AN INVESTIGATION INTO THE NEED FOR CONSUMER PROTECTION IN THE
FINANCIAL SECTOR IN NAMIBIA

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BY

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DECLARATION

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DEDICATION

This thesis is dedicated to my wife Justine, and my children Ma Nameya, Mandy and Atti.
ACKNOWLEDGMENTS

I thank God the Almighty for giving me strength and courage to complete this thesis. I also express my profound gratitude to my supervisor Professor Boyce Philip Wanda for his kind guidance and assistance during the course of this research. Great appreciation goes to my wife Justine for her unwavering support during the course of this research. I thank all the respondents for their cooperation leading to a successful completion of this research.
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ABSTRACT

This thesis investigates the need to strengthen consumer protection in the financial sector in Namibia. The necessity to intensify consumer protection in the financial sector has been necessitated by numerous complaints by consumers against unfair and deceptive practices by financial institutions. Namibia currently does not have national comprehensive consumer protection legislation nor does it have a single legislation regulating the relationship between consumers and financial institutions. The study was conducted through analysis of relevant materials such as books, journal articles, newspaper reports, websites, pieces of legislation and case law. The researcher also conducted interviews, using semi-structured questionnaire, with consumers and officials of financial regulators to obtain empirical understanding of the need for strengthening consumer protection in the financial sector. The research revealed that consumer protection framework in the financial sector is ineffective in the sense that the regulators do not have adequate powers to institute sanctions against financial institutions that are treating consumers unfairly and disregarding consumer rights. The research also reveals that consumers lack knowledge on financial products which makes it difficult for them to make informed choices on suitable financial products. The research recommends that a Financial Services Adjudicator should be established whose function will be to resolve complaints lodged by consumers against financial institutions. Further, the study recommended that the mandates of financial regulators regarding consumer protection should be clearly explained, and that their powers should be strengthened to take firm actions against financial institutions that contravene the laws by treating consumers unfairly. Finally, the study called for the strengthening of consumer education in order to ensure that consumers are empowered to make informed choices with regard to financial products and services.
CHAPTER 1: INTRODUCTION

1.1 Orientation of the proposed study

Following the global financial crisis, the need for consumer protection in the financial sector was identified. The global financial crisis has been attributed to over-indebtedness which arose due to an oversupply of credit to those considered credit worthy, resulting in heavy debt burdens for consumers.¹ This was partly due to failure on the part of financial regulators to adequately regulate financial markets.² Therefore, in order to avoid a similar future financial crisis, policy makers worldwide have been considering strengthening prudential regulation and consumer protection principles in the financial markets.

In Namibia, the necessity to intensify consumer protection in the financial sector has been caused by numerous complaints by consumers against unfair and deceptive practices by financial service providers. Lester³ has noted that complaints against financial service providers are partly aggravated by the complexity of financial transactions and intricacy of contracts entered into between consumers and financial institutions. Namibia currently does not have a national comprehensive consumer protection legislation nor does it have well-defined legislation regulating the relationship between consumers and financial institutions. Some laws relating to consumer

² Although most countries were adversely affected by the global financial crisis, African countries were not severely affected by the crisis and this was partly due to proper consumer credit regulation. For example, South Africa was reportedly shielded against the effects of the global financial crisis due to the introduction of the National Credit Act, 34 of 2005 (NCA) as well as conservative lending practices. Refer to Devnomics. (2012). Literature review on the impact of the NCA has had on South Africa’s credit market. Available at: ncr.org.za/press release/research reports. [Accessed: 1 July 2014].
protection exist in the financial sector, but these are scattered in various pieces of legislations such as the Banking Institutions Act, 1998⁴, the Namibia Financial Institutions Supervisory Authority Act, 2001⁵, the Credit Agreements Act, 1980⁶, the Usury Act, 1968⁷ as well as in various determinations and regulations. Although financial services laws exist⁸, they do not have clear provisions dealing with consumer protection.

1.2 Statement of the problem

The Namibia Financial Sector Strategy⁹ identifies structural weaknesses that need to be addressed to enable the financial sector to contribute meaningfully to the overall economic performance of the country. One of the areas of reform identified in this regard is consumer protection.

There are currently gaps in the legal framework on consumer protection in the financial sector which makes it difficult to realize consumer protection objectives. Some of the gaps identified relate to the absence of a clear mandate on consumer protection. The Bank of Namibia and Namibia Financial Institutions Supervisory Authority (NAMFISA) are currently responsible for consumer protection in the financial sector. The Bank of Namibia regulates market conduct of banking institutions while NAMFISA regulates market conduct of non-banking institutions such as micro lenders, insurance companies and medical aid schemes. The Banking Institutions Act,

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⁴ Act 2 of 1998
⁵ Act No. 3 of 2001
⁶ Act 2 of 1998
⁷ Act 36 of 1968
⁸ Some of the financial services laws are the Banking Institutions Act, 1998, the Namibia Financial Institutions Supervisory Authority Act, 2001, the Credit Agreements Act, 1980, and the Usury Act, 1968.
1998\textsuperscript{10} as amended, was enacted, inter alia, to protect the interests of persons making deposits with banking institutions. The Act does not explicitly authorize the Bank of Namibia to investigate and resolve customer complaints, but does so indirectly by protecting the interests of depositors. Thus, the Banking Institutions Act, 1998 empowers the Bank of Namibia to issue orders to a banking institution to remedy actions that are detrimental to customers and the general public.\textsuperscript{11} However, in spite of these powers, the Act offers no clear mandate on consumer protection.

Similarly, the Namibia Financial Institutions Supervisory Authority Act, 2001\textsuperscript{12} is silent on NAMFISA’s role to investigate and resolve consumer complaints. However, both the Bank of Namibia and NAMFISA deal with consumer complaints and have consumer complaints units. Moreover, their complaints-handling mechanisms are limited in the sense that they lack effective redress mechanisms for consumer protection due the fact that their decisions are not binding or enforceable except by way of legal proceedings. The failure of consumer protection could be attributed to the absence of a uniform and comprehensive legislation as well as the lack of a coordinated institutional framework for regulating consumer protection in the financial sector.

It is submitted in this study that the financial consumer protection in Namibia lacks effective enforcement and redress mechanism, and appears to be inadequate in addressing challenges facing consumers of financial services and products. The Bank of Namibia and NAMFISA, as regulators in the financial sector, are obliged to address these challenges in recognition of the fact that consumer protection should be one of the ultimate objectives of any financial regulation. The

\textsuperscript{10} Act 2 of 1998
\textsuperscript{11} Section 56(1) (a) (ii) of the Banking Institutions Act, 1998 (Act 2 of 1998) as amended.
\textsuperscript{12} Act 3 of 2001
fragmentation of consumer protection laws in the financial sector, coupled with the lack of effective enforcement mechanisms, requires coordinated efforts in order to ensure that consumers of financial products and services are adequately protected.

1.3 Objectives of the study

The overall objective of the study is to demonstrate the need to strengthen consumer protection in the financial sector in Namibia in order to ensure that the interests of all consumers of financial services are safeguarded. The specific objectives of the study are to highlight the existing consumer protection initiatives in the financial sector; to identify gaps in the consumer protection framework in the financial sector; and to recommend appropriate measures with a view to improve the protection of the rights of consumers of financial services and products.

1.4 Hypothesis of the study

The hypothesis of the study is that consumer protection framework in the financial sector is ineffective and requires to be strengthened. If the consumer protection is strengthened in the sector, interests of consumers and stability of the financial system are safeguarded. Consequently, consumers, financial service providers and prospective investors will have greater confidence in the financial system.

1.5 Significance of the study

The significance of this study lies in the fact that challenges that hamper the realization of consumer protection objectives in the financial sector will be identified and appropriate measures
will be recommended on how to respond to and address such challenges. This would not only benefit the financial sector but also other key stakeholders involved in reforming consumer protection in Namibia.

The study will provide valuable inputs to other initiatives undertaken by stakeholders such as the Ministry of Industrialisation, Trade and Small and Medium Enterprises Development which is in the process of drafting the Consumer Protection Bill. The study will serve as a guide in aligning the provisions of the Bill with key aspects of consumer protection in the financial sector. The study will also benefit other sectors such as the retail and the real estate sectors that might be experiencing similar problems of fragmented pieces of legislation and lack of enforcement mechanisms.

If the recommendations of this study are implemented, consumer protection will be strengthened in the financial sector and regulators will be able to focus on their core mandate, which is to maintain the stability of the financial system.

Finally, this study will make a valuable contribution to the academic community by increasing the knowledge regarding consumer protection in the financial sector. In this regard, the study will add to the limited existing literature on financial consumer protection in Namibia.
1.6 Limitations of the study

The study is mainly restricted to web-based sources. There is limited number of publications in Namibia on financial consumer protection. There is limited research on the subject matter\textsuperscript{13} and where there has been any study carried out, the literature can only be found online. The researcher could not find Namibian literature on consumer protection in the financial sector. Therefore, the researcher used publications by international organisations such as the World Bank, Alliance for Financial Inclusion (AFI) and Consultative Group to Assist the Poor (CGAP). However, the majority of these publications are also online publications.

1.7 Literature review

There is no single definition of a consumer and as such various authors define a consumer differently. Oughton and Lowry\textsuperscript{14} define a consumer as a person who buys goods or services and includes any user of goods or services supplied by a service provider. The concept of consumer is restricted to transactions where the credit receiver uses the goods and does not sell or lease them\textsuperscript{15}. However, with regard to banking transactions, the bank’s fiduciary duty is not restricted to account holders or depositors\textsuperscript{16}. It was held in Woods v Martins Bank\textsuperscript{17} that the bank owed a duty to a non-account holder, to whom it gave inaccurate investment advice. In this case, the manager of a bank had undertaken to act as the customer’s advisor. The undertaking was not set in writing but the

\textsuperscript{15} See Standard Credit Corporation Ltd v Strydom 1991 (3) SA 644(W) in which the court stated that the credit receiver ceases to be a consumer if he does not intend to use the goods himself.
\textsuperscript{17} Woods v Martins Bank [1958] 3 ALL ER 166
evidence suggested that this relationship was implicitly established. There were bank leaflets in
the bank emphasising the bank’s expertise in giving business advice. The bank advised the plaintiff
to invest in shares in a company that owed the bank a lot of money without revealing that this
would reduce the company's overdraft with the bank. The customer (plaintiff) lost his money. The
Court held that there was a fiduciary relationship between the bank and the plaintiff and this had
been broken. A fiduciary relationship is said to exist where the bank is acting as the customer's
advisor.

The non-account holder is accepted by the courts as a customer. The banking transaction puts
obligations on both the bank and the customer. Duties of care are imposed on the bank where it
gives advice to customers on financial matters. The duty to exercise reasonable care and skill is
implied into the bank-customer contract as a matter of common law. With regard to account
holders, the bank is obliged, among other things, to inform the customer as soon as it becomes
aware of forgery of the customers signature. The bank also has a responsibility to maintain
confidentiality of its customer’s information. For the purpose of this research, the concepts
“consumer” and “customer” are used interchangeably.

20 Ibid, page 123.
The general objective of consumer protection law is to safeguard the interests of consumers by remedying the inequality which exists between individual consumers and powerful suppliers of goods or services.\textsuperscript{23} This inequality originates from the imbalance of bargaining powers between consumers and service providers. The inequality of bargaining power leads to the violation of basic rights to negotiate and this may place consumers at a disadvantage while creating incentives for service providers or suppliers who often abuse their dominant position. It is submitted that the dominant position of financial institutions in relation to consumers, coupled with ineffective consumer protection in the sector, may result in abuse of consumers by financial institutions. In order to introduce equality and justice between consumers and financial institutions, consumer protection should be strengthened with a view to protect consumers against harmful practices and offer basic rights, such as the right to information in plain language, to consumers.\textsuperscript{24}

Strengthening of consumer protection in the financial sector is justified on the basis of lack of information on the part of consumers about financial products while financial institutions have more information about their products or services than the consumers.\textsuperscript{25} This requires financial institutions to disclose fully terms and conditions of financial transactions, education of consumers about financial products and services to enable them to make informed decisions, and avoidance of unfair practices. In this regard, an effective financial consumer protection system should incorporate laws and regulations governing relations between financial institutions and their


customers; the introduction of effective enforcement mechanisms; and the promotion of financial literacy in order to help consumers acquire necessary knowledge and skills to manage their finances.\(^{26}\)

The global financial crisis which started in 2008 demonstrated the importance of financial consumer protection for the stability of the financial system.\(^{27}\) Speedy increases in the use of financial services have necessitated the strengthening of financial regulation and consumer education to protect and empower consumers. The ideal financial consumer protection framework should set out rules of conduct for financial services providers regarding services to their customers.\(^{28}\) The aims of these rules of conduct should be to ensure that consumers receive information to allow them to make informed decisions; ensure that consumers are not subject to unfair or deceptive practices; and that consumers have access to recourse mechanisms to resolve disputes.

McLeod\(^{29}\) has noted that even with knowledge of their rights, consumers are often faced with a number of challenges; the most significant of these challenges is the enforcement of their rights. Whether the rights of consumers have any value depends on whether those rights can be enforced without too much hassle and expenses.\(^{30}\) Therefore, the *UN Guidelines on Consumer Protection, 1985* \(^{31}\) encourage governments to establish and maintain legal and administrative measures to

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\(^{26}\) Ibid, page 9.  
\(^{28}\) Ibid, page 6.  
\(^{30}\) Ibid, page 91.  
enable consumers to obtain redress through procedures that are expeditious, fair, inexpensive and accessible, taking into account the needs of low income consumers.32

While it is recognised that all consumers require protection, it has been argued that the financial sector should be subjected to a higher standard of consumer protection than other sectors.33 Some of the reasons cited for this argument are that financial transactions are complex, financial services involve large amounts of money for depositors and hence, loss of deposits or savings imposes huge losses on consumers. Further, it is argued that the underperformance or failure of financial products such as retirement annuities may impose considerable hardships on consumers, and that the quality or appropriateness of financial products such as life, property and income protection insurance is only established sometime after the purchase of such insurance product or when a disaster occurs.34

It has been noted that without sufficient information, that it is difficult for consumers of financial services to make rational choices and this makes them vulnerable to abusive practices.35 However, complex financial products can be difficult to assess, even when all relevant information is disclosed and hence the need for strengthened financial consumer protection.36 Therefore, Brix and McKee37 have submitted that in order to be effective, consumer protection in the financial sector should focus on transparency, fair treatment of consumers and effective redress mechanism.

34 Ibid, page 41.
1.8 Methodology

The research was conducted using a combination of qualitative and quantitative research methods. In this regard, the exploratory and descriptive research method involving critical analysis and review of relevant materials such as books, journal articles, newspaper reports, websites, legislation and case law was used. Further, interviews using structured questionnaires were used in order to obtain empirical understanding of the need for strengthening consumer protection in the financial sector. The study population comprised of individual customers of financial institutions, consumer protection groups and officials dealing with customer complaints at financial regulators. This sampling method was chosen because it provided an opportunity for expedient data collection.

1.9 Research ethics

The study was conducted within the ethical boundaries of the University of Namibia. The researcher worked independently under the supervision of his academic supervisor. The content reflected in this study is the researcher’s own work, unless otherwise stated and all sources that were used, either quotations or paraphrases, have been clearly referenced and acknowledged. The views expressed in this thesis are my own views and do not reflect the views my employer, the Bank of Namibia. The consultations made with respondents and materials used in the process will be kept confidential. The researcher has taken care to respect the privacy and integrity of the respondents. To this extent, the identity of all respondents has been kept anonymous except in cases where the respondents volunteered to have their identities revealed.
1. 10  **Arrangement of chapters**

Chapter one presents the theoretical overview of the study. It outlines the problem that necessitated this research, its significance and objectives. The chapter also deals with literature review which depicts views of various authors on consumer protection. It also explains the methods used to conduct this study.

Chapter two provides an overview of consumer protection in various sectors of the economy such as the communication, health and real estate sectors. The chapter discusses consumer protection issues in these sectors since consumers face almost similar challenges like those in financial sector.

Chapter 3 provides an analysis of consumer protection in the financial sector. The chapter exposes shortcomings in the laws dealing with consumer protection in their sector.

Chapter 4 examines the role played by various stakeholders, such as consumer groups, in protecting the interests of consumers. The role played by these stakeholders has an impact on consumer protection in the financial sector.

Chapter 5 examines how other jurisdictions such as South Africa, Zambia, Malaysia and Australia handle consumer protection in their respective financial sectors. Lessons drawn from these countries provide a learning opportunity for Namibia to shape her consumer protection interventions in the financial sector.
Chapter six examines regional and international treaties relevant to consumer protection. These instruments have an impact on consumer protection in Namibia because they are part of Namibian laws by virtue of Article 144 of the Constitution.

Chapter 7 presents the findings of the study and lessons learned.

Chapter 8 is the concluding chapter which contains key recommendations of the study. The recommendations are a response to the problem identified in chapter one.
CHAPTER 2: OVERVIEW OF CONSUMER PROTECTION IN VARIOUS SECTORS IN NAMIBIA

2.1 Introduction

Although this study focuses on consumer protection in the Namibian financial sector, the author deems it necessary to provide an overview of consumer protection in various economic sectors of Namibia. This necessity was informed by the fact that consumers of goods and services in various economic sectors face similar challenges, and hence it is appropriate to give a broad overview of consumer protection in various sectors in Namibia.

Currently, Namibia does not have a comprehensive consumer protection legislation. Consumer protection issues are handled by regulators in different sectors of the economy applying various pieces of legislation. The Constitution of the Republic of Namibia does not have explicit provisions dealing with consumer protection issues. However, the Constitution seems to oblige the State to adopt a consumer protection framework. Article 95(k) of the Constitution provides that the State must actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at various issues, some of which could be relevant for consumer protection.38

Further, the Constitution grants fundamental rights and freedoms containing various provisions that deal with consumer protection issues. The fundamental rights and freedoms under Chapter 3 that are relevant to consumer protection include the protection of life39, respect for human

38 Namibia Law Reform and Development Commission: LRDC 29; Consumer Protection Discussion Document, March 2014, Windhoek, page 18 (unpublished). Constitutions in other jurisdictions such as Kenya have explicit consumer protection provisions. Section 46 of the Kenyan Constitution, 2008 provides for the rights of consumers and for Parliament to enact legislation to provide for consumer protection and for fair, honest and decent advertising.
39 Article 6 of the Namibian Constitution
Article 5 of the Constitution provides that the fundamental rights and freedoms enshrined in Chapter 3 of the Constitution shall be respected and upheld by the government and by all natural and legal persons. The Constitution further states that a person who claims that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened is entitled to approach a competent court to enforce or protect such right or freedom in court and may approach the Ombudsman to provide them with the legal assistance that they require. The rights and freedoms enshrined in the Constitution can be enforced by the courts.

However, although there is a lack of comprehensive consumer protection legislation in Namibia, there are various pieces of legislation which deal with issues of consumer protection in various sectors of commercial activities. These sectors range from communication, real estate and health sectors. Consumer protection initiatives in these sectors are discussed in the sections below; while the financial sector, which is the focal point of this study, is discussed comprehensively in Chapter 3 of this study.

2.2 Communication sector

The consumer protection in the communication sector is largely regulated under the Communications Act, 2009. The Act establishes the Communications Regulatory Authority of

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40 Article 8 of the Namibian Constitution
41 Article 10 of the Namibian Constitution
42 Article 13 of the Namibian Constitution
43 Article 16 of the Namibian Constitution
44 Article 21(1)(e) of the Namibian Constitution
45 Article 25(2) of the Namibian Constitution
46 Act 8 of 2009
Namibia (hereinafter CRAN). The objects of the Act, which relate to consumer protection, are to ensure that the costs to customers for telecommunications services are just, reasonable and affordable, and to ensure fair competition and consumer protection in the telecommunications sector.\(^\text{47}\)

The regulator can enforce its regulatory mandate through the Court. In *Mobile Telecommunication Ltd v Namibia Communications Commission and Others*\(^\text{48}\), the Mobile Telecommunication Ltd (MTC) challenged a decision by the Namibia Communications Commission (the communication regulator which was later transformed into CRAN) to restrict call prices for calls made to fixed lines. The decision required providers of public mobile cellular services to implement a price cap for off-net call prices and call prices to fixed-lines to the level of their on-net prices. According to that decision, the prices for calls to fixed-lines should not exceed those of on-net calls for each product or service. Rates charged on voice calls between numbers belonging to the same institution or company, for example MTC, were exempted from the above resolution. The resolution effectively meant that calls on another mobile network or on a fixed-line network would cost approximately the same as on the own network. MTC covers large share of the mobile communication market and therefore challenged the regulator’s decision in order to maintain its dominant position in the market.\(^\text{49}\) The application by MTC to review the decision taken by the first respondent (Namibia Communication Commission) as communicated to the mobile

\(^{\text{47}}\) Section 2 (g) and (k) of Act 8 of 2009
\(^{\text{48}}\) *Mobile Telecommunication Ltd v Namibia Communications Commission and Others* (A 26/2011) [2012] NAHC 94 (3 April 2012)
\(^{\text{49}}\) MTC covers 95% of the Namibian populations according to information contained on their website: [www.mtc.com.na](http://www.mtc.com.na). [Accessed on 03 May 2016].
communication operators failed. The Court found that the interests of consumers should be taken into account in setting prices by service providers in the communication sector. The communication regulator is mandated by the Act to ensure that consumers receive the full benefits of competitive electronic communication services and are protected from any exploitation or abuse by service providers.

The Communications Act, 2009 contains specific provisions dealing with consumer protection. The Act requires a service provider to fully disclose to all users of its services adequate and relevant information concerning the standard terms and conditions for provision of telecommunications services; and to provide a contract to every customer that specifies the service to be provided and the terms and conditions for providing such service. Further, the Act provides that any user may lodge a complaint with CRAN relating to the quality of service rendered by any licensee or any other provider of any communications services. The Act empowers CRAN to consider any complaint lodged and take any action relating to the complaint as authorised by the Act.

