<p>provisions concerning the principles of jurisdiction in favour of convenience. In this regard, South African law has recognised and well-founded principles on geographical areas where matters may be heard depending on, inter alia, the principal place of business of a defendant/respondent or the defendant or respondent's place of residence.</p>
115(1)	<p>"Subject to subsection (2), the National Consumer Commission may issue a notice in the prescribed form requiring a person who is not accredited or licensed to stop engaging in an activity, offering to engage into an activity, or pretending to be authorised to engage in an activity that, in terms of this Act, requires accreditation or a license."</p>	<p>This section implies that the Commission has such wide powers that it is empowered to stop a business activity without an order of court. These powers are problematic in so far as they impose onerous obligations on business entities, whilst the Commission has wide powers having no regard to a court of law.</p>
120(4)	<p>"At the conclusion of a hearing, the Tribunal must make any order permitted in the circumstances in terms this Act and must issue written reasons for its decision."</p>	<p>This section does not provide sufficient guidance as to how the Tribunal comes to its decisions, in particular in instances where a single Tribunal member conducts a hearing as is contemplated in section 120 (3). Clarity is required as to whether the intent is to have the entire Tribunal give written reasons for the decision reached by a single member or whether the single member may give his decision on behalf of the Tribunal. In addition, clarity is required as to the role of the chairman of the Tribunal in the rendering of decisions by the Tribunal.</p> <p>The word "of" should be inserted after the word "terms".</p>
121	<p>"The following persons may participate in the hearing contemplated in this Part, in person or through a representative and may put questions to witnesses and inspect any books, documents or items presented at the hearing."</p>	<p>It is unclear as to whether the reference to "representative" in this section contemplates representation by counsel, in particular as the nature of the Tribunal's proceedings are contemplated in section 120(1) as being inquisitorial.</p>
122(d)	<p>"give directions prohibiting or restricting the publication of any evidence given</p>	<p>The reasons for the prohibition or restriction of the</p>

	to the Tribunal."	publication are not set out unlike the position in section 120(2) where a Tribunal member hearing a matter can exclude members of the public, or specific persons or categories of persons, from attending proceedings on specified grounds.
123	"Subject to the Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of the applicable sections of this Act."	Section 31 of the National Credit Act sets out the manner in which the Tribunal conducts its proceedings. It is unclear as to whether the procedure in section 123 is intended to refer to the proceedings under the National Credit Act or contemplate separate rules of procedure. In which case these rules have not been set out in this section.
125(1) and (2)	"Subject to sub-section (2), each party participating in the hearing must bear its own costs. If the Tribunal - (a) has not made a finding against the respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 119(1); or (b) has made a finding against the respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 119(1)."	The scale of costs is not provided for in this section. Accordingly, it is unclear as to whether reference to an award of costs in this section refers to the High Court or Magistrate's Court scale.
126(2)	"Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may - (a) ...; (b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 80 or 122."	It is unclear as to why a participant in a hearing would not be entitled to appeal to the High Court in respect of a decision given in terms of section 122, as the powers exercised by the Tribunal in terms of section 122 are discretionary.
127(3)	"If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the National Consumer Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months."	The reference to the "National Consumer Tribunal" in this section should refer to the "Tribunal" as this is a defined term.
128(1)(a)(iii)	"imposing an administrative fine in terms of section 127, with or without the	The reference to section 127 is incorrect and

	addition of any other order in terms of this section;"	should refer to section 129.
128(1)(b)	"confirming a consent agreement in terms of this Act as an order of the Tribunal; or"	The word "confirming" should refer to "confirm". In addition, reference is made to a "consent agreement". This has not been defined.
128(1)(c)	"condoning any non-compliance of its rules and procedures on good cause shown;"	The word "condoning" should refer to the word "condone".
128(1)(d)	"confirming an order that an unaccredited or unlicensed person must stop engaging in activity that requires the person to be accredited or licensed;"	The word "confirming" should refer to the word "confirm". In addition, reference is made to an "unaccredited"/"accredited" person in this section. These terms have not been defined.
128(1)(e)	"requiring a supplier to -"	The word "requiring" should refer to the word "require".
128(1)(f)	"any other appropriate order required to give effect to a right contemplated in this Act."	The word "grant" should be inserted at the beginning of this section.
129(4)(b)	"(4) For the purpose of this section, the annual turnover of - (a) a supplier at the time an administrative fine is assessed, is the total income of that supplier during the immediately preceding year under all credit agreements to which this Act applies, less the amount of that income that represents the repayment of principal debt under those credit agreements; or (b) any other person, is the amount determined in the prescribed manner. (5) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution. any other person, is the amount determined in the prescribed manner."	The words "the prescribed manner" in this section are not defined and remain unclear. With regard to subsection 4(a), the word "credit" should be deleted.
130	(1) Any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court, and is binding on the National Consumer Commission, provincial consumer protection authorities, a consumer court, an alternative dispute resolution agent or the ombud with jurisdiction, a debt counsellor, and a Magistrate's Court. (2) The National Consumer Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative fine imposed by the Tribunal.	It is unclear as to what extent this section contemplates ousting the inherent jurisdiction of High Courts.

	<p>(3) A proceeding under subsection (2) may not be initiated more than three years after the imposition of the administrative fine.</p>	
<p>131(1)</p>	<p>"A judge of the High Court, a regional magistrate, or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that -</p> <ul style="list-style-type: none"> (a) prohibited conduct has taken place, is taking place, or is likely to take to place on or in those premises; or (b) that anything connected with an investigation into that prohibited conduct is in the possession of, or under the control of, a person who is on or in those premises." 	<p>This part of the Bill seeks to give authority to enter and search under a warrant. A search warrant can be issued if the requirements of section 131(1) are satisfied.</p> <p>A warrant to enter and search may be issued at any time and specifically authorise an inspector or a police officer (see section 131(2)(b) to enter and search the premises and do anything listed in section 132). Only an inspector or a police officer may be authorised by warrant to conduct a search.</p> <p>An inspector is defined as a person appointed as such in terms of section 101. Section 101(4) provides that when exercising powers in terms of the Act, an inspector is a peace officer as defined in section 1 of the Criminal Procedure Act, and may exercise the powers conferred on a peace officer by law.</p> <p>The problem with section 131(1) is that it extends the ambit covered by a warrant beyond what is normally dealt with by warrant, namely a criminal offence.</p> <p>Section 14, under Chapter 2 of the Bill of Rights of the Constitution guarantees everyone the right to privacy, which includes the right, inter alia, not to have -</p> <ul style="list-style-type: none"> (a) their personal homes searched; (b) their properties searched; (c) their possessions seized.