In December 2014, CRAN investigated a complaint against the Mobile Telecommunications Company’s (MTC) promotional campaign in terms of which customers reserved N$2 daily for smartphone data requirements. The campaign was meant to save customer’s money spent on cellphone. MTC had not given customers any option to participate in the promotion, thus making

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50 Paragraph 80 of the judgment in Mobile Telecommunication Ltd v Namibia Communications Commission and Others.
51 Section 79(1) and (3) of Act 8 of 2009
52 Section 131 of Act 8 of 2009
it mandatory for all MTC subscribers to participate in the promotion. CRAN concluded that the mandatory promotional tariffs were not in line with the provisions of section 79 of the Communications Act, 2009. Consequently, MTC was ordered by CRAN to reimburse consumers who were disadvantaged by the promotional campaign.54

For the past few years CRAN has been engaging in annual consumer awareness campaigns to educate consumers about their rights and enforcement thereof.55 In 2014, the theme of the campaign was “the Consumer is King” and focused on informing consumers on their rights and responsibilities; educating consumers on mobile phone etiquette, usage and protection; and creating awareness around internet security and usage.56 These campaigns are said to have been necessitated by, among others, excessive complaints against mobile phone operators mainly regarding incorrect billing, slow broadband speed, handset repairs, excessive data roaming and Subscriber Identity Module (SIM) card hacking.57

Although progress has been made in the communication sector in terms of consumer protection, a lot still requires to be done in terms of affordability of services. CRAN has noted that comparing Namibia with international practice regarding mobile broadband, mobile prepaid voice and leased line prices, Namibia has fallen behind in terms of affordability.58 The lack of competitive pressure

56 Refer to “CRAN launches the “Consumer is King Campaign””. Available at www.cran.na. [Accessed on 2 April 2015].
57 Refer to footnote 54.
as a result of takeover of Leo by Telecom Namibia has reportedly let the country fall further behind.  

CRAN expressed concerns about lack of competition in the mobile phone sector and felt that pro-competitive regulatory strategies to address the situation are required. According to CRAN, increased competition in the telecommunication sector would lead to lower prices. As part of its mandate, CRAN launched a study on termination rates for fixed and mobile telecommunications operators. The outcome of the study would inform a decision to decrease termination rates to assist new participants enter the market and become more competitive. This intervention would result in lower costs of communication and better services that would benefit consumers in the communication sectors. This is in line with section 2(k) of the Communications Act, 2009 which states that the objects of the Act are, inter alia, “to ensure fair competition and consumer protection in the communication sector”.

2.3 Retail sector

The regulatory and supervisory oversight of the retail industry in Namibia is fragmented because consumer credit is regulated by different laws and regulatory authorities. The various pieces of legislation regulating consumer credit are the Credit Agreements Act, 1980, the Usury Act,  

59 Ibid, pages 3 and 34.
60 Kaira, C. MTC’s dominance kills market – CRAN. The Namibian, 16 February 2015.
63 Act No. 75 of 1980

Credit transactions are regulated by various pieces of legislation, such as, the Credit Agreements Act, 1980.\textsuperscript{66} The Act regulates transactions in terms of which movable goods are purchased or leased on credit or services are rendered on credit. The Act offers protection to consumers in that it prohibits certain terms to be part of credit agreements. Some of the prohibited terms include the following: (a) the period of the credit agreement should not be left undetermined; (b) the credit grantor is exempted from liability for any act, omission or representation by any person acting on his behalf; (c) the exclusion or restriction of liability of the credit guarantor in terms of any guarantee or warranty which would be implied in a credit agreement; (d) the forfeiture of moneys paid by the credit receiver in terms of the credit agreement if he fails to comply with any term of the credit agreement before goods that are delivered or service rendered to him.\textsuperscript{67}

Another notable consumer protection feature of the Act is a requirement that no credit agreement shall be binding unless the credit receiver has paid the initial payment as deposit as prescribed by regulation. In \textit{Courtney-Clarke v Bassingthwaigte}\textsuperscript{68}, the defendant was indebted to the plaintiff in terms of the installment sales agreement involving sale of a motor vehicle through installment sale. A deposit as required in terms of the Credit Agreements Act, 1980 had not been paid. The

\textsuperscript{64} Act No.73 of 1968  
\textsuperscript{65} Act No. 76 of 1976  
\textsuperscript{66} Act 75 of 1980  
\textsuperscript{67} Section 6 (1) of the Credit Agreements Act, 1980.  
\textsuperscript{68} \textit{Courtney-Clarke v Bassingthwaigte} 1991 (1) SA 684
defendant paid some instalments, but later defaulted. The plaintiff claimed the outstanding amounts from the defendant. The Court found that the agreement between the parties was illegal and *void ab initio* because no deposit was paid as required by section 6(5) of the Credit Agreements Act, 1980.69

The Bank of Namibia has on various occasions expressed its concern with the escalating level of household debts which currently stand at 87%.70 The rise in household debt could be attributed to, among others, an increase in bank credit to households in relation to the growth in disposable income. The escalating household debts require targeted interventions such as the amendment of the Credit Agreements Act, 1980 to require consumers to pay higher deposits on hire-purchase sales agreements.71 These interventions have consumer protection element as payment of deposit helps promote a culture of saving as well as slowing down credit growth.

Although the Credit Agreements Act, 1980 currently provides some form of protection to consumers, it is ineffective because it does not provide for proper enforcement mechanism. Section 23 of the Act provides penalties for contravention which is N$ 5,000 or two years imprisonment.72 These penalties were set 35 years ago and are currently insignificant to deter credit providers from contravening the Act. In order to make the penalty amount punitive enough it is recommended that the penalty fee be increased to N$ 50 000 or a penalty fee equivalent to the initial deposit amount applicable to the transaction, whichever is higher.

69 See also *Nel v Santam Bank* 1986 (2) SA 28 in which the court held that non-payment of a deposit invalidated the hire-purchase agreement.


72 In order to make the penalty amount punitive enough one would recommend that the penalty fee be increased to N$ 50 000 or a penalty fee equivalent to the initial deposit amount applicable to the transaction, whichever is higher.
applicable to the transaction, whichever is higher. Proper enforcement mechanisms and high penalties are therefore required to ensure compliance with the Act.

The Usury Act, 1968\textsuperscript{73} regulates money lending transactions. The Act sets out the limitation and disclosure of finance charges levied in respect of money lending transactions. The Act provides that a credit grantor who transacts in credit transactions in the normal course of his business shall, on demand before the conclusion of any credit transaction, furnish in writing to the prospective credit receiver the particulars relating to the selling price, all other charges forming part or which will form part of the principal debt, and the amount of each instalment and the date upon which each instalment must be paid.\textsuperscript{74} It seeks to protect consumers against exorbitant interest rates and hidden charges. However, the Act does not sufficiently protect consumers since it is not applicable to money lending transaction or a credit transaction in terms of which the principal debt exceeds R100, 000. The above exclusion implies that consumers that enter into money lending or credit transactions with lenders of which the value exceeds N$ 100,000 are not protected by the Act. The shortcomings of the Usury Act, 1968 are discussed in detail in the next chapter.

The Trade Practices Act, 1976\textsuperscript{75} provides for the control of advertisements regarding trading of goods. The Act prohibits, among others, publishing or displaying of any advertisement which is false or misleading in respect of the nature, properties, advantages or uses of such goods. If the Minister of Trade is of the opinion that any trade practice may directly or indirectly injure the relations between businesses and consumers, and is satisfied that it is necessary or expedient in the

\begin{itemize}
\item \textsuperscript{73} Act 73 of 1968
\item \textsuperscript{74} Section 3 of the Usury Act, 1968
\item \textsuperscript{75} Act 76 of 1976
\end{itemize}
interests of consumers or businesses that such trade practice be prohibited, restricted or controlled, the Minister may, by notice in the Gazette, prohibit such trade practice or impose in respect thereof such conditions as he may deem fit.\textsuperscript{76}

Although the current legislation offers some form of protection to consumers in the retail sector, this protection is inadequate. Consumers face challenges such as unfair and deceptive practices, over-indebtedness\textsuperscript{77} and reckless lending\textsuperscript{78} by some credit providers. In South Africa, the Credit Agreements Act, 1980 and the Usury Act, 1968 were repealed by the National Credit Act, 2005\textsuperscript{79} because the two Acts provided ineffective protection to consumers, particularly that they could not contain reckless behaviour by credit providers and exploitation of consumers by micro-lenders, debt collectors and debt administrators.\textsuperscript{80} Therefore, it is submitted that there is a need to consolidate existing Namibian laws dealing with consumer credit into a single piece of legislation which would deal with issues that are not currently addressed in the current Acts such as:

\begin{itemize}
  \item[a)] Registration and regulation of all credit providers. Currently, some credit providers such as general retailers and clothing shops are not registered by a regulatory authority. This state of affairs exposes consumers to unfair and deceptive practices by service providers in the retail sector.
\end{itemize}

\textsuperscript{76} Section 9 of Act 76 of 1976
\textsuperscript{77} A consumer is regarded as over indebted if he/she is unable to satisfy, in a timely manner, all his obligations under all the credit agreements having regard to his/her financial means, prospects and obligations. See Scott, J. 2009. \textit{The Law of Commerce in South Africa}. Oxford University Press Southern Africa. Cape Town. Page 188.
\textsuperscript{78} There is presumption that a credit provider has extended a loan recklessly if a credit provider failed to assess the consumer’s debt repayment history and the consumer’s existing financial means, prospects and obligation (his/her ability to repay the loans). See Scott, J. 2009, page 188.
\textsuperscript{79} Act 34 of 2005
b) Consumer rights such as the right to information in plain and understandable language;

c) Proper analysis of the consumer’s profile. All credit providers would be obliged to conduct affordability assessment to ensure that the consumer can afford the credit applied for.

d) Cooling off period for credit agreements.  

e) Prohibiting negative and door-to-door marketing of credit transactions.

f) Amending the common law principle of in duplum rule.  

g) Subjecting all leasing and suspensive sales agreements to the Act to avoid its circumvention by individuals. In this regard, the definition of leasing transaction must be changed to make the Act more effective and address its possible circumvention by individuals.

The Namibia Financial Sector Strategy advocates for a formulation of the Consumer Credit Act which will consolidate the Credit Agreements Act, 1980 and Usury Act, 1968 into a single piece of legislation with a view to address challenges faced by consumers. In order to ensure consistency in the application and enforcement of the proposed Consumer Credit Act, and enhance consumer protection efforts, it is proposed that all consumer credit issues, including credit bureau, be regulated by a single regulator. It is submitted that this approach would achieve better enforcement mechanism and offer better protection to consumers in the retail sector.

81 A majority of instalment finance by commercial banks are currently undertaken in the form of suspensive sale agreements, which are nothing else than a normal instalment sale transaction. However, this type of product is often packaged as a type of leasing transaction which is exempted from the provisions of the existing Credit Agreements Act.

82 “In duplum rule,” means that the sum of the interest and legal costs in respect of the outstanding debt may not exceed the initial capital amount of the contract. If the in duplum rule is applied, the running of interest stops when unpaid interest equals the outstanding capital balance. Kelly-Low, N. 2007. "Better consumer protection under the statutory in duplum rule", South African Mercantile Law Journal, Vol 19: 337-345.

83 It is submitted that a definition of 'leasing transaction' should be amended to “a transaction in terms of which a lessor leases goods to a lessee against payment by the lessee to the lessor of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future”.

2.4 Health sector

The Medical and Dental Act, 2004\textsuperscript{85}; Nursing Act, 2004\textsuperscript{86}; Pharmacy Act, 2004\textsuperscript{87}; Social Work and Psychology Act, 2004\textsuperscript{88}; and Allied Health Professions Act, 2004\textsuperscript{89} (hereinafter “the Acts”) regulate the conduct of registered health professionals in the health sector. The regulatory body, the Health Professions Councils of Namibia (HPCNA), administers the above mentioned Acts. HPCNA comprises the Medical and Dental Council; Nursing Council; Pharmacy Council; Social Work and Psychology Council; and Allied Health Councils established in terms of the respective Acts. The Acts establishing the Councils have identical provisions relating to consumer protection and empower the HPCNA to protect consumers and the general public against misconduct of registered health professionals. The Acts have common sections and express provisions that deal with consumer protection.

One of the objects of all the Councils is to “deal firmly, fairly and promptly with a registered person against whom a charge, complaint or allegation of unprofessional conduct has been laid or whose fitness to practise his or her profession is in doubt”.\textsuperscript{90} The Councils establish Preliminary Investigation Committees to conduct a preliminary investigation into any matter in respect of which the Councils may institute a disciplinary action against a registered health practitioner.\textsuperscript{91}

\textsuperscript{85} Act No. 10 of 2004
\textsuperscript{86} Act No. 8 of 2004
\textsuperscript{87} Act No. 9 of 2004
\textsuperscript{88} Act No. 6 of 2004
\textsuperscript{89} Act No. 7 of 2004
\textsuperscript{90} Section 5 of the Acts
\textsuperscript{91} Refer to section 12(5) of the Acts
The findings of the Preliminary Investigation Committee are reported to the Professional Conduct Committee which may institute disciplinary action against any registered practitioner.92

The Professional Conduct Committee of the HPCNA conducts regular disciplinary hearings against registered health professionals such as nurses and doctors who are charged with improper conduct. In May 2014, the Committee suspended three nurses who were found guilty of omitting and/or neglecting to correctly diagnose the health needs, and to prescribe, provide and execute the correct nursing regimen to a patient who died while in labour at Katutura Hospital on 3 May 2012.93 They were suspended for two years and therefore were not allowed to practice as nurses during the period of suspension. The three nurses appealed against their suspension to the Appeal Committee.94 In June 2015, the Appeal Committee reduced the suspension of one of the nurses to six months because that nurse was not directly involved in the care of the deceased. However, the Appeal Committee upheld the suspension of the two nurses citing that they were responsible for the care of the deceased during the period she was in labour.95 The Appeal Committee found that the decision of the Professional Conduct Committee was reasonable and fair in that respect.

In addition to the above mentioned Acts, another law that protects consumers in the health sector is the Medicines and Related Substances Control Act, 2003.96 The Act establishes the Namibia Medicines Regulatory Council which provides for the registration and control of medicines and

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92 Section 12(2) of the Acts administered by the HPCNA.
94 The Appeal Committee is established in terms of section 12 (3) of the Acts. Former Judge of the High Court, Advocate Theo Frank SC is the Chairperson of the Committee.
related substances in Namibia. The Act prohibits sale of medicines without proper labeling and
the sale of medicines that do not meet the prescribed requirements as well as advertisement of
false information on medicines. Further, if the Council is of the opinion that it is not in the public
interest that a certain medicine be used by the public, the Council may order that such medicine
be returned to the manufacturer or supplier, alternatively it should be delivered to a person
designated by the Council. Although there may be room for improvement in terms of
enforcement, the Act is regarded as one of the better existing Namibian statutes protecting
consumers.

The above analysis provides an outline of statutes dealing with consumer protection in the health
sector. Although, the above mentioned pieces of legislation do not constitute an exhaustive list of
laws dealing with consumer protection in the health sector, they nevertheless provide an indication
of mechanisms in place to protect consumers in that sector.

2.5 Real estate sector

The real estate industry is regulated by the Estate Agents Board established in terms of section 2
of the Estate Agents Act, 1976 as amended. The powers of the Board are, among others, to set
out a code of conduct of estate agents and to take such steps as may be necessary or expedient to
ensure compliance with a code of conduct; and to encourage and promote the improvement of the

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99 Section 33 (1) (a) (b) (i)(ii) of the Medicines and Related Substances Control Act, 2003 (Act No. 13 of 2003)
100 Namibia Law Reform and Development Commission: LRDC 29; Consumer Protection Discussion Document,
standard of training of and services rendered by estate agents.\textsuperscript{102} The Estate Agents Act, 1976 prohibits persons from rendering services as estate agents unless such persons hold valid fidelity certificates and have taken fidelity insurance to an amount which, in the opinion of the Board, is sufficient.\textsuperscript{103} The fidelity insurance cover is meant to cover for unintended losses of customer’s money while in the care of estate agent. The Board has the power to take disciplinary action against estate agents charged for improper conduct and may withdraw fidelity certificates of such agents or impose fines not exceeding one thousand Namibia dollars.\textsuperscript{104}

Despite the regulation of the real estate industry, some estate agents get involved in improper conduct such as misappropriation of client’s money. It was reported in the media that an estate agent was arrested after he allegedly tried to bribe the lawyer who was assisting the Congolese Army General, Francois Olenga to recover his money from him (estate agent). The estate agent allegedly misappropriated around N\$ 9 million belonging to Olenga which was supposedly to be used for the development and expansion of a property owned by Olenga at Swakopmund.\textsuperscript{105} Estate agents are also generally accused of contributing to escalating property prices in Namibia as they allegedly hike property prices to earn good commissions on expensive properties.\textsuperscript{106}

The real estate sector recently saw the enactment of the Property Valuers Profession Act, 2012\textsuperscript{107} which establishes the Namibian Council for Property Valuers Profession. The Council performs

\begin{itemize}
\item \textsuperscript{102} Section 8 (b) and (c) of the Estate Agents Act, 1976 (Act No. 112 of 1976).
\item \textsuperscript{103} Section 26 of the Estate Agents Act, 1976 (Act No. 112 of 1976).
\item \textsuperscript{104} Section 30 (2) and (3) of the Estate Agents Act, 1976 (Act No. 112 of 1976).
\item \textsuperscript{107} Section 2 of the Property Valuers Profession Act, 2012 (Act No. 7 of 2012)
\end{itemize}
consumer protection function and has the power to take necessary steps to protect the public in their dealings with registered valuers and to maintain the integrity and enhancement of the status of the property valuation profession.\textsuperscript{108} The Council is empowered by the Act to investigate allegations of improper conduct and institute disciplinary actions against registered valuers. The Act prohibits persons who are not registered as property valuers from conducting property valuation.\textsuperscript{109} The Act is aimed at creating a uniform and standardised approach, and the methods and techniques to be used by valuers in Namibia.

The Property Valuers Profession Act, 2012\textsuperscript{110} is the first of its kind in Namibia since there was no Act or body regulating property valuers in Namibia. Prior to the enactment of the Act, any person could conduct property valuation as there was no set standard in terms of education and training for property valuers in the country. Lack of proper regulation in the real estate sector has been considered as the contributing factor to the unsubstantiated increase in property prices.\textsuperscript{111} The effective enforcement mechanisms for the Property Valuers Profession Act, 2012 and the Estate Agents Act, 1976 would ensure proper conduct of property valuers and estate agents in dealing with consumers and other stakeholders in the real estate industry. This approach will inevitably benefit consumers in the real estate sector, particularly first time buyers of residential properties.

The problem facing the housing sector can be demonstrated by recent high demand for land and housing, particularly in urban areas. In November 2014, a group of youth led by Job Amupanda,

\textsuperscript{108} Section 7(1)(g) of the Property Valuers Profession Act, 2012 (Act No. 7 of 2012)
\textsuperscript{109} Section 24(1) of the Property Valuers Profession Act, 2012 (Act No. 7 of 2012)
\textsuperscript{110} Act No. 7 of 2012
a former Swapo Youth League Secretary for Information and Mobilisation, under the Affirmative Repositioning Movement, occupied the municipal land in Kleine Kuppe suburb in Windhoek.\textsuperscript{112} The youth wanted affordable land and housing. The escalating prices for land and houses as well as high rental fees in urban areas prompted the youth to take these measures. According to Amupanda, he was tired of paying a huge amount of money in rent as it appeared that purchase and rental prices for houses in Namibia were not regulated. Amupanda and two others\textsuperscript{113} therefore occupied the land in Kleine Kuppe so that they could build their own houses as they felt that they would not live in rented properties for the rest of their lives.\textsuperscript{114} They argued that access to land was a human right that every Namibian should be accorded instead of it being used for profit purposes by few individuals in the country.\textsuperscript{115}

The initiative by the Affirmative Repositioning gained momentum when Job Amupanda and two other land activists mobilised a large number of people to submit mass land applications to local authorities. The mass land application, mostly by the youth, saw around 35 000 applications submitted to various local authorities such as Windhoek, Walvis Bay, Okahandja, Keetmashoop, Ondangwa, Oshakati and many others.\textsuperscript{116} The City of Windhoek received 14 059 applications during the process.\textsuperscript{117} The Affirmative Repositioning gave the local authorities nine months to approve mass land applications submitted by thousands of landless Namibians, failing which they would occupy urban land on 31 July 2015. That plan was abandoned when the government reached

\begin{flushright}
\textsuperscript{113} The Affirmative Repositioning Movement was established by Job Amupanda and two other activists George Kambala and Dimbulukweni Nauyoma.
\textsuperscript{114} Ibid, page 1.
\textsuperscript{115} Ibid, page 1.
\end{flushright}
an agreement with the Affirmative Repositioning in terms of which 200,000 plots will be serviced in urban areas to accelerate land delivery.\textsuperscript{118} The process of identifying the available land and clearing such land has already started.

This study acknowledges that the provision of affordable housing is one of the key challenges facing policy makers in Namibia. The main contributing factor to housing shortage is the shortfall in housing supply which failed to keep up with the growing demand over the years.\textsuperscript{119} The housing shortfall is aggravated by high unemployment rate, rising housing prices and rapid urbanisation. The current developments regarding land and housing demands, if supplemented with regulatory interventions, can lead to improved supply of housing and reduced housing prices in Namibia.\textsuperscript{120}

It is submitted that there is a connection between consumer protection and the regulation of property prices in the sense that proper regulation prevents unjustified escalation of property prices that makes it difficult for consumers, particularly the youth, to afford properties. It is however acknowledged that the challenges facing the housing sector require multi-sectoral approach.

\textbf{2.6 Preliminary conclusion}

This chapter has surveyed the law regulating consumer protection in the communication, health and real estate sectors. The study has established that regulators in these sectors are empowered by the various enabling Acts to protect the interests of consumers. Some of the Acts, such as the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} Shinovene, I. “Government promises mass land project, bows to public outcry for housing”. \textit{The Namibian}, 24 July 2015, page 1.
\item \textsuperscript{119} Bank of Namibia, 13\textsuperscript{th} Annual Symposium, 2011. \textit{Housing in Namibia: Has the situation changed 21 years after independence?} Page15. Available at \url{www.bon.com.na}. [Accessed on15 July 2015].
\item \textsuperscript{120} Ibid.
\end{enumerate}
\end{footnotesize}
Communications Act, 2009 and the legislation in the health sector have explicit provisions dealing with consumer protection. The chapter has further revealed that laws in other sectors such as the retail sector are fragmented and subjected to different regulatory oversight. The study has established that the enforcement of laws in the retail sector is inadequate and this state of affairs exposes consumers to unfair and deceptive treatment by service providers. In order to ensure consistency in the application and enforcement of laws in the retail sector, and enhance consumer protection efforts, it is proposed that all laws be harmonised and consumer protection issues be regulated by a law embodied in a single Act.

The chapter has further revealed that although the Communications Act, 2009 promotes fair competition in the telecommunication sector, there is a lack of competition in the sector due to the dominant position of the Mobile Telecommunications Company in the market. The lack of fair competition in the market has a potential to negatively affect the consumers because they would not enjoy competitive services such as low call rates. Pro-competitive regulatory strategies are therefore required to address this shortcoming.

With regard to the real estate sector, the chapter has revealed that although there are laws with consumer protection provisions, there is a lack of enforcement mechanism. Property valuers have been accused of improper conduct such as overvaluing so that they may earn higher commissions\textsuperscript{121}. The chapter has noted that the lack of proper regulation in the real estate sector is considered as one of the contributing factors to the escalating property prices in Namibia. The escalating property prices have had a negative effect on consumers particularly on first time

buyers, most of whom can hardly afford to acquire properties in Namibia. Proper regulation in the real estate sector has the potential to stabilise property prices to the benefit of consumers.
CHAPTER 3: CONSUMER PROTECTION IN THE NAMIBIAN FINANCIAL SECTOR

3.1 Introduction

The global financial crisis of 2008 was attributed to various factors such as reckless lending, complex financial products and fragmented regulation.\(^{122}\) The crisis had a negative impact on consumers and prompted national and international authorities to formulate policies that are geared at improving financial sector regulation and consumer protection in global financial sectors. Policies that protect the interest of consumers of financial services contribute to competitive financial institutions and stable financial systems.\(^{123}\) A need was therefore identified to strengthen consumer protection policies in the financial sector and to ensure that the use of financial products and services do not negatively affect consumers and thus eventually become a source of financial instability. This intervention is in recognition of the fact that prior to the crisis, approaches to consumer protection in financial markets received relatively limited attention, in comparison with other issues.\(^{124}\) The crisis highlighted shortcomings in the existing consumer protection frameworks and prompted a number of broad-ranging reforms.

In response to the global financial crisis, the government of the Republic of Namibia developed a publication called the Namibia Financial Sector Strategy (2011-2021) (“the Strategy”). The Strategy is meant to chart the future direction of the financial sector over the next 10 years that


\(^{123}\) Ibid, page 2.

will ensure the financial sector’s effectiveness, competitiveness and resilience.\textsuperscript{125} The \textit{Strategy} has identified structural weaknesses in the sector that need to be addressed to enable the sector to contribute meaningfully to the overall economic performance of the country.\textsuperscript{126} One of the weaknesses identified relates to consumer protection. A lack of adequate consumer protection mechanisms has been identified as having negative impacts on the national economy and its citizens.\textsuperscript{127} In order to address consumer protection issues, the \textit{Strategy} advocates for adequate consumer protection framework that ensures that consumers receive sufficient information that will allow them to make informed decisions and have access to recourse mechanisms to resolve disputes between financial service providers and their customers when they arise.\textsuperscript{128}

Nevertheless, despite these shortcomings, there exist some consumer protection mechanisms in the Namibian financial sector. This chapter discusses reasons why consumers of financial products and services need improved protection; the chapter also discusses the current set up of consumer protection mechanisms in the financial sector.

\textbf{3.2 Why consumers of financial products and/or services need protection}

It is widely accepted that the financial sector is a catalyst for economic growth\textsuperscript{129}. The sector plays an important role in the economic growth of a country by mobilising financial resources necessary for investment. It has, however, been argued by the Treasury Department of the Republic of South

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\textsuperscript{126} Ibid, page 5.

\textsuperscript{127} Ibid, page 5.

\textsuperscript{128} Ibid, page 5.

Africa (hereafter referred to as “South African Treasury Policy Document”) that the activities involved in the financial transaction process are complex, causing the sector to face unique challenges. To this end, it is critical to ensure effective consumer protection regulation in the financial sector as the cost of poor regulation is borne not only by consumers of financial services but also by the economy as a whole. It is, however, the individual consumer of financial services and products who deserves special protection due to the unique nature of the financial sector. It has therefore been argued in “South African Treasury Policy Document” that the financial sector should be subjected to a higher standard of consumer protection than other sectors for the following reasons:

Firstly, that financial services involve large amounts of money for depositors and hence loss of deposits or savings imposes huge losses on consumers.

Secondly, that the underperformance or failure of financial products, such as retirement annuities, could impose considerable hardship on consumers.

Thirdly, that often the quality or appropriateness of financial products such as life, property and income protection insurance is only established sometime after purchase or when a disaster occurs, and

Fourthly and lastly, that many long-term financial contracts impose heavy penalties for cancellation.\(^{131}\)


\(^{131}\)Ibid, page 41.
Another argument is that financial transactions are often complicated and this complexity often makes it difficult to assess the quality of the financial services. Financial service providers often have more expertise than consumers in assessing the quality of financial services and products and possess far more knowledge on the range of services available. Lack of information or ‘information asymmetry’ 132 between consumers and financial service providers places customers at a disadvantage while creating incentives for financial service providers to exploit their superior information.

The need to enhance consumer protection efforts in the financial sector arises from an imbalance of power, information knowledge and resources between consumers and their financial service providers, placing consumers at a disadvantage. 133 Financial institutions have very good knowledge of their financial products but individual retail consumers may find it difficult or costly to obtain sufficient information on their financial purchases. 134 This state of affairs makes it very difficult for consumers to make informed choice with regard to the financial products or services which are affordable and appropriate.

In addition, complex financial products can be difficult to assess, even when all relevant information is disclosed. In Namibia, this problem is aggravated by the low level of financial

132 Information asymmetry refers to a situation where the financial services provider has different or more information regarding the particular product or services than a consumer. See the World Bank. (2013). “Asymmetric Information”. Available at: http://siteresources.worldbank.org/DEC/Resources/84797-1114437274304/Asymmetric_Info_Sep2003.pdf. [Accessed on 12 April 2015].


literacy among consumers of financial services or products. Consumer protection initiatives in the financial sector aim to address these problems faced by consumers. The dominant position of financial service providers in relation to consumers, coupled with weakened consumer protection legislation, may result in abuse of consumers by financial service providers. These abuses result in complaints by consumers ranging from poor financial advice to serious cases of misrepresentation and unauthorised withdrawals from customers’ accounts.

The above analysis confirms that consumers of financial services and products need protection from abusive and deceptive practices by financial service providers. The protection is particularly necessary in developing countries where financial institutions tend to take advantage of financially illiterate consumers by introducing new and complex products, which are often beyond the comprehension and capacity of consumers.

3.3 The current set up of consumer protection in the financial sector in Namibia

The Bank of Namibia (the Bank) and the Namibia Financial Institutions Supervisory Authority (NAMFISA) are regulators of banking and non-banking institutions respectively. The Bank of Namibia was established by section 2 of the Bank of Namibia Act, 1997 and its objectives are to: promote and maintain monetary stability and an efficient payments mechanism; foster monetary, credit and financial conditions conducive to the orderly, balanced and sustained

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137 Act No. 15 of 1997
economic development of Namibia; and assist in the attainment of national economic goals.\textsuperscript{138} NAMFISA was established by section 2 the Namibia Financial Institutions Supervisory Authority (NAMFISA) Act, 2001.\textsuperscript{139} The primary function of NAMFISA is to exercise supervision over the business of (non-banking) financial institutions.\textsuperscript{140} The two regulators (Bank of Namibia and NAMFISA) are currently responsible for consumer protection in the financial sector and have consumer complaints units which handle complaints lodged by consumers against financial services providers such as banks, microlenders and insurance companies.

### 3.3.1 The role of the Bank of Namibia

In terms of the Banking Institutions Act, 1998, the Bank of Namibia has the duty, inter alia, to safeguard the interests of persons making deposits with banking institutions.\textsuperscript{141} In order to effectively carry out this obligation, the Bank has embarked upon numerous initiatives and has issued several policy documents that are geared at protecting consumers. Some of the laws, regulations and determinations administered by the Bank which have consumer protection provisions are discussed below.

#### 3.3.1.1 Banking Institutions Amendment Act, 2010\textsuperscript{142}

One of the initiatives embarked upon by the Bank of Namibia in the area of consumer protection is the enactment of the Banking Institutions Amendment Act, 2010. The Act protects the public

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\textsuperscript{138} Section 3 of the Bank of Namibia Act, 1997 (Act No. 15 of 1997)
\textsuperscript{139} Act No. 3 of 2001
\textsuperscript{140} Section 3(a) of the NAMFISA Act, 2001
\textsuperscript{141} Preamble of the Banking Institutions Act, 1998 (Act No. 2 of 1998)
\textsuperscript{142} Act No. 14 of 2010
against illegal banking activities by outlawing activities such as pyramid schemes.\footnote{Pyramid schemes are business enterprises whose business models are based on the promise of profits based primarily on recruiting people to join their programme, not based on profits from any real investment or real sale of goods to the public. Some pyramid schemes may purport to sell a product but they often simply use the product to hide their pyramid structures. Participants are offered the promise of money if they successfully recruit members of the public to pay more to join the pyramid. Usually there are no legitimate underlying assets or products involved in the transaction. See International Monetary Fund. 1999. \textit{Current Developments in Monetary and Financial Law}, Volume 1. Washington D.C.} Pyramid schemes are illegal because they violate section 5 of the Banking Institutions Act, 1998 as amended which prohibits illegal banking business.\footnote{Illegal banking business can be defined as taking of deposits from the public without being authorised by the Bank of Namibia to conduct banking business.} This means that no person is allowed to receive, accept, take or solicit deposits from the public or pretend to be a banking institution without being registered as a banking institution.\footnote{Sections 5 and 55A of the Banking Institutions Act, 1998 as amended.} Contravention of section 5 constitutes an offence which carries a fine of up to N$ 1 million or ten years imprisonment, or both fine and imprisonment depending on the nature of the case. Further, pyramid schemes violate section 55A of the Banking Institutions Amendment Act, 2010 which declares pyramid schemes illegal.

The Bank has on numerous occasions warned the public against pyramid schemes and has taken necessary steps to investigate the activities of entities alleged to have been involved in illegal activities such as Penta Stream, Gold Prime Time and U-Care.\footnote{The Bank has on numerous occasions warned the public against pyramid schemes. Refer for example to media releases in newspapers issued by the Bank of Namibia titled “Penta Stream and Gold Prime Time’s activities in Namibia” (dated 3 October 2012); and “Illegal schemes and the Namibian law” (dated 2 November 2010). Available at: www.bon.com.na [Accessed: 10 April 2015].} The three entities were found to be pyramid schemes. Acting in terms of section 7 of the Banking Institutions Act, 1998 as amended, the Bank directed all the three entities mentioned above to repay monies obtained in contravention of section 55A within a period of 14 days to the respective persons from whom the monies had been obtained. When none of the entities complied with the Bank’s directive to the
Bank’s satisfaction, the Bank lodged an application with the High Court for the winding-up of the entities in terms of the provisions of section 7(2) of the Act. These entities were liquidated by the orders of the High Court granted on 15 November 2013 and 29 November 2013.147

The Banking Institutions Amendment Act, 2010 also empowers the Minister to make Regulations relating to unfair terms in transactions or contracts between banking institutions and their customers or the general public.148 In this regard, the Bank of Namibia drafted the Regulations relating to Unfair Terms in Transactions or Contracts between Banking Institutions and their Customers or the General Public and is in the process of consulting the banking industry before the Regulations are forwarded to the Minister of Finance for consideration before they are published in the Government Gazette.149 Legislative control of unfair terms is usually introduced due to the fact that common law rules are inadequate to protect consumers.150 In terms of the draft Regulations on Unfair Terms, a term is regarded as unfair if, contrary to the requirement of good faith, it causes any imbalance in the parties’ rights and obligations arising under the contract, to the disadvantage of the customer.151 The rationale for regulating unfair terms lies in the imbalance of powers between financial institutions and consumers which puts consumers at a disadvantage while benefiting financial institutions.152

148 Section 71 of the Act.
149 It is standard practice that the Bank consults the banking institutions on the draft regulations to obtain their inputs and comments before they are issued by the Minister. This consultation also applies to draft Determinations or Bills.
151 Regulation 3 of the draft Regulations relating to unfair terms in transactions or contracts between banking institutions and their customers or the general public, 2015.
Typically, an unfair term is a term in a pre-written standard contract which disadvantages an individual and which was not individually negotiated with a customer. Some of the terms that can be regarded as unfair are those relating to the exclusion of liability on the part of the financial service provider and preventing a customer from enforcing his/her rights against such financial service provider.\textsuperscript{153} The Regulations empower the Bank of Namibia to declare a term in a contract as unfair and to order banking institutions not to rely on such terms in any transaction with consumers.\textsuperscript{154} It is necessary to protect consumers against the effect of unfair terms contained in standard form contracts and other forms of harmful practices by financial institutions and other service providers.\textsuperscript{155}

The above interventions by the Bank of Namibia are intended to protect ignorant and unsuspecting consumers against illegal banking activities or pyramid schemes and unfair contractual terms that are detrimental to the consumers and the general public.

3.3.1.2 “Determinations on the Disclosure of Bank Charges, Fees and Commissions (BID-13)”\textsuperscript{156}

In addition to the Banking Institutions Amendment Act, 2010 and the \textit{Regulations relating to Unfair Terms in Transactions or Contracts between Banking Institutions and their Customers or the General Public} mentioned above, the Bank has also embarked upon issuing other policy

\textsuperscript{153} Ibid, regulation 13.
\textsuperscript{154} Ibid, regulation 9(3).
documents whose provisions also deal with consumer protection. One such policy document is the *Determinations on the Disclosure of Bank Charges, Fees and Commissions (BID-13).* In terms of this policy document, banking institutions are encouraged to set out their fees structure in a comprehensive manner on the various banking services provided, listing out the basis upon which bank charges are compounded and where applicable, the minimum and maximum charges imposed. Banking institutions are further required to display bank charges in a noticeable manner and not to impose bank charges on consumers in excess of the displayed structure. These *Determinations* also require banking institutions to submit copies of their disclosure documents on banking charges to the Bank of Namibia.

These *Determinations* are intended to protect and assist consumers intending to transact with a banking institution to make an informed decision whether they should take a particular product based on the fees and charges involved. Measures outlined in the *Determinations on the Disclosure of Bank Charges, Fees and Commissions* are further aimed at ensuring transparency on the part of the banking institutions and thereby protecting the consumers.

### 3.3.1.3 Payment Systems Management Act, 2003 as amended

The Payment System Management Act, 2003, as amended, was passed to provide for the regulation, oversight and supervision of payment, clearing and settlement system of banking institutions in Namibia. The Act empowers the Bank to exercise powers and functions to ensure

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157 ibid  
158 Section 1 of the Determinations on the Disclosure of Bank Charges, Fees and Commissions (BID-13)  
159 Section 3 of BID-13  
160 Act No. 18 of 2003
the safe, secure, efficient and cost effective operation of the national payment system.\textsuperscript{161} Through this Act, the Bank of Namibia issued the \textit{Determination on Standards for Basic Bank Account and Cash Deposit Fees}.\textsuperscript{162} The \textit{Determination} is meant to ensure that banking institutions provide at least one bank account (basic bank account) to individuals earning less than N\$ 2,000 per month.\textsuperscript{163} The basic bank account is free from monthly charges and account management fees. The \textit{Determination} further seeks to ensure that banking institutions provide free cash deposits for the first N\$ 2,000.00 deposited per month on all savings and investment accounts held by individuals at banking institutions.\textsuperscript{164} Further, the \textit{Determination} requires all banking institutions to provide all businesses with an annual turnover of N\$1 million or less with free monthly and account management fee for the first N\$10,000.00 deposited per month.\textsuperscript{165} These measures are aimed at protecting the interests of consumers of financial services and products by ensuring that fees and charges related to payment services are in the public interest.

\subsection*{3.3.1.4 Consumer Protection Guidelines; Guidelines for Lodging Complaints; and Bankers’ Association of Namibia’s Code of Good Banking Practice\textsuperscript{166}}

In its quest to encourage standards of good banking practices, the Bank issued Consumer Protection Guidelines in 2013 to promote sound and prudential banking practices. The purpose of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{161} Section 2 of the Act
\item \textsuperscript{162} \textit{Determination on Standards for Basic Bank Account and Cash Deposit Fees}, GN No. 295, issued on 29 August 2014.
\item \textsuperscript{163} Section 5.1 and 9 of the \textit{Determination on Standards for Basic Bank Account and Cash Deposit Fees} issued in terms of 14 of the Payment Systems Management Act, 2003 (Act 18 of 2003) as amended.
\item \textsuperscript{164} Sections 5.2 and 5.3 of the \textit{Determination on Standards for Basic Bank Account and Cash Deposit Fees}
\item \textsuperscript{165} \textsuperscript{164} Refer to the media release by the Bank of Namibia titled “\textit{Introduction of Standards for Cash Deposit Fees}” dated 4 March 2013. Available at: [www.bon.com.na](http://www.bon.com.na) . [Accessed on 10 April 2015].
\item \textsuperscript{166} “The Guidelines for Lodging Complaints” and “the Bankers’ Association of Namibia’s Code of Good Banking Practice” were launched on 28 February 2013 and are available at [www.bon.com.na](http://www.bon.com.na). [Accessed on 10 April 2015].
\end{itemize}
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these Guidelines are: (a) promote fair and equitable banking practices by setting minimum standards for banking institutions in dealing with consumers; (b) increase transparency in order to inform and empower consumers of banking services and products; (c) provide efficient and effective mechanisms for handling consumer complaints relating to the provision of banking services and products; and (d) promote integrity and confidence in the banking sector.\(^{167}\) The Guidelines also advocate for plain and simple expression of terms of contract between banking institutions and consumers as well as fair and reasonable banking relations.\(^{168}\)

The Bank has also developed the Guidelines for Lodging Customer Complaints by Bank Customers to the Bank of Namibia. The Guidelines do not have binding effect but serve to establish complaint handling procedures in the Bank and guide complainants on how to lodge complaints against banking institutions.\(^{169}\) The overall purpose is to ensure a consistent approach in resolving complaints in the banking sector. Banking institutions should establish internal procedures and policies for proper handling of customer complaints.\(^{170}\) As a standard practice, clients of banking institutions are encouraged to lodge their complaints first with respective banking institutions before seeking the Bank of Namibia’s assistance and interventions. This practice assists the Bank of Namibia to be in a position to assess the effectiveness of customer complaint resolution processes of banking institutions. Consumers whose complaints are not resolved at the level of the banking institutions can forward their complaints to the Bank of Namibia’s Consumer Protection unit for intervention.\(^{171}\) Although this arrangement provides an opportunity to the

\(^{167}\) Section 5 of the Guidelines for Consumer Protection, Bank of Namibia 2012 (Unpublished).
\(^{168}\) Ibid, section 8.2(a)
\(^{169}\) Section 4 of the Guidelines for Lodging Customer Complaints, Bank of Namibia, January 2013.
\(^{171}\) Section 9.1(b) of the Guidelines for Lodging Customer Complaints, Bank of Namibia, January 2013.
regulator to consider complaints that have not been resolved by banking institutions, the process is not entirely effective. This is particularly due to the fact that the role of the Bank, in relation to the handling of complaints, is restricted to mediation. The Bank does not have adequate enforcement powers to enforce actions against banking institutions. The escalation of complaints to the Bank raises expectations on the part of consumers that their complaints would be resolved in their favour, which is not always the case.

The banking industry has intensified their efforts in ensuring that consumers of financial services and products are protected. In this regard, the Bankers’ Association of Namibia has developed the Code of Good Banking Practice.\(^{172}\) The Code is voluntary and only applicable to member banking institutions which are First National Bank of Namibia, Standard Bank of Namibia, Bank Windhoek, SME Bank and Nedbank. The Code requires banking institutions to, among others, treat their customers fairly when engaging in business relationship with them and to disclose fully to customers terms and conditions of banking transactions. At individual level, banking institutions are expected to publicise the Code and make sure that they abide by their undertakings as contained in the Code. Some banking institutions have been running series of publications on some provisions of the Code in local newspapers as part of their education programmes. The Code is also discussed at Financial Literacy Initiative platforms, as part of financial education, where all banking institutions are represented. Ideally, one would want to see the provisions of the Code

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\(^{172}\) Bankers Association of Namibia. (2013). *Code of Good Banking Practice*. Windhoek. The subscribers to the Code are banking institutions that are members of the Bankers Association of Namibia such as First National Bank of Namibia, Standard Bank, Bank Windhoek and Nedbank.
having a binding effect, or all of its provisions being incorporated into an enforceable legal instrument. Currently, only some provisions, such as disclosure, are contained in legislation\textsuperscript{173}.