		<p>Section 36 of the Constitution provides for a limitation of rights under certain circumstances. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Whilst it is clear that the right to privacy may be limited where the person involved has committed an offence, it is doubtful that the right may be limited where, in the words of the Bill "prohibited conduct has taken place ...". "Prohibited conduct" is defined in very broad terms and means an act or omission in contravention of the Bill, other than an offence in terms of the Bill (see section 1).</p> <p>The Bill distinguishes between "prohibited conduct" and an "offence". One may ask the question, what is meant by an act or omission in contravention of the Bill? Normally a warrant is issued when a criminal offence has been committed, or is threatened.</p> <p>Chapter 2 of the Criminal Procedure Act provides for a regime for search warrants, entering premises, seizure, forfeiture and disposal of property connected with offences.</p> <p>It is noted that the Tribunal has very wide powers in terms of section 128. These include the power to declare conduct to be prohibited in terms of the Bill. These are very wide ranging powers. Even courts of law, which are vested with judicial authority by the Constitution have no general powers to declare conducted to be prohibited.</p>
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131(6)	<p>"Immediately before commencing with the execution of a warrant, a person executing that warrant must either-</p> <ul style="list-style-type: none"> (a) if the owner, or person in control, of the premises to be searched is present- <ul style="list-style-type: none"> (i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and (ii) hand a copy of the warrant to that person or to the person named in it; or (b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place." 	<p>This section provides a humane manner on how warrants should be executed. It adds no value to the nature of warrants as set out in the Criminal Procedure Act. The courts have developed the law relating to warrants in the light of the Constitution. An inspector appointed in terms of the Bill, is a peace officer in terms of the Criminal Procedure Act and is subject to all the checks and balances applicable to the execution of warrants.</p>
133(5)	<p>"(5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information."</p>	<p>This section gives the right to refuse inspection or removal of a particular document on the grounds that it contains privileged information. There is no definition of what constitutes "privileged information". The Bill should define what constitutes "privileged information".</p> <p>The right to refuse to hand over a document or information, should be extended to cover confidential and proprietary information. "There is a possibility that competitors in the commercial world may abuse the search and seizure</p>

		provisions by causing the seizure of commercially sensitive and competitive information from their competitors. This is so in so in view of the light that the Bill provides for seizure of information for purposes of investigation.
133(7) and (8)	<p>"(7) A police officer who is authorised to enter and search premises under section 132, or who is assisting an inspector who is authorised to enter and search premises under section 132 may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.</p> <p>(8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search."</p>	These sections are a mirror image of section 27 of the Criminal Procedure Act. There is no need for this section in the Bill.
134(2)(c)	<p>"(2) Subsection (1) does not apply to information disclosed -</p> <p>(c) at the request of an inspector, regulator or Tribunal member entitled to receive the information."</p>	The term "regulator" is not defined.
137(a)	<p>"A person commits an offence who, having been sworn in or having made an affirmation -</p> <p>(a) subject to section 113(6), fails to answer any question fully and to the best of that person's ability; "</p>	Failure to answer any question fully and to the best of one's ability is a very broad phrase and may lead to witnesses being punished unnecessarily. Whether a person has fully answered a question is a subjective matter and may expose persons to unjustifiable punishment.
138(2)(a)	<p>"A person commits an offence who -</p> <p>(a) does anything calculated to improperly influence the Tribunal or a regulator concerning any matter connected with an investigation;"</p>	The offence created by this section is very broad. Improper influence is a very broad phrase. There are other laws, which deal with obstruction of justice as well as corruption and which can be invoked to protect the integrity of investigations. These laws are couched in specific terms and have been applied in practice by the courts.
138(2)(b)	<p>"(b) anticipates any findings of the Tribunal or a regulator concerning an investigation in a way that is calculated to influence the proceedings or findings;"</p>	The offence created in this section is extremely broad. What does it mean to anticipate any findings of the Tribunal or a regulator? This is too broad. Further, what does it mean to commit any

		<p>act which is "calculated to influence the proceedings or findings"? Section 16 of Chapter 2 of the Constitution guarantees freedom of expression. Section 138(2)(b), in our opinion, constitutes an invasion on freedom of expression.</p> <p>The protection which is sought to be given to the Tribunal is best expressed in section 138(2)(c) which deals with conduct which would constitute contempt of court. This latter section deals with the kind of mischief which sections 138(2)(a) and (b) seek to prevent. There is a sufficient body of laws, both common law and otherwise, which have been interpreted by the courts, which gives proper guidance on what constitutes "contempt of court".</p>
139	<p>"(1) Any person convicted of an offence in terms of this Act, is liable -</p> <p>(a) an the case of a contravention of section 138 (1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or</p> <p>(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment."</p>	<p>Fines and penalties are too high for large and small businesses alike and should be reduced. Effectively the penalty will have adverse and irreversible effects on enterprises which will lead to an increase in job losses. In this regards, the consumer will ultimately bear the brut by not having access to essential goods and services.</p>
140	<p>"If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person."</p>	<p>This section does not distinguish between criminal and civil liability. It is doubtful if this section will be applied with any success in a criminal prosecution. In a criminal prosecution, every accused person is held liable for their own conduct. An accused person in a criminal case is charged separately for what they have done, and not vicariously.</p>
142(2)	<p>"(2) In any action in a civil court, other than a review or appeal of a Tribunal decision, if a person raises an issue concerning this Act or a transaction or agreement to which this Act applies, and the Tribunal -</p> <p>(a) has previously considered and determined, that court, other than the High Court -</p> <p>(i) must not consider the merits of that issue; and</p> <p>(ii) must apply the determination of the Tribunal with</p>	<p>This section is most probably unconstitutional. It seeks to interfere with the judicial authority of the courts. Chapter 8 of the Constitution governs courts and the administration of justice. Section 165(1) states that the judicial authority of the Republic is vested in the courts. The Tribunal is not a court, as defined in the Constitution and it cannot oust the jurisdiction of courts.</p>