3.3.1.5 Credit Bureau Regulations, 2014

The Bank of Namibia conducted a study in 2012 to determine how the operations of credit bureaus\textsuperscript{174} in Namibia could be organized.\textsuperscript{175} The study found that there was no regulatory framework for credit bureaus and this state of affairs led to some consumers being blacklisted indefinitely on credit bureaus without any recourse. Therefore, the study recommended enactment of some laws to regulate the operations of credit bureaus. Consequently, the Bank drafted the Credit Bureau Regulations, 2014\textsuperscript{176} in terms of section 3 read together with section 59 of the Bank of Namibia Act, 1997. The above mentioned sections of the Bank of Namibia Act empower the Minister of Finance to make regulations to foster monetary, credit and financial conditions conducive to the orderly, balanced and sustained economic development of Namibia.

The primary objectives of the Credit Bureau Regulations are to regulate the operations of credit bureaus in Namibia; and to ensure that credit information sharing is conducted within the framework of the law. The Regulations provide that consumers have the right to challenge the type of information on their names and may lodge a complaint with the respective credit bureau to have

\textsuperscript{173} See Determinations on the Disclosure of Bank Charges, Fees and Commissions (BID-13) discussed in 3.3.12 above.
\textsuperscript{174} Credit bureaus refer to institutions that collect and disseminate credit performance information to assist lending institutions such as banks and microlenders determine the credit history of a customer and credit worthiness of such customer.
incorrect information rectified. Consumers who are not satisfied with the investigations conducted by the credit bureau may appeal to the Bank of Namibia for intervention. The Regulations impose specific obligations on credit bureaus and credit information providers to ensure that credit information on consumers is accurate and reflect the correct credit history of consumers.

3.3.2 The role of the Namibia Financial Supervisory Authority (NAMFISA)

Like the Bank of Namibia, the Namibia Financial Institutions Supervisory Authority (NAMFISA) established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act, 2001 is mandated to protect the interests of consumers of non-banking institutions. The Namibia Financial Institutions Supervisory Authority (NAMFISA) Act, 2001 empowers NAMFISA to administer the financial services laws such as the Short-term Insurance Act, 1998 and Long-term Insurance Act, 1998. In order to effectively carry out its mandate, NAMFISA has introduced various draft Bills such as the Financial Institutions and Market Bill (FIM Bill), 2016; the Financial Services Adjudicator Bill, 2016; and the Micro-lending Bill, 2016. These Bills and some other laws administered by NAMFISA are discussed in the sections below.

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177 Section 24 of the Credit Bureau Regulations, 2014
178 Regulations 23 and 24 of the Credit Bureau Regulations, 2014
179 Act No. 3 of 2001
180 Act No. 4 of 1998
181 Act No. 5 of 1998
182 The FIM Bill is scheduled to be tabled in Parliament in 2017.
3.3.2.1 Short-term Insurance Act, 1998\(^{183}\) and Long-term Insurance Act, 1998\(^{184}\)

The Short-term Insurance Act, 1998 and Long-term Insurance Act, 1998 are formulated in a similar way. The Acts prohibit unregistered persons from carrying on insurance business in Namibia.\(^{185}\) Moreover, the Registrar of short-term and long-term insurance is empowered to request any information from any person who the Registrar has reason to suspect is carrying on business or is engaged in activities in contravention of the Acts.\(^{186}\) Contravention of the Short-term Insurance Act, 1998 and Long-term Insurance Act, 1998 carries a fine of up to N$ 150,000 or 10 years imprisonment or to both such fine and imprisonment depending on the circumstances.\(^{187}\) It is submitted that the fines provided in these Acts are much too low in comparison with the type of contraventions and profits that may be made by insurance companies.

3.3.2.2 Usury Act, 1968\(^{188}\)

The Usury Act, 1968 sets out the limitation and disclosure of finance charges levied in respect of money lending transactions, credit transactions and leasing transactions. The Act requires lending institutions to furnish to consumers, on demand before the conclusion of any credit transaction in connection with which finance charges are or will be payable, particulars relating to the charges involved, the amount and number of installments. The Act sets out a maximum rate at which interest can be charged by microlenders. Currently, Namibia Financial Institutions Supervisory

\(^{183}\) Act No. 4 of 1998  
\(^{184}\) Act No. 5 of 1998  
\(^{188}\) Act No. 73 of 1968
Authority (NAMFISA) regulations allow micro-lenders to charge only two times the average prime rate in respect of micro loan transactions.\textsuperscript{189} However, some microlenders have been reportedly overcharging consumers in contravention of the set regulatory limits.\textsuperscript{190}

The Act further puts obligation on a credit grantor to furnish on demand, clearly and in writing, the particulars relating to the selling price, charges involved, the amount and number of installments to customers. The Act seeks to protect consumers against exorbitant interest rates and hidden charges levied on customers by credit providers or lending institutions, particularly microlenders or cash loans, as they are commonly known. The Act further ensures that terms and conditions of credit agreements, including hire purchase agreements, are explained to customers and that fairness prevails in all contracts relating to credit agreements.

Although the Usury Act, 1968 provides some form of protection to consumers, it has some shortcomings that could make consumer protection efforts difficult to implement. For example, the Act lacks adequate enforcement mechanisms and penalties for its contravention are very low.

The Act provides that any person found guilty of contravening any provision of the Act is guilty of an offence and upon conviction is liable to a fine not exceeding N$ 10,000 or three years imprisonment.\textsuperscript{191} These penalties are too low and appear not to deter microlenders from contravening the Act. Further, the current threshold of N$ 100,000 set out in the Usury Act, 1968 is not proportionate to the current market value of a number of transactions.

\footnotesize{\textsuperscript{189} The average prime rate in Namibia in 2015 is 10 percent per annum. It therefore follows that the annual rate for microlenders is confined to 10 x 2 which translates into 20 percent per annum. \\
\textsuperscript{191} Section 17 of the Usury Act, 1968.}
Another shortcoming associated with the Usury Act is that the Act does not oblige money lenders that are involved in money lending transactions beyond the stipulated threshold of N$100,000 to be registered with NAMFISA. It is therefore imperative that the Usury Act, 1968 be revised in order to make it a requirement that all credit providers, including money lenders, be registered with NAMFISA irrespective of the amount of money involved in the lending transaction. The revision of the Usury Act, 1968 would ensure that the gap introduced by the money lending transaction provision that does not require all money lenders to be registered with NAMFISA is sealed and the business conduct of such entities are regulated.

3.3.2.3 Microlending Bill, 2015\textsuperscript{192}

In response to shortcomings of the Usury Act, 1968 relating to the regulation of microlenders as explained above, NAMFISA drafted Microlending Bill whose main objectives are to regulate microlending business in Namibia; establish effective enforcement framework relating to microlending; and to protect borrowers and promote responsible borrowing.\textsuperscript{193} The draft Bill prohibits microlenders from keeping consumers’ identity document, bank card and Personal Identification Number (PIN) as security for loan repayment.\textsuperscript{194} The Bill also prohibits microlenders from charging interest rates beyond the interest rates authorised in terms of the Usury Act, 1968.\textsuperscript{195} The Bill also provides for the borrower’s rights in terms of the microlending loan agreement; for

\textsuperscript{192} The Microlending Bill will be tabled in the National Assembly by the Minister of Finance during the 2017/2018 Financial Year. See the List of Bills that will be tabled in the National Assembly during the 2017/2018 Financial Year. Available at http://www.parliament.na/phocadownload/bills/2017/billist.pdf. [Accessed: 21 May 2017].
\textsuperscript{193} The preamble of the draft Microlending Bill, 2015 (unpublished).
\textsuperscript{194} Section 22(1)(j) of the Microlending Bill, 2015
\textsuperscript{195} Section 21 of the Microlending Bill, 2015
example microlenders are obliged to disclose the rate at which the loan is disbursed and such information should be provided to borrowers in plain and understandable language.\textsuperscript{196} The Bill provides that the microlending loan agreement must be drafted in plain language.\textsuperscript{197} The Bill also provides that no amendment of a loan agreement will be of any force and effect unless the change is recorded in writing and signed by both parties (i.e. representative of the microlender and the customer).\textsuperscript{198}

\textbf{3.3.2.4 Financial Services Adjudicator Bill, 2015}

The Namibia Financial Sector Strategy, which is a blue-print for financial sector reform, provides for the establishment of a financial services complaints adjudicator to serve as a platform where consumers of financial products and services may launch complaints that cannot be settled by customers and their financial institutions. In order to realize the objectives set in the Strategy, the Namibia Financial Institutions Supervisory Authority (NAMFISA) has drafted the Financial Services Adjudicator Bill 2015 which, once enacted, will establish the Office of the Financial Services Adjudicator.\textsuperscript{199} This office will be responsible for considering and disposing of complaints against financial services providers such as banks, microlenders and insurance companies.\textsuperscript{200} The decision of the adjudicator will be independent and impartial with respect to any complainant, financial services provider or any interested person when hearing a complaint.\textsuperscript{201}

\begin{footnotes}
\item[196] Section 26 of the Microlending Bill, 2015
\item[197] Section 26(1) of the Microlending Bill, 2015
\item[198] Section 27 of the Microlending Bill, 2015
\item[199] The Financial Services Adjudicator Bill will be tabled in the National Assembly by the Minister of Finance during the 2017/2018 Financial Year. See the List of Bills that will be tabled in the National Assembly during the 2017/2018 Financial Year. Available at \url{http://www.parliament.na/phocadownload/bills/2017/billist.pdf}. [Accessed: 21 May 2017].
\item[200] Section 3(1) of the draft the Financial Services Adjudicator Bill, 2015
\item[201] Section 14(3)(a) of the draft the Financial Services Adjudicator Bill, 2015
\end{footnotes}
The Office of the Financial Services Adjudicator will be a quasi-judicial body whose decisions will have a binding effect on financial services providers. Any person dissatisfied with the decision of the Financial Services Adjudicator will be allowed to appeal to the High Court.

The establishment of the Financial Services Adjudicator will improve complaint resolution in the financial sector because although the Bank of Namibia and NAMFISA currently have complaint resolution mechanisms, they merely play a mediation role and their decisions do not have a binding effect on financial institutions. As stated earlier, the decision of the Financial Services Adjudicator will have a binding effect on financial institutions and such decisions will be enforceable just like a decision of a Court.

3.3.2.5 The Financial Institutions and Markets Bill 2015 (FIM Bill)

The Namibia Financial Institutions Supervisory Authority (NAMFISA) has drafted the Financial Institutions and Markets Bill (FIM Bill), 2015 to achieve the financial sector reform outlined in the Namibia Financial Sector Strategy. The primary objectives of the FIM Bill are, among others, to foster the highest standards of conduct of business by financial institutions and financial intermediaries; to promote fairness, efficiency and orderliness of the financial institutions and markets sector; and to protect consumers of financial services. The Bill seeks to establish a holistic, integrated platform for regulation of financial institutions, and consolidates the regulatory

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203 Section 2 of the Financial Institutions and Markets (FIM) FIM Bill, 2015.
requirements as set out in the different financial services laws. As such it repeals various financial services laws such as the Short-term Insurance Act, 1998\textsuperscript{204}, the Long-term Insurance Act, 1998\textsuperscript{205}, Pension Funds Act, 1956\textsuperscript{206} and Friendly Societies Act, 1956.\textsuperscript{207} Provisions related to other financial services sectors such as asset management, securities and medical aid funds have been incorporated in the FIM Bill.

The harmonization and consolidation of financial services laws into the FIM Bill have been necessitated by the fact that some of the laws are outdated (some of the laws were enacted in the 1950’s), fragmented and inconsistent with the current realities in the financial market. These laws have limited mandate with regard to consumer protection and enforcement has proved to be difficult due to the fact that some of the laws are old with low penalties and inadequate enforcement mechanisms, as well as limited powers to act against non-compliance.\textsuperscript{208} Therefore, it has become imperative that these laws be reviewed since they have become largely irrelevant to the current socio-economic conditions, particularly with regard to protection of consumers in the financial sector.

3.3.3 The role of the Financial Literacy Initiative (FLI)

The Financial Literacy Initiative (FLI) is a national platform established to enhance financial education for individuals and small and medium-sized enterprises (SMEs). FLI comprises of

\textsuperscript{204} Short-term Insurance Act, 1998 (Act No. 4 of 1998)
\textsuperscript{205} Long-term Insurance Act, 1998 (Act No. 5 of 1998)
\textsuperscript{206} Pension Funds Act, 1956 (Act No. 5 of 1956)
\textsuperscript{207} Friendly Societies Act, 1956 (Act No. 25 of 1956)
\textsuperscript{208} Some of the laws such as the Friendly Societies Act, 1956 (Act 5 of 1956) are 60 years old and have thus become irrelevant to the current market environment.
around 40 platform partners from the Namibian public, private and civil society sectors which strive to address the needs in the area of financial literacy and consumer protection.\textsuperscript{209} The specific objectives of the FLI are, among others, to increase knowledge and skills of individuals and SMEs on financial services, products and institutions; to create awareness of consumer rights and responsibilities; and to enhance protection of consumers through appropriate laws and regulations and to provide availability of recourse mechanisms.\textsuperscript{210}

Financial literacy and consumer protection are interrelated in the sense that consumers of financial services will only be able to assert their rights if they are well informed about financial services. Therefore, consumers have to understand products they buy; they need to be aware of their rights, they need to know available recourse mechanisms; and they need to know how to choose and manage a financial product. However, the financial literacy baseline survey conducted in 2012 revealed that the rate of financial literacy in Namibia stands at 42.75\%.\textsuperscript{211} The FLI is therefore striving to create awareness through collaboration with various stakeholders, such as the print and electronic media to increase the level of financial literacy.\textsuperscript{212} The media, particularly radio, is regarded as appropriate medium to disseminate information about financial literacy because a lot of people in Namibia have access to radio even in rural areas.

\textsuperscript{209} The Bank of Namibia, NAMFISA, commercial banks, insurance companies, microlenders and various government ministries are members of the FLI.

\textsuperscript{210} About the Financial Literacy Initiative refer to www.fli-namibia.org. [Accessed on 21 April 2015].

\textsuperscript{212} FLI has been collaborating with the Namibian Broadcasting Corporation through\textsuperscript{212} Ministry of Finance, Republic of Namibia. 2012. \textit{Financial Literacy Survey}. (Unpublished). A program called “Money Wise” to educate the public on financial issues.
3.3.4 Shortcomings of the financial laws and the need for an appropriate legal framework for consumers in the financial sector

Although the current financial services laws offer some form of protection to consumers of financial services, these laws lack adequate enforcement and have limited mandate with regard to consumer protection. The Banking Institutions Act, 1998 as amended and the NAMFISA Act, 2001, which empower the financial regulators to protect consumers do not have direct provisions dealing with consumer protection issues, unlike laws in other sectors such as the communication sector.\(^{213}\) The regulators therefore rely on the broader mandates outlined in respective legislations to protect consumers. The enforcement mechanism proves to be difficult due to limited powers to deal with consumer protection issues. As indicated earlier, the regulators have customer complaints units; however, these units merely play a mediation role and they do not have powers to impose penalties with regard to issues pertaining to customer complaints.

It has been stated that the absence of specific provisions dealing with consumer protection in financial services laws often fail to protect consumers of financial services.\(^ {214}\) This is due to the fact that financial transactions are usually complex and beyond comprehension of most consumers. There is thus a need to incorporate into a single law key consumer protection provisions such as

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\(^{213}\) The Communications Act, 2009 has specific provisions dealing with consumer protection in section 79(1) and (3) of the Communications Act, 2009 (Act No. 8 of 2009)

fair market practices, equitable treatment of consumers, disclosure of relevant information to consumers, redress mechanisms and financial education.\(^{215}\)

In order to offer comprehensive protection to consumers of financial services, market conduct regulations should be consistent across the financial sector. This consistency calls for a single body that would deal with complaints by consumers against financial service providers, including those that are not regulated by the Bank of Namibia and NAMFISA. In this regard, the Financial Services Adjudicator advocated by the Namibia Financial Sector Strategy is regarded by key stakeholders such as the Ministry of Finance, the Bank of Namibia and NAMFISA as the appropriate body to deal with customer complaints across the entire financial sector.\(^{216}\)

Currently, the Bank of Namibia and NAMFISA deal with consumer protection issues regarding the banking and non-banking institutions respectively, and as earlier indicated, the two institutions have consumer complaints units. However, these two regulators do not make binding decisions in respect of complaints, leaving consumers of financial services with no appropriate alternative dispute resolution option. The only alternative left to consumers is to pursue their cases through the courts, a process which is not only lengthy but also costly.

With the possible establishment of the Financial Services Adjudicator, consumers would have an option to have their complaints resolved within a reasonable period of time. The Financial Services Adjudicator would be a quasi-judicial institution whose decisions would be binding on the


financial institutions. That institution would be preferred because it will be independent from both regulators and financial institutions. The Bank of Namibia and NAMFISA, being the regulators of the financial institutions, have vested interests in the protection of both consumers and the financial sector in general, given their roles in guarding against financial instability. This state of affairs calls for objectivity in respect of complaints adjudication, and hence an impartial body like the Financial Services Adjudicator will certainly be an appropriate option.

It is submitted that the best way to protect the rights of consumers in the financial sector is to review obsolete financial services laws and consolidate them into a single holistic enactment which provides effective enforcement mechanisms. It is further submitted that an independent Financial Services Adjudicator is the appropriate forum to handle complaints against financial services providers in the entire financial sector. Its powers should include adjudication of complaints lodged by consumers against financial service providers that are not currently regulated by the Bank or NAMFISA, such as the Agricultural Bank of Namibia, NamPost Savings Bank, the Development Bank of Namibia and the National Housing Enterprises, among others. It is expected that, once established, the Financial Services Adjudicator will go a long way in addressing concerns relating to consumer protection which are prevalent in the financial sector.

3.4 Preliminary conclusion

In summary, this chapter looked at the present consumer protection measures in the Namibia financial sector. It has articulated reasons why consumers of financial services require protection and outlined the roles played by the Bank of Namibia, NAMFISA and the Financial Literacy
Initiative in the area of consumer protection. The chapter has highlighted shortcomings of financial services laws in the country and how these can be addressed to ensure adequate protection of consumers.

The discussion has revealed that consumers of financial services require protection because financial transactions are complex and often difficult to comprehend by consumers. This situation is aggravated by general financial illiteracy and lack of information on financial services and products on the part of consumers. It has further been shown that the Bank of Namibia and NAMFISA are responsible for consumer protection in the financial sector. However, due to limited mandate on the part of these regulators and shortcomings with regard to enforcement of financial services laws, consumer protection efforts in the sector are inadequate. Therefore, these laws need to be consolidated into a single law with effective adequate enforcement mechanisms. The chapter has concluded with the submission that the proposed Financial Services Adjudicator is the appropriate body to deal with consumer complaints in the entire sector.
CHAPTER 4: NATIONAL INITIATIVES IMPACTING ON FINANCIAL CONSUMER PROTECTION

4.1 Introduction

This chapter analyses efforts by government agencies, consumer groups and other stakeholders in promoting consumer rights in Namibia. It particularly looks at the role and efforts of the Ministry of Industrialisation, Trade and Small and Medium Enterprises (SME) Development and the Law Reform Commission in formulating comprehensive consumer protection legislation for Namibia. It also looks at the role of the Namibia Competition Commission and its activities which impacts on consumer protection in various sectors of the economy. Finally, the chapter analyses the role played by the consumer protection groups in advocating and promoting consumer rights in Namibia. It is submitted that consumer protection efforts by various stakeholders complement each other and therefore it is necessary to discuss consumer protection efforts by others stakeholders (apart from financial sector regulators) and understand their impact on consumer protection in the financial sector.

4.2 Ministry of Industrialisation, Trade and Small and Medium Enterprises (SME) Development

The Ministry of Industrialisation, Trade and Small and Medium Enterprises (SME) Development (hereafter the Ministry of Industrialisation) is responsible for promoting growth and development of the economy through the formulation and implementation of appropriate policies to attract
investment, increase trade, develop and expand the country’s industrial base.\textsuperscript{217} One of the key mandates of the Ministry of Industrialisation is the development of a vibrant and competitive domestic economy and market conditions which involves fair market conduct. The Ministry has a Consumer Protection Division which is tasked with the promotion and protection of consumer rights through regular inspections and enforcement of product standards, weights and measures at retail levels as well as consumer awareness campaigns.\textsuperscript{218}

Some of the functions of the Consumer Protection Division include handling complaints, and raising consumer awareness. In the absence of a guiding framework on consumer protection, the Ministry of Industrialisation’s Consumer Protection Division lacks adequate legal tools necessary to execute its consumer protection functions.\textsuperscript{219} Once a consumer protection legal framework has been developed, the Division will be in a better position to carry out its mandate in respect of promoting consumer rights.

The Ministry of Industrialisation has in the past acknowledged that the current legislative protection accorded to consumers is insufficient and fragmented and there is a need to develop a comprehensive consumer legislation to ensure some level of responsibility to the institutions concerned.\textsuperscript{220} In recognition of the urgent need to formulate a policy and legal framework aimed at safeguarding the interests and rights of the consumers, the Ministry, in 2014, invited expressions

\begin{flushleft}
\footnotesize
\textsuperscript{218} ibid
\end{flushleft}
of interest for consultants to develop a policy and legal framework on consumer protection in Namibia.\textsuperscript{221} The consultant would be tasked to advise the Ministry regarding the institutional and human resources necessary for the development and implementation of a consumer protection policy\textsuperscript{222}, and to develop a comprehensive legal framework for the promotion of consumer protection that would result in a smooth functioning and integrated market.