	<p>respect to the issue; or</p> <p>(b) has not previously considered and determined, that court may -</p> <p>(i) consider the merits of that issue; or</p> <p>(ii) refer the matter to the Tribunal for consideration and determination."</p>	<p>Section 142(2)(a) seeks to oust the jurisdiction of the courts to consider the merits of any issue which the Tribunal has previously considered and determined.</p> <p>The Bill seeks to exclude the High Court from the operation of this section. In other words any other court, except the High Court, may not consider the merits of any issue on which the Tribunal has ruled. There are other courts other than the High Court, including the Constitutional Court, the Supreme Court of Appeals and the Magistrates Court. This section is unconstitutional as it seeks to oust the jurisdiction of the courts.</p>
142(3)(a)	<p>"(3) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct, -</p> <p>(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or"</p>	<p>This section is probably unconstitutional It interferes with the right of access to courts, contained in section 34, Chapter 2 of the Constitution. Even though in practice parties may restrict by agreement their rights to commence legal proceedings prior to, for instance, arbitration, it is arguable that unless the consent order is drafted in clear and concise terms, it may not be possible to bar a party from access to courts on the basis of section 142(3)(a).</p>
142(4)	<p>"(4) A certificate referred to in subsection (3)(b) is conclusive proof of its contents, and is binding on a civil court."</p>	<p>It is doubtful if this clause is constitutional either. It states that a certificate issued in terms of sub-section 3(b) by the chairperson of the Tribunal is binding on a civil court. The Tribunal is not a court as defined in the Constitution.</p>
142(5)	<p>"(5) An appeal or application for review against an order made by the Tribunal in terms of this Act suspends any right to commence an action in a civil court with respect to the same matter."</p>	<p>This section is most probably unconstitutional because it interferes with section 34 of the Constitution, namely the right of access to courts. In addition, it seeks to interfere with the judicial authority of courts.</p>
142(6)	<p>"A person's right to damages arising out of a prohibited or required conduct comes into existence -</p> <p>(a) on the date that the Tribunal made a determination in respect</p>	<p>This section is most probably not valid in law. A person's right to claim damages in law arises when the conduct giving rise to the damages</p>

	<p>of a matter that affects that person; or</p> <p>(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded."</p>	<p>occurs. Whether or not the Tribunal has made a determination does not take away the person's right to damages.</p> <p>The section also refers to "required conduct", a term which is not defined.</p>
142(7)	"(7) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6)."	This section seeks to fix the date on which interest on a debt in relation to a claim for damages in terms of the Bill will commence. The facts of each case will be different and the date when interest may be levied will depend on the facts of each case. It is doubtful whether in law a date of issue of a certificate by the Tribunal can validly take away the right to claim interest commencing from an earlier date.
144(a)	"(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after - (a) the act or omission that is the cause of the complaint; or (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased."	This section should be abandoned in its entirety. There are sufficient laws to deal with matters of prescription.
144(2)	"(2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct."	This section is confusing. The intention seems to be to deal with a principle of law commonly referred to as "lis pendens". The aim of the principle is to stop parties from bringing the same dispute before a number of tribunals at the same time. There are sufficient principles of law which are clearly established through courts, which can deal with the matter.
147	"(1) In any criminal proceedings in terms of this Act - (a) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved; and (b) an order certified by the Chairperson of the Tribunal is	This section is unconstitutional. It seeks to presume guilt before facts are proven.

	<p>conclusive proof of the contents of the order of the Tribunal.</p> <p>(2) A statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it."</p>	
149(1) read together with section 1(a) of Schedule 1	"If there is any inconsistency between any provision of - ... Part B of Chapter 3 and the provisions of the Promotion of Access to Information Act 2000 (Act No. 2 of 2000), the provisions of this Act and that Act apply concurrently, to the extent that the provisions of this Act are not excluded in terms of section 5 of that Act."	It is not clear how Part B of Chapter 3, which refers to sections 83 to 85 would conflict with the provisions of the Information Act. In terms of this section it would appear that in so far as a conflict exists between the Bill and the Information Act, the Information Act takes precedence over the provisions of Part B of Chapter 3 of the Bill.
149(1) read together with section 1(c) of Schedule 1	<p>"If there is any inconsistency between any provision of ... this Act and the provision of any Act not mentioned in paragraph (a) or (b) -</p> <p>(i) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and</p> <p>(ii) the provisions of this Act prevail to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second."</p>	<p>It is not clear how one determines the term "this second". Does this term apply to the Act as opposed to the Bill? If so, if there a presumption that the Bill takes precedence over any other Act notwithstanding the fact that, in terms of the existing principles of the interpretation of statutes, the provisions of a more recent Act should be read as subjugating the provisions of an earlier Act?</p> <p>In any event, in so far as it is possible to apply the inconsistent provisions without contravening either provisions of the Bill or the Act concerned, it is not clear how one should interpret the Bill in light of the provisions of this section. The hierarchy of legislation created by Schedule 1 perpetuates confusion.</p> <p>In addition, in so far as specifically regulated commodities are concerned, for example medicines, foodstuffs or cosmetics, and the Bill provides less onerous provisions for, by way of example, the labelling of a medicine, food or cosmetic, notwithstanding legislation to the contrary, then, in terms of Schedule 1, the</p>

		<p>manufacturer of a medicine, foodstuff or cosmetic, would be entitled to rely on the provisions of the Bill over and above those provisions in another piece of legislation, which is specifically designed to control medicines, foodstuffs or cosmetics, and thus would be entitled to the benefits of such compliance including but not limited to the registration of a medicine, foodstuff or cosmetic with an applicable or appropriate regulatory authority.</p> <p>In any event, and by of example, the manufacturer of a medicine who does not comply with the provisions of the Bill, in respect of the labelling of that medicine but nevertheless complies with the provisions of the Medicines Act, as amended, in relation to the labelling of that medicine, will be entitled to sell the medicine in South Africa notwithstanding the provisions of the Bill. It is therefore not clear how the Bill will then remedy or address issues relating to, inter alia, the labelling of goods that are already regulated by South African law.</p> <p>This aspect is dealt with below in greater detail under the heading "General".</p>
149(1) read together with Schedule 2	<p>This section inserts section 126A into the National Credit Act No. 18 of 2005. Section 126A provides that:</p> <p>"(1) A person must not promote, offer to supply, supply or induce any person to accept the supply of any service that has as its dominant function -</p> <p>(a) the breaching of a credit agreement, or</p> <p>(b) the unauthorised transfer of any right of a credit provider under a credit agreement to a third person.</p> <p>(2) Sub-section (1)(b) does not apply in respect of -</p> <p>(a) any negotiation, by an attorney on behalf of a consumer, with</p>	<p>Reference to the National Credit Act 18 of 2005 is incorrect and should be replaced by the National Credit Act 34 of 2005.</p> <p>Section 126A(2) conflicts with the provisions of section 45 as section 45 states that the consumer has a right to assume that it is an implied term of every transaction or agreement that the supplier has a legal right to sell the goods to the consumer and that the goods are free from any charge or encumbrance in favour of any third party, whilst on</p>