Following the appointment of the consultant, the Ministry of Industrialisation organised a workshop on 17 March 2015 to discuss the draft Consumer Protection Bill and the work done thus far. The workshop was attended by representatives from key stakeholders such as the Bank of Namibia\textsuperscript{223}, NAMFISA, the Law Reform and Development Commission, the Namibia Competition Commission, Office of the Attorney General and the two consumer groups, namely, the Namibia Consumer Trust and the Namibia Consumer Protection Group. Various international experts, such as Advocate Ira Rheingold, the Executive Director and General Counsel of the National Association of Consumer Advocates (NACA) in Washington D.C made presentations at the workshop. NACA is an organization dedicated to protecting consumers from unfair and deceptive business practices. Advocate Allan Coetzee, a consumer protection expert from South Africa, gave a perspective on the institutional framework for consumer protection in South Africa. The presentations were meant to provide international experience that would enrich the draft Consumer Protection Bill.


\textsuperscript{223} The researcher of this study represented the Bank of Namibia at the workshop hosted by the Namibia Competition Commission.
4.2.1 Key provisions of the Draft Consumer Protection Bill

The general objectives of the Draft Consumer Protection Bill are to protect consumers and establish standards for fair conduct in the consumer marketplace; to establish the Namibian Consumer Protection Bureau in the Ministry of Trade and Industry; and to provide for consumer dispute resolution and enforcement of consumer protection. The specific purpose of the Bill is to protect consumers in marketplace transactions and improve trust in market transactions in order to, among others, protect vulnerable consumers from marketplace conduct that takes advantage of unsophisticated or less educated consumers; promote efficiency, transparency and consumer trust in the Namibian economy and marketplace; and ensure accessible, transparent and efficient redress for consumers who are subjected to unfair, deceptive and abusive practices by service providers.

In terms of the Draft Bill, a practice is classified as unfair if it causes a significant imbalance on the rights of the consumer and the seller to the detriment of the consumer; whereas a practice is regarded as deceptive when it misleads or is likely to mislead the consumer and the misleading practice is material to the sale. Where there is doubt whether the term of a contract constitutes an unfair practice, there is a rebuttable presumption that the term is unfair if it has not been individually negotiated. For purposes of the Bill, a contract is regarded as not having been

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226 According to section 1 of the draft Bill the seller is defined as a person that offers merchandise for sale to consumers in the ordinary course of that person’s business, vocation or trade; while merchandise is defined as any goods, services, intangibles, real estate, insurance or loans.
227 Section 7(c) of the Draft Bill, 2015
228 Section 8 of the Draft Bill, 2015.
229 Section 10 of the Draft Bill, 2015
individually negotiated when it has been drafted in advance by the seller and the consumer has not
been given an opportunity to influence the substance of the term in the context of a pre-formulated
standard contract.\textsuperscript{230} The Bill requires that a contract drafted or adopted by a seller should be in
plain language, and in the event that the contract term is ambiguous, the interpretation most
favourable to the consumer should prevail.\textsuperscript{231} This approach accords with the common law
principle of \textit{contra proferentem}, i.e. ambiguous terms or documents in a contract should be
interpreted against the author.\textsuperscript{232}

A consumer contract must not contain a term that prohibits the consumer to seek redress, file
complaint against a service provider, or pursue any legal recourse available. Any consumer may
file a complaint about prohibited acts or practices in terms of this Bill.\textsuperscript{233} A consumer protection
bureau is required to mediate disputes between the consumer and the seller and may issue an
administrative order that may require the service provider or seller to rescind a contract\textsuperscript{234}, refund
the money or take other actions as needed to provide full restitution to the consumer of any loss or
injury from the purchase.\textsuperscript{235} If the seller fails to appeal against the order or to comply with the
terms of the order within 30 days of the date of the order, the court may issue a judgment or order
against the seller for the relief specified in the order. The court may issue such a judgment or order
at the request of either the consumer protection bureau or the consumer in whose favour the order
has been issued.\textsuperscript{236}

\textsuperscript{230} \textit{ibid}
\textsuperscript{231} Section 11 of the draft Bill, 2015
\textsuperscript{232} The basis of the contra proferentem principle is that if the meaning of a word in a contract is not clear or is
ambiguous, the \textit{verba fortuis accipiuntur contra proferentum} rule is applicable. The rule requires a written
document to be interpreted against the person who drafted it. See \textit{Fedgen Insurance Ltd v Leyds 1995 (3) SA (AD)}
\textsuperscript{233} Section 18 of the draft Bill, 2015
\textsuperscript{234} Section 19 of the draft Bill, 2015
\textsuperscript{235} Section 20 of the draft Bill, 2015
\textsuperscript{236} Section 24 of the draft Bill, 2015
The draft Bill makes provision for class actions by members of the public. Any person may institute proceedings in a court and seek certification by the court as a representative for a consumer class.\textsuperscript{237} If a certified representative of a consumer class has been injured by a violation of the Act by a seller, the court should award to the consumer class any relief that could be granted in terms of the Act. The relief may take the form of a declaration that the act or practice of the seller violates the Act; or an order restraining the future conduct of the seller; or an order imposing specified penalties; or an order awarding costs of the investigation against the seller.\textsuperscript{238}

There have been a few cases of class actions against banking institutions in Namibia. However, in *Maletzky and Others v Attorney General and Others*\textsuperscript{239} all banking institutions were cited as respondents by 15 applicants who brought an application in the High Court seeking for, among others, an order “declaring section 66(1) (a) of the Magistrates’ Courts Act, 1944\textsuperscript{240} unconstitutional. Section 66(1) (a) provides that:

\begin{quote}
“Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the moveable property and, if there is not found sufficient moveable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made”.
\end{quote}
The application involves sales in execution of immovable property by banking institutions as a result of debtors unable to repay their loans in terms of the mortgage loan agreements. The application was dismissed with costs due to the fact that the applicants could not prove that they had a *locus standi* to bring such an application before the Court[^31]. The Court stated that there is no provision in the Namibian Constitution which expressly authorizes *locus standi* to persons acting as a member of or in the interest of a group or class of persons or acting in the public interest[^34]. The applicants could not prove that they had substantial interest in the matter.

The draft Bill provides a limited timeframe within which consumers can lodge complaints against a service provider. A complaint may not be made more than four years after the act or omission that is the subject matter of the complaint, or in the case of conduct, after the date that the conduct or practice ceased[^39]. The reason for the extended period within which consumers may lodge their complaints against service providers could be intended to allow consumers sufficient time to prepare and submit their complaints to the respective service providers. However, the time frame within which consumers are expected to lodge their complaints against service providers is not in line with the provision of the Prescription Act, 1969[^68] which provides that a debt prescribes after three years from the date they become due[^11].

Lastly, the draft Bill deals with the relationship between the envisaged Consumer Protection Act and other Acts administered by other regulatory authorities. If there is inconsistency between any

[^31]: Paragraph 31 of the judgment.
[^34]: Paragraph 34 of the judgment.
[^39]: Section 39 of the draft Bill, 2015
[^68]: 68 of 1969
[^11]: Section 11 of the Prescription Act, 1969
provision of the envisaged Consumer Protection Act and the provision of any other Act, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with both Acts; or if concurrent application or compliance is not possible, the provision that extends the greater protection to a consumer prevails. Consumers are not prevented from exercising their rights under common law or other laws of Namibia.

It is submitted that the draft Bill will provide consumers with protection against sellers, particularly in the retail industry. The draft Bill also makes provision for platforms to resolve complaints by consumers within a reasonable period of time through bodies such as consumer protection bureau established in terms of the draft Bill. However, the draft Bill appears to concentrate more on consumer protection in the general retail sector and offers little protection to consumers in other sectors of the economy, such as the financial and communication sectors. Therefore, there is a need for close coordination between various sectors of the economy in order to ensure that consumers in all sectors are offered adequate protection against services providers or sellers of goods or services.

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246 Section 42 of the draft Consumer Protection Bill, 2015
247 Section 25(2) of the Constitution provides that “Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient”.

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4.3 Law Reform and Development Commission

The Law Reform and Development Commission (LRDC) was established in terms of section 2 of the Law Reform and Development Commission Act, 1991. The objects of the Commission are to undertake research in connection with and examine all branches of the law of Namibia and to make recommendations for the reform and development of the law in various aspects such as: the repeal of obsolete or unnecessary enactments; the consolidation or codification of any branch of the law, or the introduction of other measures aimed at making the law more readily accessible; and the introduction of new or more effective procedures for the administration of the law and the dispensing of justice.

In order to achieve its objects, the Commission develops programmes relating to various areas of the law which require consideration for reform, placing them in order of priority and subject to the approval of the Minister. The Commission initiated various projects such as the Succession and Estate Project; the Customary Marriages Project; the Insolvency Project, and the Consumer Protection Project which is the subject matter of this discussion.

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248 Act 29 of 1991
249 Section 6 of Act 29 of 1991
250 Section 7 of Act 29 of 1991
4.3.1 Consumer Protection Project (Being Project No. 15 of the Law Reform and Development Commission)

One of the programmes embarked upon by the Law Reform and Development Commission is the Consumer Protection Project, which is Project No. 15 of the Commission. The project dates back to around 2001 when communication between the Commission and the Ministry of Trade and Industry on this subject matter commenced. However, work on the Project only commenced in 2011 when the Commission undertook a study to investigate the current status of consumer protection in Namibia.

The Commission recognized that consumer rights violations do not only occur when the consumer purchases goods but also when services are provided to the consumer. Put differently, consumer rights violations also take place in services industries such as the financial services industry where consumers are offered services instead of goods. The Commission also recognized that confident consumers are an important drive of competitiveness in that such consumers know and understand that they have consumer rights; they know when their rights have been violated; and that they know that they have a redress mechanism which they can invoke to have their complaints against service providers resolved in the event that their rights have been violated.

The study conducted by the Commission revealed that consumer protection system in Namibia is outdated and fragmented, and does not clearly set out the rights and obligations of consumers and

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service providers.\textsuperscript{254} The current consumer protection system is governed by common law principles which do not articulate clearly guiding principles of market conduct. The study further found that Namibia lagged behind many countries in terms of adopting a system for reviewing its consumer laws, particularly in view of changes in global markets.\textsuperscript{255} Therefore, according to the Commission, an effective enforcement mechanism is an integral part of a consumer protection system, and this mechanism involves redress mechanisms to enable consumers to obtain redress to their complaints.

Although the Commission has recognised the need for comprehensive consumer protection legal framework in Namibia, the question that needed to be thoroughly addressed was whether such a legal framework should follow the rights approach and be of general application to all sectors, such as the financial sector and the retail industry, or whether it should be sector specific in its application.\textsuperscript{256} In order to have an informed position on this matter, the Commission conducted consultations with various sectors of the economy and embarked upon international benchmarking exercises in various countries in Africa and beyond.\textsuperscript{257}

\subsection*{4.3.2 Sectoral consultations and international benchmarking exercise}

In order to better understand the laws that affect consumers in various sectors of the economy, the Law Reform and Development Commission consulted with relevant stakeholders and conducted

\begin{footnotesize}
\begin{enumerate}
\item Consumer Protection Project, Project No. 15. Issue Paper No. 1, page 2.
\item ibid
\item ibid, page 7.
\end{enumerate}
\end{footnotesize}
interviews with representatives from industry and government, among others, the Bank of Namibia, Communications Regulatory Authority of Namibia, Namibia Financial Institutions Regulatory Authority, and the Ministry of Trade and Industry. To supplement the information sourced from sectoral regulators and key stakeholders during consultations, the Commission also analysed relevant consumer protection laws in the respective sectors.

As regards the banking sector, the Commission concluded that despite the existence of various protections in this sector, there are various issues that could be addressed either through amendment to the statutes or through other initiatives, such as the formulation of secondary laws to address areas of concerns. According to the Commission, more study still needs to be conducted regarding the question of bank fees and charges since consumers still complained about exorbitant fees charged by banking institutions for services rendered to consumers. Further, the Commission was of the view that banking institutions should provide information to consumers in plain language, or alternatively, in widely spoken indigenous languages. The Bank of Namibia also needs to intensify its efforts in addressing all types of illegal banking practices. Moreover, in order to intensify consumer protection in the banking industry, the provisions of the Code of Banking Practice should be made mandatory through incorporation into a piece of legislation.

With regard to the non-banking sector, the Commission found that NAMFISA, the regulator in that sector, does not have adequate enforcement powers. The regulator’s powers are limited to

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258 The researcher was one of the officials consulted at the Bank of Namibia to give the perspective of consumer protection aspects in the banking industry.


260 ibid, page 63.

261 ibid, page 63
making recommendations to financial institutions to resolve complaints.\textsuperscript{262} If the financial institution is not amenable to NAMFISA’s recommendations, the latter is unable to resolve the complaint to the customer’s satisfaction. If the consumer is not receptive to the outcome of the investigation, the only option left for the consumer is to pursue the matter through litigation, a process which is not only lengthy but unaffordable to most consumers.

In general, the Commission found that statutes in the financial sector were archaic\textsuperscript{263} and with inadequate enforcement mechanisms. Some statutes were enacted during pre-independence era by the South African administration and are still applicable in independent Namibia. After the democratization of South Africa, laws such as the Usury Act, 1968 were repealed by the National Credit Act, 2005 after the authorities in that country realized that these laws rendered consumers, especially illiterate consumers, vulnerable and exploitable by service providers\textsuperscript{264}. However, some of these pre-independence laws are still applicable in Namibia.

In the communication sector, the Commission found that the Communications Regulatory Authority (CRAN) is addressing consumer protection issues; however there are few areas that need improvement.\textsuperscript{265} Although the complaints procedure through CRAN has proven to be an effective means for consumer redress, consumers should still have the ability to access the courts.\textsuperscript{266} The redress mechanism through CRAN should not be an end in itself and there should be an opportunity for consumers to appeal to the courts should they not be satisfied with the

\textsuperscript{262} Ibid, page 75.
\textsuperscript{263} For example, the Usury Act, 1968 is 47 years old, and is no longer responsive to the current economic realities.
\textsuperscript{265} Ibid, page 86
\textsuperscript{266} Ibid, page 86.
outcome of the investigations. Currently, the Communications Act, 2009 does not make provision for consumers who are not satisfied with the outcome of the investigation to appeal to the courts. Another weakness of the Communications Act, 2009 is that it lacks a general offence and penalty provision that penalises those who fail to comply with the provisions of the statute. Although the regulator (CRAN) may impose enforcement orders, it does not have the authority to issue general administrative penalties, except in limited circumstances.

The Commission, in conjunction with the Ministry of Industrialisation, Trade and Small and Medium Enterprises Development, also conducted a benchmarking study of consumer protection frameworks in a number of jurisdictions to learn more about consumer protection in those jurisdictions. Study visits were conducted in Australia, South Africa, and Botswana as well as at Consumers International, in London. These countries were selected because of various reasons. A study visit to South Africa was deemed beneficial because South Africa shared legal and jurisprudential history with Namibia and because the country recently passed a comprehensive consumer law in 2008. Botswana was preferred because the country places consumer protection enforcement within its Ministry of Trade and not within a separate commission or agency; whereas Australia was selected because the country has a new consumer law and a single body handles both consumer protection and competition issues. Consumer International was preferred because the organisation is the representative body of consumer groups globally.

\[267\] Ibid, page 86
\[268\] Ibid, page 86.
\[270\] Consumer Protection Act, 2008 (Act No. 68 of 2008)
\[271\] Competition and Consumer Act, 2010 (Act No. 51 of 1974 as amended)
\[272\] Australian Competition and Consumer Commission established in terms of section 6A of the Competition and Consumer Act, 2010 (Act No. 51 of 1974 as amended)
The study visits to the above mentioned jurisdictions provided a wide range of revelations. The study visit to South Africa revealed that although there is a comprehensive Consumer Protection Act, 2008, a number of other industries regulatory bodies also protect consumers in some other form.\textsuperscript{273} Therefore, South African consumers may seek relief through industry specific ombudsmen in addition to mechanism of the Consumer Protection Act, 2008. Regarding Botswana, the country has the Consumer Protection Act, 1998\textsuperscript{274} which is administered by the Consumer Protection Office under the Ministry of Trade and Industry. The Consumer Protection Office deals with general complaints by consumers particularly those involving unfair business practices.\textsuperscript{275}

Complaints in the banking sector in Botswana are adjudicated by the Office of the Banking Adjudicator (OBA). The OBA is a voluntary scheme in the banking sector established on the initiative of commercial banks in Botswana. It investigates complaints about banking services provided by member banks of the Bankers' Association of Botswana.\textsuperscript{276} In Australia, consumer protection issues are provided for in the Competition and Consumer Act, 2010 which applies across all sectors but is supported by industry specific consumer laws where appropriate.

Study visits to these countries provided invaluable lessons for Namibia in terms of formulating the appropriate legal and institutional framework for consumer protection. The findings would assist the authorities to determine whether such legal framework should follow the rights approach and have general application to all sectors, or whether it should be sector specific.

\textsuperscript{274} Chapter 42:07 of the \textit{Laws of Botswana}
4.4 Namibia Competition Commission

The Namibia Competition Commission was established in terms of section 4 of the Competition Act, 2003. The objective of the Competition Act, 2003 is, among others, to enhance the promotion and safeguarding of competition in Namibia in order to provide consumers with competitive prices and product choices. The Act does not have any direct consumer protection provisions although it seeks to provide consumers with competitive prices and product choices through enforcement of the statute’s provisions.

Nevertheless, competition policy offers some protection to consumers despite the lack of direct provisions in the Act itself. However, the protection that competition policy offers is limited, especially in the context of consumer transactions. Competition policy protects consumers by ensuring that markets remain competitive and that consumers have various options. Consumers generally benefit from competitive markets through lower prices and better quality products and services. This was particularly the case in the mobile communication sector when a second mobile operator Cell One (Leo) entered the market in 2007. It is submitted that the emergence of Cell One ended the monopoly enjoyed by the Mobile Telecommunications Company (MTC) and resulted in a drastic reduction of costs of mobile communication services. For instance, before Cell One entered the market MTC charged N$ 180 for a starter pack (SIM card) and that price has reduced to as little as N$ 5 in 2016.

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277 Act No. 2 of 2003
278 Section 7 of the Competition Act, 2003
280 This assessment is based on the current market price of MTC’s SIM cards in Namibia.
The Competition Commission acknowledges the role played by regulatory authorities in various sectors of the economy and the possible overlaps that may exist in the execution of their mandates. In some cases, the statutes which govern sector regulations contain provisions that regulate competition in respective sectors. This inherently gives rise to the issue of concurrent jurisdictions between the Competition Commission and sector regulators. Therefore, in terms of section 67 of the Competition Act, the Commission concluded Memoranda of Understanding (MoU) with regulatory bodies such as the Bank of Namibia, NAMFISA and CRAN particularly on how to handle issues of concurrent jurisdiction between regulatory bodies.

On matters involving concurrent jurisdiction, the Bank of Namibia and the Competition Commission agree that the primary authority resides with the Commission to promote and safeguard matters of competition in the banking sector, and the Commission after consultation with the Bank makes the final determination on such matters. Further, the two Authorities agreed that the primary authority resides with the Bank to promote safety and stability of the banking system and that the Bank, after consultation with the Commission, makes the final determination on such matters.

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281 Clause 1.4.1 of the Memorandum of Understanding between the Bank of Namibia and the Namibia Competition Commission concluded on 22 February 2012.

282 Clause 1.4.2 of the Memorandum of Understanding between the Bank of Namibia and the Namibia Competition Commission concluded on 22 February 2012.
4.4.1 The link between competition and consumer protection

Competition and consumer protection policies share a common goal of enhancing the welfare of consumers.\textsuperscript{283} Competition policy deals with the market from the supply side (service providers’ side) and its main purpose is to ensure that through competition, consumers have wide choices of goods and services at low price. Competition prevents certain undesirable market conduct such as monopoly and anti-competitive market conduct.\textsuperscript{284} On the other hand, consumer protection policy deals with the market from demand side (consumers’ side) and its main purpose is to ensure that consumers exercise efficiently the choices that competition provides. Consumer policy addresses, among others, information asymmetry between service providers and consumers, false and misleading information and unfair contract terms.\textsuperscript{285}

Competition in the market benefits consumers. In an environment where adequate competition exists, the quality of goods and services supplied to the consumer are high as each manufacturer or supplier works diligently to outperform the other. The consumer not only benefits from improved quality of goods and services, he also gets them on fair and reasonable prices. Competition is motivated by the objective of improving the functioning of the market as a whole. The consumer reaps the benefit of an efficient functioning market and therefore competition is a form of consumer protection.\textsuperscript{286}

\textsuperscript{285} Ibid, page 8.
In order to explore the linkage between competition and consumer protection, the Competition Commission conducted a study entitled “The link between competition policy and consumer protection from a competition perspective”. The study proposes approaches for institutionalising consumer protection in Namibia and serves as an input for Namibia’s consumer protection law and policy currently being formulated by the Ministry of Industrialisation, Trade and SME Development.

The study confirms that there is a link between competition policy and consumer protection. The study establishes that the link pertains to the protection of consumers in terms of product choice and competitive pricing. The study reveals that competition law and policy play a significant role in terms of promoting consumer welfare. Therefore, in terms of institutional developments, the study proposes that the Competition Commission be accorded a consumer protection function in terms of consumer rights (competitive price and product choice). In this regard, the study recommends that the Competition Act, 2004 should be amended to include provisions on consumer protection. The proposed protection should not be confined to price and product choice, but should extend to other areas which are normally covered by consumer protection provisions which include unfair contract terms and misleading representation in as far as these have bearing on competition.

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The study further proposes that a Steering Committee on Consumer Protection be established, consisting of organisations which currently deal with some aspect of consumer protection, especially those mandated to do so through statutes which govern their operations. The objective of the proposed Steering Committee is to discuss and propose an ideal approach to consumer protection in Namibia.