	<p>the credit provider concerned; or</p> <p>(b) any action carried out by, on behalf of, or with the permission of the credit provider concerned.</p> <p>(3) A person who offers to supply, or supplies, any service for the express or implied purpose of -</p> <p>(a) improving a consumer's credit record, credit history or credit rating; or</p> <p>(b) causing a credit bureau to adverse credit information from its records concerning that consumer does not charge a consumer, or receive any payment from the consumer, for the credit repair service until that service has been fully performed, and must provide each consumer with a disclosure statement in the prescribed manner and form -</p> <p>(4) Sub-section 3 does not apply in respect of any credit repair service rendered by an attorney, or a registered credit bureau.</p> <p>(5) A person who offers to supply, or supplies -</p> <p>(a) any service for the express or implied purpose for investigating fees, charges, or interest charged on a credit agreement; or</p> <p>(b) a computer software programme originating within the Republic, which is programmed to calculate fees, charges, or interest charged on a credit agreement, for valuable consideration</p> <p>must provide each consumer of the service or software, as the case may be, with a disclosure statement in the prescribed manner and form.</p> <p>(6) This section does not apply to a debt counsellor in respect of any action authorised in terms of this Act."</p>	<p>the other hand, section 126A(2) states that the supplier may transfer any right under a credit agreement to a third person where it is unauthorised.</p> <p>What is the intention of this section as it seems to be inconsistent itself? What is the reason for the differences between sections 126A(1)(b) and (2)?</p> <p>What is the reason for the differences in sections 126A(3) and (4)?</p> <p>Section 126A (5) will result in huge costs for the suppliers.</p> <p>What is the intention of the legislature in respect of subsection (6)?</p>
<p>Schedule 3: Transitional provisions – Section 3</p>	<p>"(1) This Act applies to an agreement that was made before the effective date, even though the agreement contemplated that the parties to it would be bound until a date that is on or after the second anniversary of the effective date, subject to sub-item 2.</p> <p>(2) The application of this Act to a pre-existing agreement applies only to -</p>	<p>The Bill will be retrospective but only to the extent stipulated in section 3. In so far as section 3(2) is concerned, the Bill, once it becomes an Act, will have the effect of altering contractual terms concluded between parties in so far as such contractual terms must then conform with the requirements set out in section 2(a) to (c).</p>

	<p>(a) any prepayment for services, deposit or right to a refund under that agreement;</p> <p>(b) any property of the consumer held by the supplier on or after the effective date; and</p> <p>(c) any action, forbearance, obligation or right contemplated in that agreement and to be performed or enjoyed on or after the effective date."</p> <p>(3) Section 65 to 70 of this Act apply in respect of goods that were first supplied to a consumer during a prescribed period before the effective date."</p>	<p>The imposition of such contractual terms by the law, may give rise to certain contracts becoming unenforceable or rendering certain contracts void as a result of a change in legislation. In such circumstances, the consumer may be prejudiced in so far as he or she will be required to deliver back to the supplier of goods and services either the goods or tender the cost of the services supplied, as the case may be.</p> <p>The same criticism, as set out above in relation to subsection (2), may be made in relation to the provisions of subsection (3). In terms of existing South African law, contracts may only be varied by changes in legislation, in so far as the parties foresaw, at the time of contracting, that legislation may change to the extent that the Bill now proposes. In so far as the parties did not foresee this amendment to the legislation, it may be argued that the contract may not be altered in the manner contemplated in subsections (2) and (3).</p> <p>Therefore the Bill will have no effect on such contracts notwithstanding the provisions of these sections. The application therefore of subsection (3) to existing contracts or those contracts concluded prior to the effective date of the Bill appears to be superfluous and should be revised.</p>
Schedule 3: Transitional provisions – Section 5	<p>"(1) Any other right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provisions of a previous Act, that had not been spent or fulfilled immediately before the effective date must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.</p>	<p>It is not clear from the provisions of this section what the status is of any right, obligation or entitlement or a notice, as the case may be, issued or made available under a previous Act in so far as there is not a "comparable section" contained in the Bill. In so far as a person falls into a category where there is not a "comparable</p>

	<p>(2) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.</p> <p>(3) A document that, before the effective date, had been served in accordance with the previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.</p> <p>(4) An order given by an inspector, in terms of any provisions of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act."</p>	<p>section" contained in the Bill, then there are two distinct classes of consumers: those with rights enforceable under the Bill and those who do not.</p> <p>The transitional provisions therefore appear to undermine the provisions of sections 2 and 3 of the Bill in so far as the majority of people referred to in section 3(2)(b), in so far as that section is capable of being understood as creating categories of "vulnerable persons", may be in a position where they do not have rights that are enforceable in terms of the Bill but are nevertheless bound to agreements that may be in conflict with the provisions of the Bill.</p> <p>A more direct approach should be taken by the Bill in relation to such contracts, alternatively, the Bill should not be applied retrospectively in the manner contemplated in Schedule 3 but rather only apply to contracts or agreements that are concluded after the effective date. In this regard, the term "effective date" is defined in section 1 of Schedule 3 as being "the date on which this Act, or any relevant provision of it, came into operation in terms of section 149".</p> <p>The effect of the provisions of section 5 will be that repealed legislation, set out in section 149(3), will continue to limp on for as long as a contract, contemplated in section 5, continues to exist subject to a period of three years.</p> <p>This is an undesirable state of affairs in so far as a consumer may suffer prejudice as a result of the application of such legislation over and above that contained in the Bill. In addition, section 5 frustrates the hierarchy of legislation that is</p>
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		<p>created in Schedules 1 and 2. Schedule 3, through its transitional provisions, allows provisions of legislation that is otherwise repealed by section 149(3) to remain in effect provided there is a comparable section in the Bill.</p> <p>It is difficult to decipher from the provisions of Schedule 3 who is to make the decision as to whether or not there is a comparable section in the Bill, when compared to repealed legislation, and, in so far as such a comparison is not applicable, what is to happen to the contract or agreement that was concluded in terms of the repealed legislation if the contract is to endure for a period in excess of the three years contemplated in section 7(1) of Schedule 3.</p> <p>Is this contract or agreement to be considered void and the parties reduced to the position they were in before the contract was concluded? What is to happen to damages that may be incurred by one party as a result of the effect of the Bill on the contract? What is to be done if any prejudice is suffered by the consumer as a result of the absence of a "comparable section" in the Bill?</p> <p>The transitional provisions undermine contractual certainty, which is a cornerstone of South African contract law and potentially expose consumers, as defined in section 1, to greater prejudice should they be unable to locate "comparable sections" in the Bill to those in the Act repealed by section 149(3). The provisions of Schedule 3 therefore are in direct conflict with the provisions of the Bill, more particularly, section 2 and 3.</p>
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3 GENERAL COMMENTS

1 The Bill: definitions

- 1.1 The Bill contains a number of definitions, which are set out in section 1. Whilst it is an arduous task to decipher the majority of the numerous definitions contained in the Bill, two definitions appear to be of relevance to the sections referred to above: the definitions of "transaction" and "supply" respectively.
- 1.2 The definitions of "transaction" and "supply" are of importance due to the fact that the sections of the Bill, to which you have referred us, deal extensively with these two concepts in one way or another. Therefore, these sections rely, to a large degree, on the aforementioned definitions for their operation and enforceability.
- 1.3 However, the abovementioned definitions cannot be read in isolation. These definitions are dependant upon certain other definitions also contained in section 1 including the definitions of "agreement", "business", "consideration", "consumer", "continuous service", "display", "goods", "lease", "loyalty credit or award", "loyalty programme", "offer to supply", "price", "promote", "public regulation", "service", "service provider", "utility" and the general interpretation section contained in section 2.
- 1.4 It is clear from what is set out above, that the use of section 1, in so far as applying the Bill is concerned, is of vital and crucial importance. However, as will appear below, the degree of and number of definitions make the Bill onerous and difficult to interpret.
- 1.5 The sections to which you have referred us, for the purposes of rendering this opinion, deal with two concepts: the first is an "agreement" and the second is a "transaction". Both of these terms are defined in section 1 -
- 1.5.1 the term "agreement" is defined to mean "an arrangement of understanding between or among two or more parties, that purports to establish a relationship in law between those parties, with respect of an actual, intended or potential transaction in the ordinary course of business";
- 1.5.2 the term "business" is defined to mean a "continuous offer to supply, and the continual supply of any goods and services to consumers for consideration ...". The term "continuous offer" is not defined in section 1 of the Bill. However, based on the ordinary grammatical meaning of this term, which is the primary method of interpreting statutes in South African law, implies that the supply is ongoing and generally over a fixed period of time but certainly not a once-off transaction. This distinction is clear from the manner in which the term "transaction" is defined in section 1. There appears therefore to be two distinct commercial regimens in the Bill: a commercial relationship established in terms of an agreement and a commercial relationship established by a transaction.

- 1.6 The term "transaction" is difficult to interpret based on the current formulation of the definition. However, it would appear that the term is dependant upon or relates exclusively to goods or services that are regulated by public regulation. This is apparent from the definition. The term "public regulation" is defined to mean "any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority". A transaction therefore appears to deal with goods and services that are currently the subject matter of public regulation. This is distinct from the subject matter of the term "agreement", which refers to the continuous supply of goods or services or both but not goods that are regulated by "public regulation".
- 1.7 In light of the foregoing, in so far as goods are supplied in terms of an arrangement, of a commercial nature, that does not constitute an "agreement" or a "transaction", then conceivably the Bill does not apply to these goods.
- 1.8 In light of the foregoing, there appears to be a *prima facie* discrimination by the Bill between goods that are subject to agreements or transactions, as defined, and those that are not. Consequently, persons who engage themselves in commercial activity that does not conform with the definitions of either "agreement" or "transaction" will not be affected by the Bill. The Bill therefore draws a distinction, quite arbitrarily in our view, between certain types of commercial activities and the persons who participate in such activities. The arbitrary nature of this distinction, in light of the objectives set out in the Bill, contravenes, at least, section 9 of the Constitution in so far as it arguably constitutes unfair discrimination, alternatively, limits the rights of certain consumers or suppliers or both in respect of a law that is not of general application and which therefore is subject to a legal challenge in terms of the Constitution.
- 1.9 The use of the word "any" throughout the Bill is problematic and has vast consequences or implications when it comes to issues of interpretation. When used in conjunction with other words such as "goods" or "services", the use of the word "any" creates various meanings and will result in a broad and wide interpretation. We suggest that word "any" when used in conjunction with other words to be deleted, alternatively, those words used in conjunction with "any" should be specifically defined so as to avoid confusion amongst consumers and suppliers alike.
- 2 The Bill and other legislation**
- 2.1 Section 5 of the Bill deals with the application of the Bill, once it becomes an Act, to transactions, agreements, advertisements and "the production, distribution, promotion, sale or supply of goods, or similar incidental activities relating to a transaction contemplated in paragraph (a) or an agreement contemplated in paragraph (b)." It is clear, as is stated above, that the application of the majority of the sections in the Bill relies exclusively on the definitions of "transaction" and "agreement".
- 2.2 Section 5 contains the principles that the Bill relies upon for the purposes of applying to transactions and agreements, as defined. Certain exemptions are created for, example, "used goods" in terms of section 5(3). However, section 5 is silent on the consequences of a conflict arising between the Bill and any other existing piece of legislation.

- 2.3 In order to clarify the relationship between the Bill and existing pieces of legislation, one must turn to section 149. This section deals with conflicts between the Bill and other pieces of existing legislation and repeals certain sections of existing legislation that obviously conflict with the Bill. Therefore, section 149(1) requires that any inconsistency between the provisions of the Bill and legislation referred to in Schedule 1 to the Bill must be resolved in accordance with the manner indicated in Schedule 1. Schedule 1 deals with the provisions of the Information Act and the Public Finance Management Act No. 1 of 1999 and the Public Service Act No. 103 of 1994. Schedule 1, however, also deals with "this Act and the provision of any Act not mentioned in paragraph (a) or (b)" Insofar as the provisions of both the Bill and a conflicting statute apply concurrently, then one must apply and comply with one of the inconsistent provisions without contravening the other and "the provisions of this [Bill] prevail to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second." The Bill therefore contains a very powerful interpretation clause that allows its provisions to subjugate the provisions of any conflicting piece of legislation including legislation that is already on the statute books.
- 2.4 Schedule 2 to the Bill contains references to legislation that is repealed by the Bill in terms of section 149(2). Certain statutes are also repealed in terms of Schedule 3 as read together with section 149(3).
- 2.5 Existing legislation, in certain respects, deals specifically with particular types of goods and services that are currently available in South Africa and that require special legislative attention. This special legislative attention is arguably necessitated due to the nature of the commodity concerned. In this regard, medicines are regulated by the Medicines Act, as amended and cosmetics and foodstuffs are regulated by the Foodstuffs. Similar pieces of legislation exist relating to goods, products or services -
- 2.5.1 the Fertilisers, Farm Feeds, Agricultural Remedies & Stock Remedies Act No. 36 of 1947;
- 2.5.2 the Hazardous Substances Act No. 15 of 1973;
- 2.5.3 the Liquor Act No. 59 of 2003;
- 2.5.4 the National Health Act No. 61 of 2003;
- 2.5.5 the Banks Act No. 94 of 1990;
- 2.5.6 the Bills of Exchange Act No. 34 of 1964;
- 2.5.7 the Broadcasting Act No. 4 of 1999;
- 2.5.8 the Carriage By Air Act No. 17 of 1946;