Finally, the study recommends that, currently in the absence of comprehensive consumer protection legislation, existing regulatory authorities such as the Bank of Namibia, NAMFISA and the Namibian Competition Commission should continue to handle consumer protection issues in their respective areas of regulation until such time that an appropriate approach has been determined.

4.5 Consumer protection groups

The presence of consumer lobby groups ensures that consumers have a representative voice. Consumer champions play a critical role in providing information to consumers through public education. As part of their advocacy, consumer protection groups play an important role in sensitizing consumers about their rights, responsibilities and the mechanisms available to consumers to have their complaints against service providers resolved.

There are three consumer groups in Namibia, namely, the Namibia Consumer Lobby, the Namibia Consumer Trust and the Namibia Consumer Protection Group. Of the three consumer protection


\[291\] Amunkete, T. 2013, page 13
groups, only the Namibia Consumer Trust has gained international recognition as a member of Consumer International.²⁹² A brief description of these consumer groups are outlined below.

### 4.5.1 The Namibia Consumer Lobby (NCL)

The Namibia Consumer Lobby (NCL) was established in 1988 with its main goal of protecting the consumer from possible exploitative practices by sellers in the retail sector as well as creating better understanding between producers and consumers.²⁹³

The NCL had a good vision, but struggled to make a significant impact, mainly due to limited human resources. The organisation was reportedly run by a one part-time person such that it could hardly deliver on its mandate.²⁹⁴ As a result of limited resources, the consumer lobby became dormant around the year 2006.

### 4.5.2 Namibia Consumer Trust

Namibia Consumer Trust (NCT) is a non-governmental organisation focusing on consumer rights in Namibia.²⁹⁵ The organisation was launched²⁹⁶ at a time when consumers had limited avenue for

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²⁹⁶ Namibia Consumer Trust was launched on 15 March 2011
redress when their rights had been infringed.297 The organisation has been involved in promoting the rights of consumers through print and electronic media, in addition to visits to the regions around the country.

The NCT has been a member of the Consumer International since 05 December 2012.298 At the domestic level, the NCT is a member of the Financial Literacy Initiative299 and the Advisory Body to the Financial Inclusion Council.300 Through these platforms, the NCT promotes the interests of consumers.

As part of its responsibility towards consumers, the NCT embarked on investigations in 2013 following the allegations of the existence of genetically modified organisms (GMO) in maize meal and mislabeling of meat products in certain retail shops. The investigations revealed the existence of the GMO in maize meal sold in local retail shops. The NCT stressed that it is important for consumers to be informed in advance of the existence of GMO in food so that they make a decision whether they would like to have GMO in food or not.301 According to NCT, if the label does not indicate the existence of GMO in a food product such as maize, consumers are denied their rights to choose, to be informed and, where necessary, their right to redress.

299 Financial Literacy Initiative is a national platform to enhance financial education for individuals, and small- and medium sized enterprises. FLI, which comprises of around 40 platform partners from the Namibian public, private and civil society sector, strives to address the needs in the area of financial literacy and consumer protection.
300 Advisory Body to the Financial Inclusion Council is the Body that advises the Financial Inclusion Council on matters relating to financial inclusion (i.e. access to finance and consumer protection). The Advisory Body is chaired by the Governor of the Bank of Namibia and deputized by the Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority (NAMFISA). On the other hand, the Financial Inclusion Council is the body that oversees the financial inclusion aspects in the country. The Council is chaired by the Prime Minister.
Regarding the testing of meat products, the investigation by NCT revealed that some meat products in shops were not correctly labeled. For example, the investigation revealed that while some meat products were labeled as beef products, they were in actual fact kangaroo or game meat products. These revelations prompted NCT to call on the Namibian authorities to intensify efforts to enhance consumer protection particularly with regard to food safety. Food is a necessity of life and therefore there is public interest to ensure that food processing is done in a safe environment. The consumer may be under informed about the nature of foodstuff offered by a seller and may not be in a position to distinguish between varying level of safety. A seller or manufacturer who supplies unsafe product or foodstuff to a consumer is liable to pay compensation to a consumer where harm befalls consumer as a result of consumption of an unsafe product. The manufacturer of a product has a legal duty to the consumer to take reasonable care that the product is free from defect likely to cause injury. A consumer should have recourse against a manufacturer that provides a flawed product to the consumer and to deny such a legal remedy would be a social and legal wrong.

As part of its consumer advocacy function, NCT has also in the past expressed concerns about lack of competition in the banking industry and high bank fees charged by the banking institutions. The consumer group felt that fees charged by banks are exorbitant and have become unaffordable.

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304 Ibid, page 376.
306 Ibid.
to consumers. Further, similar products and services offered by banking institutions at similar prices denied consumers their right to choice and to affordable prices. As indicated in chapter 3, the Bank, pursuant to the provisions of the Payment System Management Act, 2003 as amended, issued the Determination on the Standard for a Basic Bank Account and Cash Deposit Fees which requires commercial banks to provide free cash deposit fees on all individual and business accounts with an annual turnover of N$ 1,000,000 or less.\(^\text{309}\) The primary purpose of this Determination is to ensure that fees and charges related to banking services are in the public interest and are cost-effective.

### 4.5.3 Namibia Consumer Protection Group

The Namibia Consumer Protection Group (NCPG) is a lobby group established in 2009 to provide information to consumers about their rights in Namibia.\(^\text{310}\) The group has been advocating for the finalization of the comprehensive consumer protection legislation and raising awareness on consumer rights in the areas of credit and housing.

According to the NCPG, the financial services sector is one of the areas where consumers need to be sensitized about their rights, particularly the implications of the contracts they sign with the financial service providers. In addition, the housing sector in Namibia needs to be better regulated, particularly the operation of estate agents.

\(^{308}\) Act No. 18 of 2003  
\(^{309}\) Section 5.3 of the Determination on the Standard for a Basic Bank Account and Cash Deposit Fees issued in terms of the Payment Systems Management Act, 2003 as amended.  
4.6 Preliminary conclusion

This chapter has provided an analysis of efforts on consumer protection undertaken by government agencies, non-governmental organisations and other institutions that may impact on consumer protection in the financial sector. The chapter has revealed that other stakeholders that play a key role in consumer protection are the Ministry of Industrialisation, Trade, and Small and Medium Enterprises (SME) Development, the Law Reform and Development Commission, the Namibia Competition Commission and civil society groups.

The chapter has further revealed that the Ministry of Industrialisation, Trade and SME Development, in conjunction with the Law Reform and Development Commission, is in the process of formulating a Consumer Protection Bill which, once enacted, will deal with consumer protection issues in the country. The objectives of the Bill are, among others, to establish standards for fair conduct in the consumer market place; establish the Namibian Consumer Protection Bureau in the Ministry of Trade and Industry; and provide mechanism for consumer dispute resolution. In the event that there is inconsistency between a provision of the Consumer Protection Act and a provision of any other Act, the provision that extends the greater protection to consumers prevails.

The chapter has also established that the Namibia Competition Commission has some consumer protection role because of an inherent link between competition and consumer protection. The Commission, however, has proposed that the Competition Act, 2003 be amended so as to grant the Commission express powers to deal with consumer protection issues. According to the Commission, sector regulators should continue to deal with consumer protection issues in their
respective sectors until such time that an appropriate consumer protection legal framework for the country has been determined. Sector regulators should be involved in the process of identifying and formulating the appropriate consumer protection policy for Namibia. It is submitted that the Commission’s recommendations are reasonable in view of the fact that sector regulators understand the needs of consumers in the sectors better and know the shortcomings associated with sectoral legislation.

The chapter has acknowledged the role played by consumer protection groups in Namibia amid challenges facing their operations such as lack of capacity and resource constraints. The chapter concludes that roles played by various stakeholders have an impact on consumer protection and their inputs should be critically considered in the process of formulating the consumer protection legislation for Namibia.
CHAPTER 5: COMPARATIVE OVERVIEW OF THE LAW AND PRACTICE OF FINANCIAL CONSUMER PROTECTION IN FOUR JURISDICTIONS

5.1 Introduction

This chapter provides an overview of financial consumer protection in four jurisdictions, namely, South Africa, Zambia, Malaysia and Australia. These countries were selected because they provide a combination of developing and developed countries from different continents and which are at different stages of development in matters of financial consumer protection. South Africa was particularly selected because of the historical and economic ties with Namibia.

The study draws lessons from these jurisdictions where comprehensive consumer protection legislation exists. Some of the countries selected such as Malaysia and Australia have advanced legal and institutional framework for financial consumer protection. It is hoped that by analysing consumer protection mechanisms in these countries and comparing them with local initiatives, Namibia’s consumer protection weaknesses will be identified and appropriate measures will be taken to improve the country’s consumer protection laws.

5.2 South Africa

5.2.1 Overview of the South African financial sector

The financial sector in South Africa comprises of banking and non-banking institutions. The banking sector is regulated by the South African Reserve Bank established by section 9 of the
Currency and Banking Act, 1920\textsuperscript{311} and governed in terms of the South African Reserve Bank Act, 1989.\textsuperscript{312} The retail banking comprises of, among others, the Amalgamated Banks of South Africa (ABSA), which is a South African subsidiary of the Barclays Group; First National Bank; Standard Bank; and Nedbank. The pieces of legislation governing the banking sector are the Banks Act, 1990\textsuperscript{313} and the Mutual Banks Act, 1993\textsuperscript{314} which is intended to achieve a sound and efficient banking system in the interest of depositors and the economy as a whole. The above mentioned Acts do not have express provisions dealing with consumer protection although their overall objectives are the safeguarding of the interests of depositors and the maintenance of the stability of the financial system. As a regulator, the South African Reserve Bank is more concerned about systemic risk to the banking sector as opposed to pushing a consumer protection agenda.\textsuperscript{315}

The non-banking sector is regulated by the Financial Services Board (FSB) established in terms of section 2 of the Financial Services Board Act, 1990.\textsuperscript{316} The functions of the Board are, among others, to supervise the compliance with laws regulating financial institutions and provisions of financial services.\textsuperscript{317} The FSB was established, among others, to create conducive investment environment and to ensure that consumers are treated fairly by the financial services providers.\textsuperscript{318} The non-banking sector comprises of short and long-term insurance, fund managers, collective investments schemes, retirement funds and capital markets.\textsuperscript{319} The FSB administers a number of

\textsuperscript{311} Act 31 of 1920
\textsuperscript{312} Act 90 of 1989
\textsuperscript{313} Act 94 of 1990
\textsuperscript{314} Act 124 of 1993
\textsuperscript{316} Act 97 of 1990
\textsuperscript{317} Section 3 of the Financial Services Board Amendment Act, 12 of 2000.
\textsuperscript{319} www.fsb.co.za
Acts such as the Financial Services Board Act, 1990\textsuperscript{320}, the Financial Advisory and Intermediaries Act, 2002\textsuperscript{321}, the Financial Services Ombud Schemes Act, 2004\textsuperscript{322}, the Inspection of Financial Institutions Act, 1998\textsuperscript{323}, the Short-Term Insurance Act, 1998\textsuperscript{324} and the Long Term Insurance Act, 1998\textsuperscript{325} and other Acts establishing regulated entities in the non-banking sector. The FSB is responsible for ensuring that the regulated entities comply with the relevant legislation to promote financial soundness of these entities, and promote and support financial education, awareness and confidence regarding financial products.\textsuperscript{326} The ultimate objective of the FSB is to ensure that regulated entities conduct themselves in a manner that is not detrimental to the financial well-being of consumers.

The FSB has enforcement powers to deal with breaches through the Enforcement Committee\textsuperscript{327} which is responsible for enforcing compliance with the laws regulating financial institutions and the provision of financial services.\textsuperscript{328} The Committee may impose penalties, compensation orders and cost orders which are enforceable as if it was a judgment of the Court.\textsuperscript{329} The FSB also runs a customer complaints service and there is a separate appeal board that can be approached by any person aggrieved by a decision of the FSB or its executive officers.\textsuperscript{330} The appeal board is an

\begin{footnotesize}
\begin{itemize}
    \item Act 97 of 1990
    \item Act 37 of 2002
    \item Act 37 of 2004
    \item Act 80 of 1998
    \item Act 53 of 1998
    \item Act 52 of 1998
    \item Section 3 of the Financial Services Board Act, 97 of 1990 read together with section 56 of the Financial Services Laws General Amendment Act, 45 of 2013.
    \item The Enforcement Committee is established in terms of section 10A of the Financial Services Board Act, 97 of 1990.
    \item Section 10(3) of the Financial Services Board Act, 97 of 1990.
\end{itemize}
\end{footnotesize}
independent tribunal made up of members who are neither employees of the FSB nor active participants in the financial services industry. The chairperson and members of the appeal board are appointed by the Minister of Finance.

Another regulatory body in the South African financial sector is the National Credit Regulator (hereafter NCR) established in terms of section 2 of the National Credit Act, 2005. The NCR is responsible for regulating the credit industry including the registration of credit providers, credit bureaus and debt counselors. The NCR is also responsible for investigation of complaints against registered entities and/or persons such as credit providers, credit bureaus and debt counsellors, and ensuring compliance with the Act. The Act is meant to promote economic and social welfare of the people, fair and transparent credit market and to protect interests of consumers.

The National Credit Act, 2005 further aims at preventing reckless lending by credit providers. Credit providers are required to conduct comprehensive affordability assessment before extending credit to consumers. Failure to carry out comprehensive affordability assessment can result in consumers being unable to service their loans, thus resulting in high number of non-performing loans. Credit providers must therefore take all reasonable steps to ensure that they properly assess the ability of consumers to afford monthly loan repayment. However, if the client withholds information or gives incorrect details, this can be used as an adequate defense by credit provider. The Act makes provisions for debt restructuring, a process where consumers who are unable to

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331 Act 34 of 2005
332 See the preamble of the National Credit Act, 2005.
333 Section 81(2) of the National Credit Act, 2005
334 Section 81(4) of the National Credit Act, 2005
service their monthly repayments on their loans are assisted by debt counsellors to rearrange their monthly repayments with credit providers.\textsuperscript{335}

Debt counsellors offer debt restructuring services which involve the review of client’s outstanding debts to determine whether a consumer is over-indebted.\textsuperscript{336} The counsellors consult with credit providers on the client’s behalf and assist the client in establishing an affordable monthly payment plan that incorporates both earning and living expenses. This process protects the consumer from losing crucial assets and prevents credit providers from taking legal action against an indebted consumer, while still ensuring repayment of the debt. Any consumer can apply for debt counselling whereupon an evaluation of the state of indebtedness or over-indebtedness will be determined. When a consumer is found to be over-indebted, the debt counsellor is required to inform all creditors and negotiate on the terms of the credit agreement, i.e. to lengthen the term of each agreement and/or to reduce the instalment payable.\textsuperscript{337}

The National Credit Act, 2005 also makes provision for complaints resolutions. Consumers can lodge complaints against registered entities such as credit providers, credit bureaus and debt counsellors. If the credit provider concerned is a financial institution, the complaint should be addressed to the respective Ombudsman after it has been addressed to the credit provider without being successfully resolved.\textsuperscript{338} In the event that the credit provider and the Ombudsman concerned are unable to resolve such complaints, consumers can approach the NCR for redress.\textsuperscript{339} The

\textsuperscript{335} Section 86(1) of the National Credit Act, 2005
\textsuperscript{336} Section 86(6) of the National Credit Act, 2005
\textsuperscript{337} Section 86(7)(c) of the National Credit Act, 2005
\textsuperscript{338} Sections 13 and 14 of Financial Services Ombuds Schemes Act, 37 of 2004
\textsuperscript{339} Section 136 of the National Credit Act, 2005
National Credit Act, 2005 establishes the National Consumer Tribunal as an independent body tasked with hearing cases and making appropriate orders relating to consumer complaints and disputes against credit providers and other registered entities such as credit bureaus and debt counsellors.\textsuperscript{340} In summary, the mandate of the NCR as laid down under the National Credit Act, 2005 is to develop an accessible market and to avoid exploitation of consumers by credit providers.

In 2011, South Africa promulgated the Consumer Protection Act, 2008 (hereafter the CPA).\textsuperscript{341} The CPA establishes a single and comprehensive framework for consumer protection and seeks, among other things, to promote responsible consumer behaviour and a consistent legislative and enforcement framework relating to consumer transactions and agreements. The CPA co-exists with other legislation such as the National Credit Act, 2005; Financial Services Ombud Schemes Act, 2004; Financial Advisory and Intermediary Services Act, 2002 (FAIS Act); Short-Term Insurance Act, 1998; and Long Term Insurance Act, 1998. The above mentioned pieces of legislation and the CPA complement each other in setting standards of conduct that protect the interest of consumers. In the event of inconsistency between the CPA and any other law, including the National Credit Act (NCA), the Acts must be interpreted concurrently.\textsuperscript{342} If the Acts cannot be interpreted concurrently, the Act that is most beneficial to the consumer will prevail. Thus, if the CPA affords better protection to a consumer than the National Credit Act, then the Consumer Protection Act will apply in that instance.

\textsuperscript{340} Section 26 of the National Credit Act, 2005
\textsuperscript{341} Act 68 of 2008
\textsuperscript{342} Section 9 of the Consumer Protection Act, 2008
The contrary is also true, where an existing piece of legislation already protects the consumer adequately or better than the Consumer Protection Act, then that piece of legislation takes precedence. The practical impact hereof is that if a credit provider sells a product or service to a consumer under a credit agreement, the credit agreement must comply with the requirements of both the NCA and the CPA. Some of the requirements that should be complied with include that the agreement be drafted in plain, understandable language, that it should not contain any prohibited contract terms and conditions and that the consumer must not be required to waive any of his or her any rights.

Although, the CPA appears to afford consumers more basic rights, the Act lacks effective enforcement mechanism. The enforcement of CPA is carried out by the National Consumer Commission which promotes resolution of disputes between service providers and consumers.\(^{343}\) The Commission also monitors the financial market to ensure that prohibited activities and offences are prevented or detected and prosecuted. The Commission has the power to receive complaints relating to alleged prohibited conduct and investigates such complaints through interrogation.\(^{344}\) The Commission does not investigate a complaint until parties have unsuccessfully attempted to resolve the dispute through Alternative Dispute Resolution.\(^{345}\) Through such approach, consumers are encouraged to seek redress through other recognised structures such as Ombudsman. It is submitted that this arrangement is time consuming since consumers have to follow various processes to have their complaints resolved.

\(^{343}\) Section 99(a) of the Consumer Protection Act, 2008  
\(^{344}\) Sections 102-105 of the Consumer Protection Act, 2008  
\(^{345}\) Section 72(1)(b) and (d of the Consumer Protection Act, 2008
Further, South Africa has various Ombudsmen or Adjudicators for various sub-sectors in the financial industry. These include Ombud for Financial Services (hereafter FAIS Ombud). The objective of the FAIS Ombud is, among others, to consider and resolve complaints by consumers against financial service providers. The institution is independent, impartial and performs its functions without favour or prejudice and its services are free and accessible to all consumers of financial services. FAIS Ombud has the authority under the Financial Services Ombud Schemes Act, 2004 to deal with complaints against financial institutions which do not fall within the jurisdiction of any other ombudsman scheme or where there is uncertainty over jurisdiction.

Other Ombudsmen or Adjudicators exist for other sub-sectors such as banking, insurance, credit agreements and pension funds. The Financial Services Ombud Schemes Act, 2004 stipulates that no voluntary ombudsman scheme will be permitted to operate as such unless it has been accorded recognition in terms of the Act. The requirements for recognition stipulate that the scheme must be answerable to an independent body which monitors the performance and the continued compliance by the scheme with its constitution, and the Act.

In the banking sector, the Ombudsman of Banking Services was established by the Banking Council of South Africa and operates on independent and impartial basis. The duty of the

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346 Ombud for Financial Services is established in terms of section 20(1) of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act)
347 Sections 20(3) and (4) of the FAIS Act.
348 Act 37 of 2004
349 Section 13(2) and (3) of the Financial Services Ombud Scheme Act, 2004
350 Section 10(1)(a) of Act 37 of 2004
351 Section 10(1)(b) of Act 37 of 2004
Ombudsman for Banking Services is to mediate between banks and their customers, and to ensure that the customers receive fair and equitable treatment from banks.\textsuperscript{353}

Regarding the insurance sub-sector, the Ombudsman for Long Term Insurance is responsible for mediating in disputes between subscribing members of the long-term insurance companies registered in terms of the Long-Term Insurance Act, 1998\textsuperscript{354} and policyholders regarding insurance contracts\textsuperscript{355}; while the Ombudsman for Short-Term Insurance serves the interest of the insuring public and all short-term insurers registered under the Short-term Insurance Act, 1998.\textsuperscript{356} The Ombudsmen for Long Term and Short Term Insurance are recognised as ombudsman schemes in terms of section 11 of the Financial Services Ombud Schemes Act, 2004.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 1956.\textsuperscript{357} The Office seeks to protect the interests of pension fund members by investigating complaints lodged against pension fund managers in terms of section 30A of the Act. The Adjudicator’s determinations in respect of complaints brought to its attention are binding and any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court.\textsuperscript{358}

\textsuperscript{353} Ibid, page 2.
\textsuperscript{354} Act 52 of 1998
\textsuperscript{355} See Ombudsman for Long-Term Insurance, Annual Report 2014. Page 3. Available at: www.ombud.co.za
\textsuperscript{357} Act 24 of 1956.
\textsuperscript{358} Section 300 of the Pension Funds Act 24 of 1956.
In April 2015, the Pension Fund Adjudicator made a determination in *Z Paulse v Sanlam Staff Umbrella Pension Fund and Sanlam Life Insurance*.\(^{359}\) In this case the complainant was the former spouse of Mr. C Paulse (“Mr. Paulse”), a member of Sanlam Life Insurance. The marital bond between the complainant and Mr. Paulse was dissolved in terms of the tenets of the Islamic religion. The dissolution of the marriage and the settlement agreement between the parties were made an order of the High Court. In terms of the settlement agreement, the applicant was entitled to 50% of the pension interest in the abovementioned policies as at the date of divorce, and that these sums were to be paid by the Sanlam Fund directly to the applicant or transferred to an approved fund in accordance with Section 37D (4) of the Pension Funds Act, 1956.