- 2.5.9 Civil Aviation Offences Act No. 10 of 1972;
- 2.5.10 the Counterfeit Goods Act No. 37 of 1997;
- 2.5.11 the Electronic Communications & Transactions Act No. 25 of 2002;
- 2.5.12 the Electricity Act No. 41 of 1987;
- 2.5.13 the Housing Consumers Protection Measures Act No. 95 of 1998;
- 2.5.14 the Human Tissue Act No. 65 of 1983;
- 2.5.15 the Lotteries Act No. 57 of 1997;
- 2.5.16 the Long-Term Insurance Act No. 52 of 1998;
- 2.5.17 the Petroleum Products Act No. 120 of 1977;
- 2.5.18 the Pharmacy Act No. 53 of 1974;
- 2.5.19 the Tobacco Products Control Act No. 83 of 1993;
- 2.5.20 the Trade Metrology Act No. 77 of 1973;
- 2.5.21 the Trademarks Act No. 194 of 1993;
- 2.5.22 the Water Services Act No. 108 of 1997; and
- 2.5.23 the regulations associated with the aforementioned legislation.

- 2.6 The legislation, referred to above, does not purport to be exhaustive of the legislation that may be affected by the Bill or may be in conflict with the Bill.
- 2.7 It is difficult to determine the nature of the conflict between the Bill and "any Act not mentioned in paragraph (a) or (b)" of Schedule 1 in so far as -
- 2.7.1 regulations will be required in order to identify "prescribed goods" to which the Bill is to apply; and
- 2.7.2 the definition of "hazard" is yet to be determined for the purposes of interpreting the Bill.
- 2.8 There are therefore tracts and provisions of the Bill that are difficult if not impossible to interpret without the necessary regulations contemplated in section 148 of the Bill.
- 2.9 In so far as the Bill does purport to conflict with other pieces of existing legislation, which is clearly envisioned due to the inclusion in the Bill of section 149, then the effect of this conflict must be considered carefully. In this regard, the most important section, for the purposes of the supplier of goods and services generally, is section 50. Section 50 fundamentally removes indemnities in respect of liability in certain circumstances where certain information is not communicated to consumers by the suppliers of certain goods and services.
- 2.10 The difficulty, however, with such a provision is that in so far as existing legislation is concerned, to which reference is made above, imposes obligations on manufacturers or wholesalers or retailers of certain goods and services to ensure that goods are labelled in accordance with the law or contain information that is lawfully prescribed on the labels of products that are to be sold, it is an inconsistency that arises between these pieces of legislation and the Bill. In this regard, the following examples should be considered -
- 2.10.1 South African law imposes certain obligations on, for example, the manufacturers of medicines to insert certain information on to the immediate labels of medicines or in patient information leaflets, which are then inserted into the packages together with the medicine concerned. Medicines are, by their nature, hazardous in so far as they may cause harm to a human being who ingests medicines not in accordance with the prescribed particulars in respect of that medicine;
- 2.10.2 obviously, section 50(4) is applicable irrespective of whether or not the medicine manufacturer or wholesaler has complied with the provisions of either the Bill or the Medicines Act;
- 2.10.3 in so far as one is able to argue that the provisions of the Bill should apply, in addition to those of the Medicines & Related Substances Act, to the manufacturers of medicines, then one will necessarily create a situation in which non-compliance with the Medicines & Related Substances Act will be monitored by the Medicines Control Council and any additional requirements that are imposed by the Bill, will be

	enforced by the regulatory authorities created in terms of the Bill;
2.10.4	medicine manufacturers or wholesalers, by way merely of example, will then be subject to the regulatory control of two regulatory authorities. In light of the provisions of section 50, the regulatory authorities that are created by the Bill, as read together with the provisions of section 149, would have more control over the information that is available to the consumer on the packs of medicine than the Medicines Control Council;
2.10.5	however, the regulatory authorities, created in terms of the Bill, would not conceivably have the legislative authority to meddle in the affairs that are reserved, in terms of the Medicines Act, for the Medicines Control Council. Such an action or actions by the regulatory authorities created in terms of the Bill, would arguably be <i>ultra vires</i> the Bill and in direct conflict with the Medicines Act.
2.11	This criticism is applicable in any circumstance where an alternative piece of legislation creates a regulatory authority that is in charge or control of the manner in which products or services are labelled and prepared for distribution or sale to the consumer. The inherent nature of the conflict that will arise between regulatory authorities, as opposed merely to Acts, created in terms of the Bill and existing regulatory authorities, will, in all likelihood, give rise to confusion in the marketplace and cause, in circumstances that will arise more often than not, one regulatory authority acting <i>ultra vires</i> the powers afforded to it in terms of legislation. This situation is not resolved in terms of section 149 of the Bill. Conflicting provisions between the Bill and any other piece of legislation may not be capable of harmonisation especially in circumstances where a person has complied with every aspect of the legislation to which he or she is primarily subject and the Bill but in circumstances where the regulatory authorities, created in terms of the Bill, meddle in the nature of the compliance and consequently with the directions of an alternative regulatory authority. It is therefore legally undesirable for the Bill to regulate goods and services that are otherwise already regulated and dealt with in terms of alternative pieces of legislation.
2.12	In light of the foregoing, a person who is required to adhere to an existing piece of legislation, from a regulatory point of view, will also be subject to certain provisions of the Bill, which apply in addition to or instead of the existing provisions contained in existing legislation. No doubt, confusion will arise within the marketplace as to what particular conditions should be met for the purposes of making available for sale or supply, as the case may be, by way of example, medicines, foodstuffs or cosmetics to the market.
2.13	The resultant confusion arguably contravenes the provisions of section 33 of the Constitution in so far as everyone is entitled to administrative action that is procedurally fair and to administrative decisions that are clear and well-reasoned. This confusion is not remedied by the provisions of section 29(3) of the Bill, in so far as this section exempts goods and services "in respect of which a substantially similar label or notice has been applied or provided in terms of any other public regulation" from the provisions of section 29(1), which requires certain additional information that must be supplied on the packaging of certain goods in respect of environmental facts affecting the goods.
2.14	It is not clear what meaning one is required to attribute to the words "substantially similar label or notice" in section 29(3), alternatively, why it is not more appropriate to exempt certain goods and services, that are already regulated by existing pieces of legislation, from the provisions of the Bill or, at least, section 29 altogether. In any event, the prohibition that is contained in section 29(3), does not appear to affect the liability,

- to which reference has been made above and referred to in section 50 of the Bill. It is therefore not clear how one is to reconcile the exemption contained in section 29(3) with the exemption of liability contained in section 50.
- 2.15 In so far as one adopts a robust approach to the interpretation of section 29(3) or for that matter section 64(3), which contains similar provisions to those contained in section 29(3), then one creates a situation where the Bill does not apply to certain goods and services.
- 2.16 However, the provisions of sections 64 and 65 create a difficulty, which is not present in sections 28 and 29 in so far as there is no definition of "prescribed goods" or "hazards" in sections 64 and 65. In so far as the term "prescribed goods" is defined in regulations, promulgated in due course, so as to include goods and services that are already regulated by existing legislation, then -
- 2.16.1 the exemption provisions of section 64(3) would apply to these goods and services;
- 2.16.2 however, there will then be a number of regimes that will govern certain goods in respect of, inter alia, the labelling of these goods: one regime will exist in terms of the Bill and various other regimes will exist, on a goods-by-goods basis, in terms of existing and alternative pieces of legislation;
- 2.16.3 there is a disconnect between sections 64(3) and section 50 of the Bill in so far as whilst there is an exemption is granted in sections 64(3) to the provisions of sections 64(1) and (2), this exemption is not extended to the provisions of section 50.
- 2.17 In addition to the objections set out above, section 64 is replete with terms that are either not defined or are vague and consequently and overly broad -
- 2.17.1 the definitions of "activity" and "facility", in section 64(1), are vague and omitted from section 1 of the Bill. It is not therefore clear how one is to determine the meanings of these terms in relation to the definitions that already exist, and to which reference has been made above, in respect of, inter alia, "goods" and "supply";
- 2.17.2 it is not clear how any activity or facility may be "subject to any unusual hazard". The facts of the matter are that -
- 2.17.2.1 an activity or facility that is, as a matter of fact, subject to an unusual hazard and that is otherwise available to the consumer, would either be banned by existing legislation or specifically and carefully controlled by existing legislation so as to render it safe i.e. neither unusual nor a hazard;
- 2.17.2.2 an "unusual hazard" is obviously a hazard that is distinct from the hazard referred to in section 64(1)(b) or section 64(1)(c). In this regard, section 64(1)(b) deals with hazards "of which a consumer could not reasonably be expected to be aware, or which an ordinarily

	<p>alert consumer could not reasonably be expected to contemplate". The hazard referred to in section 64(1)(c), is a hazard that could result in serious injury or death. Therefore, an "unusual hazard" is neither one that could reasonably be expected to have been foreseen nor one that results in serious injury or death. However, this does not clarify the meaning of "unusual hazard" but rather renders it unacceptably vague;</p>
2.17.3	<p>the meaning of "ordinarily alert consumer" is vague especially in light of the provisions of section 50(4), which refer to consumers that are "unable to read a provision or notice as a result of impaired vision, limited literacy, or inability to comprehend any language in which the notice or provision is written";</p>
2.17.4	<p>it is not clear how one is to determine what "ordinarily alert" is and when a consumer would fall within this category. It is not clear from the provisions of section 64 whether or not one is required to interpret the term "ordinarily alert" with reference to the meaning of the term "hazard" or the meaning of "consumer" in section 1 of the Bill;</p>
2.17.5	<p>references to "specifically draw the fact, nature and potential effect of that hazard to the attention of consumers", referred to in section 64(1), do not clarify whether or not "specifically" refers to and means "expressly". The reference to sections 50(2) to (5) does not aid the interpretation of section 64(1) in so far as sections 50(2) to (5) refer to "transaction" and "agreement", neither of which is the subject matter of section 64(1);</p>
2.17.6	<p>a definition of "prescribed goods", in section 64(2), is required: considering that section 64(2) refers only to persons who "package" such prescribed goods as opposed to anyone who supplies these goods to the consumer;</p>
2.17.7	<p>in so far as the "chemical or biological hazard to humans or the environment", referred to in section 64(2)(b), is concerned, it is not clear to what degree the hazard must exist in relation to humans or the environment. This reference is especially puzzling in light of -</p>
2.17.7.1	<p>section 28 of the National Environmental Management Act No. 107 of 1998 in which reference is made to "significant pollution or degradation" as the standard against which environmental pollution is measured and determined; and</p>
2.17.7.2	<p>substances are classified in accordance with the group classification system in the Hazardous Substances Act with reference to the potential hazard that these particular substances pose to humans or the environment;</p>
2.17.8	<p>consequently, one is required to rely on the provisions of the aforementioned legislation in order to determine the nature of the hazard for the purposes of the labelling of goods that must occur legally and not the standard that is contemplated in section 64(2)(b). In so far as this is the case, section 64(2)(b) remains silent and its interpretation and enforcement require clarification;</p>
2.17.9	<p>section 64(3) creates an exemption to section 64(2) but only in so far as "goods or services" are concerned as opposed to "prescribed</p>