Sanlam Life Insurance refused to pay the applicant her 50% pension interest as per the divorce settlement. It was submitted that the sole reason why Sanlam Life Insurance refused to give effect to the court order was that there was no divorce as contemplated in section 7(8)(a) of the Divorce Act, 1979.\(^{360}\) Further, Sanlam submitted that the parties were not married in terms of the Marriage Act, 1961\(^{361}\) (i.e. civil marriage), but in terms of the tenets of the Islamic religion.\(^{362}\) Therefore, according to Sanlam, the Divorce Act, 1979 was not applicable to the dissolution of the said marriage as the latter had to be dissolved in terms of the tenets of the Islamic religion. Sanlam was ordered by the Court to pay the applicant her share of pension interest that it held in terms of section 37D (4) of the Pension Funds Act, 1956 and as provided in the settlement agreement.\(^{363}\) Sanlam complied with the judgment of the Court and paid the applicant the amount of money due

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\(^{360}\) Act 70 of 1979

\(^{361}\) Act 25 of 1961

\(^{362}\) Paragraphs 4.2 and 4.3 of the Determination by the Pension Fund Adjudicator.

\(^{363}\) Paragraph 6.1.1 of the Determination by the Pension Fund Adjudicator.
in terms of the settlement agreement. This case illustrates that consumers who are aggrieved by a
decision taken by a financial service provider have rights to approach the Court for redress and
have their rights restored.

Another institution that protects the interests of consumers in the financial sector is the Credit
Ombudsman. This institution is a voluntary, non-statutory body recognised under section 11 of the
Financial Services Ombud Schemes Act, 2004 and may engage in the resolution of disputes arising
within the credit industry.364 This means that the Credit Ombuds resolves disputes arising between
credit providers, credit bureaus, debt counsellors, and payment distribution agents on the one hand
and consumers on the other. In resolving complaints, the Credit Ombudsman acts independently,
fairly and objectively balancing the rights of consumers on the one hand and the rights of
subscribing members such as credit bureaus on the other hand.365 Some of the common features
of the various Ombudsmen or Adjudicators as described above are that they are non-statutory
bodies recognised under section 11 of the Financial Services Ombud Schemes Act, 2004 and that
these bodies offer free service to consumers.

5.2.2 “Twin peaks” system of regulation

The global financial crisis brought regulatory changes with some jurisdictions moving towards
“twin peaks” model of financial regulation.366 The “twin peaks” model refers to a system of

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364 Terms of Reference of the Credit Ombuds, 2013. Page 5. Available at:
regulation where prudential regulation\textsuperscript{367} and market conduct regulation\textsuperscript{368} are handled by separate regulators in the financial sector.\textsuperscript{369} This model separates regulatory functions between two regulators whereby the prudential regulator performs the safety and soundness supervision function while the market conduct regulator focuses on the conduct of business regulation.\textsuperscript{370}

Various countries such as the United Kingdom (UK) and Australia have adopted “twin peaks” model.\textsuperscript{371} South Africa is in the process of adopting a “twin peaks” model of regulation.\textsuperscript{372} The adoption of the “twin peaks” system envisages that the South African financial services sector will have two primary regulators, being a prudential regulator the Prudential Authority and a new market conduct regulator, the Financial Sector Conduct Authority that will replace the Financial Services Board.\textsuperscript{373} The Prudential Authority (PA) will be established within the South African

\hspace{1cm}https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf . [Accessed on 06 May 2016].

\textsuperscript{367} Prudential regulation refers to the regulation of financial industry whose objectives are to protect the stability of the financial system and protect deposits so its main focus is on the safety and soundness of the banking system and on non-bank financial institutions (NBFIs) that take deposits. See Brownbridge, M, Kirkpatrick, C, and Maimbo, S.M. \textit{Prudential regulation: Finance and Development Briefing Papers}, September 2002. Page 1. Available at: www.seed.manchester.ac.uk. [Accessed 06 May 2016].


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Reserve Bank to supervise the safety and soundness of banks, insurance companies and other financial institutions\textsuperscript{374}, whereas the Financial Sector Conduct Authority will be responsible for the supervision of the conduct of the business of all financial institutions, and the integrity of the financial markets.\textsuperscript{375}

Financial Services Ombuds\textsuperscript{376} which deals with issues relating to adjudication of complaints against financial institutions will fall under the mandate of the FSB. The decision towards a twin peaks system in South Africa was as a result of an assessment by the International Monetary Fund (IMF) of the South African financial sector which identified a need to prioritize and strengthen both prudential and market conduct supervision and regulatory powers.\textsuperscript{377} The main policy recommendation was the adoption of the twin-peaks model of financial regulation in South Africa, partly in recognition of the fact that there was a global shift from the single regulator model to the twin peak model after the world economic crisis.\textsuperscript{378} The twin peaks model is regarded as the optimal means of ensuring a safer financial sector through a tougher prudential and market conduct framework.\textsuperscript{379}

The National Treasury Policy Document referred to above particularly proposes a comprehensive framework on how the market conduct regulator will operate, in order to ensure that financial institutions treat their customers fairly. Poor customer outcomes in South Africa’s financial sector

\begin{footnotesize}
\textsuperscript{374} Section 32 of the Financial Sector Regulations Bill, 2015  
\textsuperscript{375} Section 57 of the Financial Sector Regulations Bill, 2015  
\textsuperscript{376} There exists various Financial Services Ombuds in South Africa, for example Ombudsman for Banking Services; Ombudsmen for Short-Term and Long-Term Insurance; and Credit Ombudsman.  
\textsuperscript{378} National Treasury Policy Document, page 29.  
\end{footnotesize}
have highlighted the need for stronger oversight of how financial institutions conduct their business and treat their customers.\footnote{ibid} To better protect customers, the financial sector must be held to higher standards than generic consumer protection, and these standards must be applied consistently across the sector.

The Draft Financial Sector Regulations Bill, 2014 proposes a consolidation of various pieces of legislation applicable to the financial sector.\footnote{Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulations Bill, 2014. Page 11} The law will also empower the FSCA to supervise institutions more intensively, and take strict corrective actions against financial institutions guilty of breaching the law.\footnote{Section 58 of the Financial Sector Regulations Bill, 2014} The new market conduct framework will improve the ombudsman system so that customers can easily and effectively lodge disputes against financial institutions.\footnote{See National Treasury: Republic of South Africa. (2012). National Treasury Policy Document: “Safer financial sector to serve South Africa better”, page 32.}

The adoption and implementation of the twin peaks model will be carried out in two phases.\footnote{See Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulations Bill, 2014. Page 12} The first phase will involve the finalisation of the Financial Sector Regulation Bill. The object of the Bill is to achieve a financial system that works in the interests of financial customers by establishing a regulatory and supervisory framework that promotes, among others, the fair treatment and protection of financial customers, and the efficiency and integrity of the financial system.\footnote{Section 6 of the Financial Sector Regulation Bill} During this phase, the Financial Services Board will be dissolved and replaced with the new Financial Sector Conduct Authority which will be responsible for all aspects regarding consumer protection in the financial sector. The second phase of implementation involves the
revising and consolidating of the sectoral laws such as the Pension Funds Act, 1956\textsuperscript{386}, the Short-term Insurance Act, 1998\textsuperscript{387} and the Long-term Insurance Act.\textsuperscript{388} Ultimately, the various market conduct and market integrity provisions in current sector laws will be repealed and replaced with more streamlined, consistent, overarching legislation.

5.3 Zambia

5.3.1 Overview of the Zambian financial sector

There exist three supervisory authorities in the Zambian financial sector, namely: the Bank of Zambia established in terms of section 3 of the Bank of Zambia Act\textsuperscript{389}, the Securities and Exchange Commission established in terms of section 3 of the Securities Act\textsuperscript{390}, and the Pension and Insurance Authority established in terms of section 4 of the Pension Scheme Regulation Act, 1996.\textsuperscript{391} The Bank of Zambia is the supervisory authority for banks and non-banking financial institutions.\textsuperscript{392} The Securities and Exchange Commission regulates the activities of, among others, security exchanges, dealers and investment advisers\textsuperscript{393}; whereas the Pension and Insurance Authority regulates pension funds and insurance companies.\textsuperscript{394}

\begin{flushleft}
\textsuperscript{386} Act 24 of 1956  
\textsuperscript{387} Act 53 of 1998  
\textsuperscript{389} Bank of Zambia Act, Chapter 360, \textit{Laws of Zambia}  
\textsuperscript{390} Securities Act, Chapter 354, \textit{Laws of Zambia}  
\textsuperscript{391} Act 28 of 1996  
\textsuperscript{392} Section 4(2) of Bank of Zambia Act, Chapter 360, \textit{Laws of Zambia}  
\textsuperscript{393} Section 4 of the Securities Act, Cap 354, \textit{Laws of Zambia}  
\textsuperscript{394} Section 5 of the Pension Scheme Regulation Act, 1996 (Act 28 of 1996) as amended by Act 27 of 2005.
\end{flushleft}
The Bank of Zambia has the responsibility of licensing and supervising commercial banks, development financial institutions, leasing companies, building societies and microfinance institutions. The Bank has the powers to investigate complaints lodged by customers against commercial banks. However, customers are required to first bring their complaints to their respective commercial banks which have internal procedures for handling customer complaints. If the complaint by a customer remains unresolved at the commercial bank level, the customer is at liberty to refer his/her complaint to the Chairperson of the Bankers Association of Zambia (BAZ). BAZ appoints a Banking Adjudicator to investigate the complaint further at no cost to the customer. All banks which are members of BAZ are bound by the decision of the Adjudicator. Any person who is not satisfied with the decision of the Adjudicator may approach the Bank of Zambia for intervention, or the Court if he/she is not satisfied with the decision taken by the Bank on the matter.

The Pension and Insurance Authority of Zambia (PIA), established in terms of section 4(1) of the Pension Scheme Regulation Act, 1996, is responsible for regulating the conduct of pension and insurance industry in order to protect the interests of pension scheme members and insurance policyholders. The PIA receives and handles complaints lodged against institutions registered by PIA and its duties and powers are described in the Insurance Act, 1997 and the Pension

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395 Section 4(2)(a) of the Bank of Zambia Act, Chapter 360, Laws of Zambia. See also sections 4 and 10 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.
396 Section 48 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia
398 Act 28 of 1996
400 Act No. 27 of 1997
Scheme Regulation Act, 1996. The Authority has a complaints procedure which lays down steps that should be followed when a member of the public lodges a complaint against a registered entity. The nature of the complaint should be that the registered entity complained against has behaved in a way which constitutes unsound practice and that such act or course of conduct has caused injustice to the complainant.

The complainants are first expected to lodge their complaints against the registered institutions, which are pension funds and insurance companies. All registered institutions are required to have an in-house complaint handling mechanism and it is required that complainants first exhaust this internal process before filing their complaint with the PIA. If the complainant is not satisfied with the outcome of the internal investigation, he or she can then refer his or her complaint to the PIA. As a general rule, the PIA does not deal with complaints or disputes which are already subject of court proceedings, or dealings or complaints from lawyers except where judgment has already been passed against a registered member. The enforcement ability of PIA is limited to the suspension of the license. The absence of explicit powers to deal with violations through penalties limits PIA’s enforcement effectiveness.

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401 Section 5 of the Act No. 28 of 1996
403 Ibid.
405 Ibid.
The Securities and Exchange Commission\textsuperscript{407} has the responsibility to safeguard the interest of persons who invest in securities and to suppress illegal, dishonourable and improper practices in relation to dealings in securities.\textsuperscript{408} The Commission is empowered to take reasonable steps to promote and maintain the integrity of persons licensed to deal in securities and encourage the provision by such persons of balanced and informed advice to their clients and to the general public.\textsuperscript{409} The licensed persons are prohibited from issuing false or misleading statements in connection with sale of securities. People should be provided with correct information to enable them to make informed decisions.\textsuperscript{410}

The Securities and Exchange Commission published the Securities Rules that guide the conduct of business by registered entities.\textsuperscript{411} Among the provisions of the Rules are rule 17 which provides that a licensee shall not, in any agreement, seek to exclude or restrict any of the following:\textsuperscript{412}

a) Any duty or liability to a customer which he has under the Act;

b) Any other duty to act with skill, care and diligence that is owed to a customer in connection with provision of a service; and

c) Any liability owed to a customer for failure to exercise the degree of skill, care and diligence that may reasonably be expected of him in the provision of service.

Any purported exclusion or restriction prohibited under these Rules shall be void and of no effect.

\textsuperscript{407} The Commission was established in terms of section 3(1) of the Securities Act, CAP 354
\textsuperscript{408} Section 4(1) of the Securities Act, CAP 354
\textsuperscript{409} Section 4(j) of the Securities Act, Chapter 354, Laws of Zambia
\textsuperscript{410} Section 4(g) of the Securities Act: Chapter 354, Laws of Zambia
\textsuperscript{411} Securities (Conduct of Business) Rules: Chapter 354, Laws of Zambia
\textsuperscript{412} Rules 17 of the Securities (Conduct of Business) Rules: Chapter 354, Laws of Zambia
Consumers in the securities industry who are aggrieved by the conduct of the licensed persons or institutions (licensees) have the right to complain to the Securities and Exchange Commission and have their complaints resolved by the Commission.\textsuperscript{413} Licensees are required to have internal procedures to ensure the proper handling of complaints from customers and to ensure that appropriate remedial action on those complaints is promptly taken.\textsuperscript{414} As a general rule, customer information should be kept confidential throughout the process.\textsuperscript{415} Although the Securities and Exchange Commission has legal instruments for consumer protection, the Commission does not have capacity in terms of manpower or training to implement the law.\textsuperscript{416}

There are other bodies whose mandates have an impact on consumer protection in the financial sector, and one such body is the Competition and Consumer Protection Commission established in terms of section 4 of the Competition and Consumer Protection Act, 2010 (CCPA).\textsuperscript{417} The CCPA is a comprehensive legal framework for consumer protection and was passed after the Zambian authorities recognised the need for a consolidated legal framework because consumer protection laws were scattered under various statutes.\textsuperscript{418}

Currently, the Competition and Consumer Protection Commission acts as the primary advocate for competition and consumer protection issues in all sectors. The Commission may, at its own initiative or on complaint lodged by any person, undertake an investigation if it has reasonable

\begin{footnotesize}
\begin{enumerate}
\item Rule 30 of the Securities (Conduct of Business) Rules read together with section 4(i) of the Securities Act: Chapter 354, \textit{Laws of Zambia}
\item Rule 30 of the Securities (Conduct of Business) Rules
\item Rule 33 of the Securities (Conduct of Business) Rules
\item Act No. 24 of 2010, Chapter 417 of the \textit{Laws of Zambia}
\end{enumerate}
\end{footnotesize}
grounds to believe that there is contravention of any provision pertaining to competition or consumer protection.\textsuperscript{419} The Commission may also appoint inspectors for the purpose of ensuring compliance with the Act on issues under its mandate including consumer protection.\textsuperscript{420}

Some of the functions of the Commission that may have a bearing on consumer protection in the financial sector are the powers and responsibility to investigate allegations of unfair trading practices and unfair contract terms.\textsuperscript{421} A term in a contract can be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.\textsuperscript{422} An unfair contract or an unfair term of a contract between a consumer and a service provider is not binding.\textsuperscript{423}

The Competition and Consumer Protection Commission is also empowered to undertake investigation into the effectiveness of competition in individual sectors of the economy in Zambia and on matters of concern to consumers.\textsuperscript{424} In terms of section 43 of the CCPA, the Commission signed Memoranda of Understanding with sectoral regulators to cooperate in the field of consumer protection and competition in various sectors of the economy.\textsuperscript{425} Although the CCPA is a fairly new Act, the need to strengthen consumer protection framework has already been identified. The

\begin{itemize}
\item \textsuperscript{419} Section 55(1) of the CCPA
\item \textsuperscript{420} Section 7(1) of the CCPA
\item \textsuperscript{421} Section 5(d) of the CCPA
\item \textsuperscript{422} Section 53(1) of the CCPA
\item \textsuperscript{423} Section 53(2) of the CCPA
\item \textsuperscript{424} Section 5 (d) and (e) of the CCPA
\end{itemize}
Commission called for review of the CCPA so that its enforcement mechanism may be tightened and provided with administrative powers to impose fines for contravention of consumer rights.426

5.3.2 Challenges facing consumer protection in the Zambian financial sector

The existing legal framework for financial consumer protection in Zambia is inadequate and fragmented, making implementation and enforcement difficult.427 The sector specific laws have limited provisions related to consumer protection and contain a number of deficiencies. Some laws do not have explicit provisions dealing with consumer protection and those that contain such explicit provisions, do not have sufficient deterrent penalties for contravention. Low penalties for contravening the law do not serve as effective deterrence to offenders. There is therefore a need in Zambia to review consumer protection provisions in various financial laws so as to ensure that effective penalties are in place in response to the current economic developments in the country.428

There are a number of overlaps and areas of conflict in the regulatory environment of financial services in Zambia leaving room for regulatory arbitrage and bureaucratic tendencies.429 There are overlaps between sector specific laws and the Competition and Consumer Protection Act (CCPA). Both the Competition and Consumer Protection Act and the Banking and Financial Services Act (BFSA) contain provisions relating to competition in the banking sector, while the BFSA also

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contains consumer protection provisions applicable to customers of financial institutions.\textsuperscript{430} There should be institutional linkages and coordination between various regulatory authorities in the areas of competition and consumer protection to ensure coordinated implementation and enforcement of the legal framework.\textsuperscript{431} It has therefore been recommended that sector regulators and the Competition Commission should enter into Memoranda of Understanding to ensure effective cooperation in the areas of competition and consumer protection.\textsuperscript{432}

Another serious shortcoming in the Zambian financial sector is the absence of formal structures for a financial safety net.\textsuperscript{433} Currently there is no deposit insurance scheme in Zambia, though the establishment of the scheme is under consideration.\textsuperscript{434} The absence of a deposit scheme exposes depositors to risk as they may lose all their deposits in the event of the collapse of a bank because there is no insurance scheme to reimburse them.


\textsuperscript{431} Ibid, page 14.

\textsuperscript{432} Ibid, page 7. Also see section 43 of the CCPA

\textsuperscript{433} A financial safety net is a mechanism put in place by financial regulatory authorities to ensure that depositors’ money are protected in the event of a bank failure. Ordinarily, financial safety nets take a form of deposit insurance funded by deposit taking institutions.

5.4 Malaysia

5.4.1 Overview of consumer protection in the Malaysian financial sector

General consumer protection issues in Malaysia are regulated by the Consumer Protection Act, 1999.\textsuperscript{435} Although the Act was enacted to offer complete protection to consumers, it is not applicable to all sectors of the economy. In terms of section 2(2) of the Act, professionals who are regulated by any legislation or who are covered by a separate statute permitting either self-regulation or regulation by an administrative agency, are not subject to the Act. The Minister may prescribe an additional matter to be within the jurisdiction of the Tribunal established in terms of the Act.\textsuperscript{436} However, the power of the Minister to extend such jurisdiction does not extend to any matter to which any written law applies if that written law provides for a mechanism by which consumers may obtain redress in relation to such matter.\textsuperscript{437}

The Act covers areas such as misleading and deceptive conduct, false representation and unfair practices.\textsuperscript{438} The application of the Act is supplementary in nature and is without prejudice to any other law regulating contractual relations.\textsuperscript{439} Therefore, the consumer protection framework in Malaysia does not follow a comprehensive approach but a sectoral approach in which regulators in various sectors such as financial services industry handle their own consumer protection issues.

\textsuperscript{435} Act 599 of 1999
\textsuperscript{436} Section 103(1) of Act 599 of 1999
\textsuperscript{437} Section 103(2) of Act 599 of 1999
\textsuperscript{438} See Part II of Act 599 of 1999
\textsuperscript{439} Section 2(4) of Act 599 of 1999
In the financial sector, consumer protection issues are handled by Bank Negara Malaysia (Central Bank of Malaysia) established in terms of section 3 of the Central Bank of Malaysia Act, 2009\(^{440}\), the Credit Counselling and Debt Management Agency (*Agensi Kaunseling dan Pengurusan Kredit*) established by the Bank of Malaysia in terms of section 48(1)(b) of the same Central Bank of Malaysia Act, 2009, and the Malaysia Deposit Insurance Corporation (*Perbadanan Insurans Deposit Malaysia*) established in terms of section 3 of the Malaysia Deposit Insurance Corporation Act, 2001.\(^{441}\)

The Central Bank of Malaysia regulates banks in Malaysia.\(^{442}\) The Bank has the mandate for consumer protection through the Consumer and Market Conduct Department that deals with aspects relating to consumer protection in the financial sector. The Consumer and Market Conduct Department implements its consumer protection interventions through, among others, formulation of policies and regulations on the conduct of financial institutions; monitoring compliance with the law and taking enforcement action on breaches of the law; and overseeing and promoting high standard of professionalism among financial institutions.\(^{443}\) In order to achieve its consumer protection objectives, the Bank adopts consumer empowerment and protection through a comprehensive framework that includes market conduct regulation and supervision, avenues for redress, consumer literacy and public awareness initiatives.\(^{444}\)

\(^{440}\) Act 107 of 2009  
\(^{441}\) Act 720 of 2011  
\(^{442}\) Section 5(2)(c) of Act 701 of 2009  
\(^{444}\) Ibid, page 1.
In order to protect the interests of consumers of financial services, various non-governmental organisations in Malaysia, such as the Association of Banks, intensified their efforts to defend consumer rights and advocate for consumer protection initiatives. In this regard, the Association of Banks in Malaysia developed a Code of Banking Practice to foster good relations among banking institutions and consumers. Though not binding in nature, the Code of Banking Practice sets standards for good banking practice for financial institutions to follow when dealing with their customers. Some of the provisions set out in such Code are the disclosure requirements of terms and conditions of loan agreements, and the requirement for banks to provide information to their customers in plain language.