	goods" with which section 64(2) is concerned. It is therefore unclear how sections 64(2) and (3) are to interact for the purposes of enforcing the exemption provisions of section 64(3);
2.17.10	section 64(4) refers to people who install "goods contemplated in subsection (2) for a consumer". It is not clear to what goods this section refers in light of the definitions already contained in section 1 of the Bill.
2.18	Section 66, which concerns the monitoring of prescribed goods for hazards, provides, in section 66(5) that "[t]he provisions of this section, and of sections 67 – 69 are in addition to, and not in substitution for, any other legal obligation or duty on a manufacturer or importer of goods, whether in common law or in terms of any public regulation." In this regard, we refer you to the remarks, set out above, concerning the conflicting provisions of the Bill with existing legislation. These comments are equally applicable to section 66 as they are to other sections of the Bill.
2.19	Section 68 refers to "potential danger", which appears to be distinct from "hazard" or "unusual hazard" referred to in sections 50 and 64 of the Bill. It is not clear how one is to interpret the aforementioned terms. However, it is clear that the legislature intends that different meanings be attributed to the aforementioned terms, as should the legislature have intended that sections 64 and 68 apply to the same subject matter, a consistency in the use of terminology would have been expected.
2.20	Reference is also made, in section 68(1)(a), to a "registered consumer". It is not clear what a "registered consumer is" in relation to the definition of "consumer" in section 1.
2.21	Sections 67 and 68, create certain powers for the "Commission" in respect of a duty to investigate apparent defects or failures in "any goods that have been prescribed in terms of section 65". These powers appear to be in addition to powers already vested in alternative regulatory authorities created by existing legislation concerning the potential danger posed by various goods to the public.
2.22	In any event, existing pieces of legislation are created to govern and regulate specific commodities, products, goods and services so that any potential danger to the public is avoided. This is achieved through a system of regulatory control that ensures, inter alia, that certain standards are maintained, in respect of certain goods and services, that are to be registered as such, in terms of alternative pieces of legislation, with the particular and specialised regulatory authority. Therefore, medicines are regulated specifically by the Medicines Control Council, which subjects medicines to particular criteria in order to determine the quality, efficacy and safety of the medicines prior to them being registered and sold in the marketplace.
2.23	None of sections 65, 66, 67, 68 or 69 contains exemptions that are otherwise applicable in terms of section 64(3). Therefore, whilst the provisions of section 64(3) may exempt certain goods from the provisions of section 64, these goods are not exempted from any one of the aforementioned sections. It is not clear therefore how sections 65 to 69 would apply to goods otherwise exempted under section 64(3) or the basis upon which the application of these sections would apply to such goods. In so far as it is intended by the Bill that these sections do

apply to goods otherwise exempted in terms of section 64(3)-

- 2.23.1 then sections 65, 66, 67, 68 or 69 must be carefully considered in relation to sections, in respect of the control of goods, contained in other pieces of existing legislation in respect of which decisions have already been made by regulatory authorities concerning the safety and acceptability of the goods concerned;
- 2.23.2 a decision by a regulatory authority approving the saleability of certain goods in the marketplace will already have dealt with issues concerning the safety of the goods concerned and the decision by the Commission may be administratively redundant. It is therefore not for the manufacturer or supplier or the Commission to second-guess the decision of another regulatory authority;
- 2.23.3 there is no reason why a supplier or manufacturer should not rely upon a decision of such a regulatory authority that the goods are safe for sale in the Republic.
- 2.24 Any decision that controverts this decision, by an existing regulatory authority, by the Commission, will render the Commission's decision contradictory to the decision already made by a regulatory authority. The Commission will then have powers of review, unintentionally based on the provisions of the aforementioned sections, in respect of any decision by a regulatory authority concerning the safety of products otherwise dealt with and registered in terms of alternative pieces of legislation. Such powers of review and consequent contradictory decisions, contravene those provisions of the Constitution relating to co-operative government -
- 2.24.1 section 40(2), which requires that "[a]ll spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.";
- 2.24.2 section 40(2) must be viewed in relation to the principles set out in section 41(1)(g), which requires that all spheres of government and organs of State must "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere".;
- 2.24.3 section 41(2)(a) requires that Acts of Parliament must "establish or provide for structures and institutions to promote and facilitate inter-government relations".
- 2.25 The same comments, as set out above in relation to sections 67 and 68, are applicable to section 70 in so far as section 70 refers to sections 66, 67 and 68.
- 2.26 In so far as section 71 is concerned, this imposes liability for damage caused by goods. Section 70(1)(i) creates a strict liability for such damage, which is related to "a product failure, defect or hazard in a good, or as a result of inadequate instructions or warnings provided to the consumer". Issues concerning liability in respect of certain goods regulated by alternative pieces of legislation, to which we have already made

reference above, are equally applicable to the provisions of section 71 in so far as the provisions of section 71(4) provide that "[t]he liability of any person in terms of this section is in addition to, and not in substitution for, any other liability of that person in terms of any law."

- 2.27 We have dealt with the issues arising out of the Bill that conflict with existing pieces of legislation. However, we note that the Bill also deals with advertisements. The term "advertisement" is defined in section 1. The fact that advertisements will be dealt with by and are subject to the provisions of the Bill will bring the Bill into conflict with the Code of Practice of the Advertising Standards Authority of South Africa, proposed marketing codes active, from time to time, in terms of various pieces of legislation including, by way of example, the draft marketing code in terms of section 18C of the Medicines Act.

3 **Overview of the Bill**

3.1 Language

The language of the Bill appears to be legalistic for the ordinary consumer to understand and more particularly for a consumer of average literacy as referred to in section 34. One of the main objectives of the Bill, as underlined in section 3(1)(e) is to improve consumer awareness and information. It is in this light that the Bill should be made more "user friendly" and should desist from the use of the terms that may albeit inhibit the consumer's understanding of the provisions of the Bill.

3.2 Reasonable

Stemming from the aforementioned, the frequent use of the word "reasonable" or "unreasonable" in the Bill should be more carefully considered, monitored and in certain instances restricted. The concept of what is reasonable is a legal one, based on an objective enquiry. The average consumer and supplier have no knowledge of the exact meaning and scope of the word as it may be interpreted by the legislature, judiciary, academics and legal practitioners. A uniform approach to the word is the preferable route to take, but if used, should be clearly defined and understandable to the persons affected by the Bill.

4 **Regulations**

- 4.1 Section 148 of the Bill provides that the Minister may in certain circumstances make regulations in consultation with the Commission. Notwithstanding the fact that subsection 2 of the said section provides for such regulations to be published for public comment, it is suggested that the business industry be involved in the consultative process. Further, where industry is governed by existing Codes of Conduct, these should be applied.

- 4.2 It is also suggested that a Regulatory Impact Assessment conduct an assessment on the impact of the Bill prior to it being promulgated.

5 Duplication

- 5.1 The overriding concern with the Bill is that many of the consumer protection mechanisms contained in the Financial and Intermediary Services Act No. 37 of 2002 and the Policyholder Protection Rules are duplicated in the Bill. We therefore question the value of this duplication of legislation and are concerned about the associated increase in costs.
- 5.2 Duplication of legislation does not create any additional protection for the consumer and may make products so costly that they become unaffordable to the very people who the legislator is intending to protect. This will result in the increase of costs for the Financial Sector and will therefore lead to unaffordable goods and services for both consumers and service providers.