In order to restrain high level of over-indebtedness among consumers, the Central Bank of Malaysia, in terms of section 48(1) (b) of the Central Bank of Malaysia Act, 2009, established the Credit Counselling and Debt Management Agency (Agensi Kaunseling dan Pengurusan Kredit) to provide debt management services and objective advice on financial budgeting, money management and credit related issues such as helping the individual develop a budget to manage their expenses. The Agency also helps debtors to develop personalized debt repayment plans in consultation with the respective financial service providers. These plans assist debtors to repay their debts and thus to regain control over their finances. Retail consumers are assisted in rescheduling or restructuring their housing loans, hire purchase loans and personal loans from, or

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446 Section 7 of the Code of Banking Practice, 2012, Malaysia.


outstanding credit/charge card balances due to, financial service providers regulated by the Central Bank of Malaysia. These services are offered free of charge to consumers.  

Another institution that has a consumer protection mandate is the Malaysian Deposit Insurance Corporation (MDIC) established in terms of section 3 of the Malaysian Deposit Insurance Corporation Act, 2011. The MDIC is mandated to administer a deposit insurance system and provide insurance against the loss of part or all deposits of which a bank or a deposit taking institution is liable. The Corporation serves as a financial safety net to make sure that depositors do not suffer losses if there is a bank failure.

5.4.2 Assessment of challenges facing consumer protection in the financial sector in Malaysia

Malaysia has enacted some laws that govern consumer credit. However, these laws are administered by different authorities. Thus, the Hire-Purchase Act, 1967 is under the jurisdiction of the Ministry of Domestic Trade and Consumer Affairs and regulates the business of hire purchase financing by credit companies. The Money Lenders Act 1951 is administered by the Ministry of Housing and Local Government and regulates money lending activities. One of the

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450 Act 720 of 2011
452 Some of these laws are such as the Hire-Purchase Act, 1967 (Act 212 od 1967) and Moneylenders Act, 1951 (Act 400 of 1951).
453 Act 212 of 1967
454 See preamble of the Hire-Purchase Act 21 of 1967
455 Act 400 of 1951
456 See the preamble of the Hire-Purchase Act 21 of 1967
shortcomings associated with these Acts is that they are scattered and do not offer adequate protection to consumers. For example, there is no provision in the Hire-Purchase Act that governs the terms and conditions of loans given to borrowers. Consequently, credit providers can impose any terms and conditions in their favour and at the expense of the consumers. The Act also does not set out licensing requirements for credit providers in the retail industry, although it makes provision for the regulation of hire purchase activities.\footnote{This situation is similar to the current situation in Namibia where the Credit Agreements Act, 1980 regulates aspects relating to credit agreements but does not require credit providers to be registered in terms of the Act.}

The Money Lenders Act caps interest rate on loans given out by moneylenders.\footnote{Sections 17 and 23 of the Money Lenders Act, 1951} However, monitoring and enforcement is lacking and there is no provision that prevents moneylenders from manipulating their activities for their own benefit and at the expense of borrowers. In addition to the Hire-Purchase Act, 1967 and the Moneylenders Act, 1951 mentioned above, there are other pieces of legislation such as the Banking and Financial Institutions Act, 1989\footnote{Act 372 of 1989} and the Pawnbrokers Act, 1972\footnote{Act 81 of 1972} which also regulate credit. However, there are some credit activities, such as fees charged on instalment credit and repossession fees, which are currently not subject to any legislative requirements which disadvantage consumers.\footnote{Lim, Y.K. 2011. \textit{Ministry of Domestic Trade and Consumer Affairs. Consumer Credit Regulations in Malaysia: A Country Report.} Available at: \url{http://www.ciroap.org/apcl/credit/docs/Yap%20Kon%20Lim%20-%20Malaysia.PDF}. [Accessed on 06 May 2016].}

The legislative framework for financial consumer protection in Malaysia is undergoing reform to provide sufficient powers to regulatory authorities to regulate business conduct of banks and other regulated entities. The reform focuses on, among others, clarifying the mandate of financial

In terms of the \textit{Financial Sector Blue Print 2011 – 2020} of the Bank Negara Malaysia, Malaysia will introduce a regulatory regime that addresses regulatory gaps with a view to formulate and operationalize a new consumer credit law. The consumer credit law to be enacted in Malaysia will provide for comprehensive protection to consumers, and consistent supervision and regulation of credit activities by the respective regulatory authorities. The law will be flexible and responsive to challenges confronting consumers and will provide greater clarity in consumer protection and market oversight in the consumer credit market.\footnote{Bank Negara Malaysia. 2011. \textit{Financial Sector Blue Print 2011 – 2020}. Kuala Lumpur, Malaysia. Available at: www.bnm.gov.my. [Accessed on 06 May 2016].}

\section*{5.5 Australia}

\subsection*{5.5.1 Overview of financial consumer protection in Australia}

The Competition and Consumer Protection Act, 2010\footnote{Act 148 of 2010} regulates all aspects relating to competition and consumer protection in Australia. The Act is a consolidation of a number of
Acts and Regulations dealing with consumer protection. The Act deals with, inter alia, the following issues: unfair contract terms, including prescribing standard form contracts; guaranteeing consumer rights when buying goods and services; product safety law and enforcement systems; regulating unsolicited consumer agreements; simple rules for lay-by agreements; and penalties, enforcement powers and consumer redress options. The Act is administered by the Australian Competition and Consumer Commission which regulates general consumer protection functions such as product safety and labeling, unfair market practices and price monitoring.

In 1998, the Australian government adopted the “twin peaks” model of regulation as a result of the recommendations of the Wallis Commission which had been tasked to examine the effect of the deregulation of the Australian financial systems in the 1980’s and 1990s. The Commission recommended restructuring of the financial regulation which led to the creation of two regulators in the financial sector, namely the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investments Corporation (ASIC).

APRA was established in terms of section 7 of the Australian Prudential Regulatory Authority Act, 1998 as the prudential regulator for banks, credit unions, building societies, general

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470 Act 50 of 1998
insurance and reinsurance companies, life insurance, private health insurance, and friendly societies.\textsuperscript{471} APRA’s powers include the licensing and supervising of financial institutions, and protecting depositors and policy holders in circumstances of financial difficulties and of taking control of entities and/or winding up insolvent entities.\textsuperscript{472} Although APRA has been relatively successful in its operation, it has also been faced with challenges arising from the ever changing and complex financial system and from public perception about its performance.\textsuperscript{473} Unlike a market conduct regulator whose success can easily be observed by the general public, the success of a prudential regulator, such as APRA, can hardly be measured by the public. It is therefore easier to judge the failure of APRA than to appreciate its successes which are mostly associated with the whole economy.\textsuperscript{474}

ASIC on the other hand was established in terms of section 8 of the Australian Securities and Investments Corporation Act, 2001\textsuperscript{475} to regulate market conduct of financial services providers in the financial sector. The functions of ASIC are to ensure market integrity among registered institutions, and enhance consumer protection.\textsuperscript{476} ASIC’s role involves ensuring that consumers have access to beneficial and safe financial products, and are protected against service providers that fail to operate in ways that are legal and fair to consumers.\textsuperscript{477}

\textsuperscript{471} Section 8(1) of the Australian Prudential Regulatory Authority Act, 1998
\textsuperscript{473} Cooper, J. 2006, note 453, page 8.
\textsuperscript{474} Cooper, note 453, page 8.
\textsuperscript{475} Act 51 of 2001.
\textsuperscript{476} Section 12A of the Australian Securities and Investments Corporation Act, 2001.
\textsuperscript{477} Cooper, 2006, note 453, page 4.
ASIC has powers relating to consumer protection, such as the power to investigate situations where a breach of the Act has occurred; to prosecute in a criminal court and to bring civil action against financial service providers who have violated any provision of the Act. However, ASIC, just like APRA, has faced regulatory challenges, such as keeping up with a rapidly evolving and complex financial system; balancing business facilitation with consumer protection; and managing investor and community expectations. Thus, the perception is that as a regulator, ASIC has not performed to the full satisfaction of both investors and the general public.\(^{478}\)

ASIC and APRA signed a Memorandum of Understanding which sets out a framework for cooperation between the two regulators in the areas of common interest, namely, prudential regulation and market conduct (consumer protection) regulation for the effective and efficient performance of their functions.\(^{479}\) In terms of the Memorandum, the regulators recognize the need to cooperate and collaborate at all levels with a view to effectively carry out their respective responsibilities.\(^{480}\) The two regulators further agree, subject to legislative provisions, to share and exchange information that may impact on their respective functions.\(^{481}\)

In addition to the role played by ASIC and APRA, Australia has the Financial Ombudsman Service (FOS) which is responsible for adjudicating consumer complaints in the financial sector. The FOS is non-governmental and non-profit organisation which provides free, fair and independent dispute resolution for consumers and financial service providers relating to banking, insurance, financial

\(^{478}\) Cooper, 2006, note 453, page 8.


\(^{480}\) Clause 4 of the Memorandum of Understanding between ASIC and APRA, 2010.

\(^{481}\) Clause 5 of the Memorandum of Understanding between ASIC and APRA, 2010.
planning and investments. The Ombudsman is a non-statutory organisation whose service is limited to its members and, as such, only customers of financial providers who are members of the FOS are eligible to lodge their complaints with the FOS. This arrangement disadvantages consumers of financial service providers who are not members of the FOS as they are left with no free dispute resolution platform through which they can have their complaints resolved. It should however be noted that although not compulsory, membership of FOS is open to any financial services provider carrying on business in Australia.

5.6 Preliminary conclusion

This chapter has provided an overview of financial consumer protection in selected jurisdictions, namely, South Africa, Zambia, Malaysia and Australia. It reveals that South Africa has a Consumer Protection Act, 2008 (CPA) which provides a comprehensive framework for consumer protection. The CPA co-exists with other legislation such as the National Credit Act, 2005, the Financial Advisory and Intermediaries Act, 2002, and the Financial Services Ombud Schemes Act, 2004. The CPA and the related mentioned laws above are interpreted concurrently, and in the event that there is a conflict between these Acts, the Act that affords better protection to consumers prevails. According to the National Treasury of South Africa, the country is moving towards the adoption of the “twin peaks” model of regulation where prudential and market conduct regulations will fall under the mandate of separate regulators. This approach was necessitated by, among other factors, the desire to consolidate consumer protection framework in the financial sector.

483 Ibid
The chapter further has revealed that the existing legal framework in the Zambian financial sector is inadequate and fragmented, making consumer protection enforcement and redress mechanism difficult. The discussion further has revealed that there are also overlaps between the Competition and Consumer Protection Commission and financial regulators such as the Bank of Zambia, the Pension and Insurance Authority, and the Securities and Exchange Commission. There is, therefore, a need for improved coordination and collaboration in the area of consumer protection in that country.

With regard to Malaysia, the chapter has revealed that the country has a comprehensive Consumer Protection Act, 1999. However, the Act does not apply to all sectors of the economy. There are also other pieces of legislation that deal with credit issues, but they are administered by different regulatory authorities. Some of the shortcomings of these laws are that they are scattered across various sectors thus making enforcement difficult. The chapter concludes by observing that there is a need to streamline the laws that deal with consumer protection in the financial sector in that country in line with the Financial Sector Blue Print 2011 – 2020.

Finally, the chapter also provided an analysis of consumer protection aspects in the Australian financial sector. It revealed that Australia has adopted the “twin peaks” model of regulation which has resulted in the creation of two regulatory authorities in the financial sector, namely, the Australian Prudential Regulatory Authority (APRA) and Australian Securities and Investments Corporation (ASIC). APRA is responsible for prudential regulation, whereas ASIC’s mandate involves (market conduct) consumer protection. The Financial Ombudsman Scheme is responsible
for customer complaints resolution in the financial sector. The chapter concluded that although financial regulators in Australia have recorded some successes, they face challenges such as the ever changing and complex financial system, and the high expectation from service providers and consumers alike.
CHAPTER 6: INTERNATIONAL AND REGIONAL INSTRUMENTS AND BODIES IMPACTING ON FINANCIAL CONSUMER PROTECTION

6.1 Introduction

This chapter gives an overview of the regional and international instruments and bodies whose functions and powers involve the protection of consumers. While the treaties and bodies discussed in this chapter are of international application, they have an impact on Namibia by virtue of article 144 of the Namibian Constitution, 1990 which states that the general rules of public international law and international agreements binding upon Namibia form part of the law of Namibia. Accordingly, the international agreements and instruments ratified by Namibia form part of the law of Namibia and remain in force unless and until the National Assembly, acting under Article 63(2) (d) of the Constitution, decides otherwise. Therefore, international instruments that offer protection to consumers of financial services, by implication, offer protection to consumers of financial services in Namibia. It is thus imperative that an overview of international instruments and bodies impacting on financial consumer protection is provided since these have an indirect impact on financial consumer protection efforts in Namibia.

Namibia is a member of a number of international organisations, including the Southern African Development Community (SADC) and the United Nations (UN), and has ratified a number of treaties and agreements made under these bodies. Some of the regional and international

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484 Act 1 of 1990
485 Article 143 of the Namibian Constitution
instruments ratified by Namibia that are relevant to consumer protection are, among others, the SADC Treaty\textsuperscript{486}, the United Nations Declaration on Human Rights\textsuperscript{487} and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{488} Although not a legally binding instrument, the United Nations Guidelines on Consumer Protection provide guidance to countries in formulating their domestic consumer protection laws. The above mentioned instruments have provisions relating to consumer protection, some more direct and relevant than others, and they form part of the law of Namibia by virtue of Article 144 of the Constitution.

In addition to the international instruments mentioned above, international bodies such as the Consumer International (established on 1 April 1960)\textsuperscript{489}, the Alliance for Financial Inclusion (formed in 2008)\textsuperscript{490}, the Consultative Group to Assist the Poor (established in 1995)\textsuperscript{491}, and the Group of Twenty (G-20) (established in 1999) are relevant to financial consumer protection. These bodies and the international instruments form the basis of the discussion in this chapter due to their relevance to financial consumer protection.

\textsuperscript{486} The SADC Treaty was signed by His Excellency Dr. Sam Nujoma, Founding President of the Republic of Namibia, on 17 August 1992 in terms of Article 32(3) (e) of the Namibian Constitution. See the SADC Treaty, available at: http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf. [Accessed on 08 September 2015].

\textsuperscript{487} United Nations Declaration of Human Rights, 1948. Namibia ratified this treaty upon independence in 1990.


The United Nations *Guidelines on Consumer Protection* are declarations of best practices in consumer protection law and policy that were adopted by the United Nations General Assembly on 9 April 1985.\(^\text{492}\) The *Guidelines* call upon governments to develop consumer protection policies with the following objectives: to promote and protect economic interests of consumers; ensure that consumers have access to adequate information to enable them to make informed choices; ensure that consumers are educated about their rights; and ensure that effective redress mechanism exists for consumers to have their complaints against service providers resolved.\(^\text{493}\)

Although not binding, the *Guidelines* provide a set of basic consumer protection objectives upon which governments have agreed, thereby serving as a policy framework for implementation at national level. Countries that have comprehensive consumer protection laws, such as Malaysia and South Africa, have incorporated provisions of the *Guidelines* in their national legislation. Namibia adopted the *Guidelines* in 2010 making it the third African country to adopt the *Guidelines*.\(^\text{494}\)

The *Guidelines* encourage governments to develop, strengthen and maintain a strong consumer policy that provides comprehensive protection to consumers. The *Guidelines* address issues such as physical safety, promotion and protection of consumers' economic interests, standards for the

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safety and quality of consumer goods and services, distribution facilities for essential consumer goods and services, and measures enabling consumers to obtain redress. National governments are required to develop or maintain a strong consumer protection policy, taking into account their own priorities for the protection of consumers in accordance with their economic, social and environmental circumstances and the needs of their population.

In relation to the financial sector, the consumer needs relating to the protection of consumers in the financial sectors which the Guidelines intend to address include the promotion and protection of the economic interests of consumers; access of consumers to adequate information to enable them to make informed choices; consumer education; availability of effective consumer redress; and freedom to form consumer and other relevant groups or organisations and the opportunity of such organisations to present their views in decision-making processes affecting them. The Guidelines further provide that consumer organisations should be encouraged to monitor adverse practices such as contamination of food, and false or misleading marketing of food products.

It is worth noting that the majority of aspects mentioned above are contained in the draft Consumer Protection Bill of Namibia and in some sectoral laws in various economic sectors, for example, disclosure of information in plain language and redress mechanisms. Further, as indicated in chapter 4, consumer groups exist in Namibia in line with objective 4 of the Guidelines and one

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such group represents consumers’ interests at various platforms such as the Financial Literacy Initiative and the Advisory Body to the Financial Inclusion Council.\textsuperscript{499}

The \textit{Guidelines} have two sets of provisions, namely, the provisions regarding the assistance to be rendered to consumers to protect their interests; and provisions regarding responsibilities of governments to make necessary laws and regulations to protect consumers.\textsuperscript{500} The \textit{Guidelines} require governments to provide and maintain adequate infrastructure to develop, implement and monitor consumer protection policies for the benefit of all sectors of the population particularly the rural population and people living in poverty.\textsuperscript{501}

Although the \textit{Guidelines} cut across all the sectors, there are provisions that apply particularly to the economic interests of consumers. In this regard, governments are required to create policies that enable consumers obtain optimum benefit from their economic resources\textsuperscript{502} (this could include their deposits, investments and insurances placed with financial institutions). The \textit{Guidelines} require governments to create an enabling environment for fair business practices, informative marketing and effective protection against practices which could adversely affect the economic interests of consumers.\textsuperscript{503}

\textsuperscript{499} Section 1 (e) of the UN Guidelines calls for governments to facilitate the development of independent consumer groups. These groups should be provided with opportunities for presenting their views in the decision-making process or to speak up on behalf of consumers and, in particular, measures are to be put in place to represent the interests of disadvantaged consumers.


\textsuperscript{501} Section 2 of the UN \textit{Guidelines on Consumer Protection}, 1985

\textsuperscript{502} Section 2 of the UN \textit{Guidelines on Consumer Protection}, 1985

\textsuperscript{503} Section 15 of the UN \textit{Guidelines on Consumer Protection}, 1985
The Guidelines provide that Consumers should be protected against one-sided standard contracts that exclude consumer rights in the contracts.\textsuperscript{504} Information about products and services should be accurate to enable consumers make independent and informed choices considering appropriateness and affordability of products and services.\textsuperscript{505} The Bank of Namibia has devised mechanisms to deal with unfair terms and the need for use of plain language in financial contracts as discussed in chapter three of this thesis.\textsuperscript{506}

The provisions of the Guidelines that are relevant to consumer protection in the financial sector are the redress mechanisms and consumer education. The Guidelines call for the establishment or maintenance of measures to enable consumers to obtain redress through formal or informal procedures that are fast, fair, inexpensive and accessible, taking into account the needs of low income consumers.\textsuperscript{507} In this regard, the Namibian financial sector is in the process of establishing the Financial Services Adjudicator which will be responsible for resolving customer complaints in the financial sector. As discussed in chapter three, the Financial Services Adjudicator Bill is expected to be tabled in Parliament during 2017/2018 Financial Year.

Finally, with regard to consumer education, the Guidelines encourage governments to develop general consumer education and information programmes to enable consumers to obtain necessary information to make informed choices of goods and services.\textsuperscript{508} Again, Namibia has made remarkable strides in general consumer education. The Ministry of Finance launched the Financial

\textsuperscript{504} Section 21 of the UN Guidelines on Consumer Protection, 1985
\textsuperscript{505} Section 22 of the UN Guidelines on Consumer Protection, 1985
\textsuperscript{506} Refer to the Draft Regulations relating unfair terms in contracts between banking institutions and their customers as discussed in chapter 3 of this thesis.
\textsuperscript{507} Principle 32 of the UN Guidelines on Consumer Protection, 1985
\textsuperscript{508} Principle 35 of the UN Guidelines on Consumer Protection, 1985
Literacy Initiative in 2012 as a platform to increase consumers’ knowledge and skills on financial services and products and educate consumers about their rights and responsibilities.\(^{509}\)

6.3 Southern African Development Community (SADC) Treaty

The Southern African Development Community (SADC) is a regional economic community established in terms of article 2 of the SADC Treaty.\(^{510}\) SADC\(^{511}\) was established on 17 August 1992 in Windhoek after it was transformed from its predecessor the Southern African Development Co-ordination Committee. The main objective of SADC is the promotion of regional integration and poverty eradication within the region through economic development.\(^{512}\)

The SADC Treaty does not have a specific provision dealing with consumer protection. However, some legal instruments of SADC have express and implied consumer protection provisions. Some of these instruments include the SADC Protocol on Trade, 1996\(^{513}\), and the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, 2009.\(^{514}\) The SADC Protocol on Trade requires member States to implement measures within the region to prohibit unfair business


\(^{510}\) SADC Treaty, 1992

\(^{511}\) SADC is made up of 15 Member States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

\(^{512}\) The objectives of SADC are contained in Article 5 of the SADC Treaty (1992).


practices and promote competition.\textsuperscript{515} The Protocol discourages all forms of business practices that have a negative impact on consumers and other business operators within a given market.\textsuperscript{516}

Similarly, the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, 2009 calls for the establishment of a system of effective cooperation in the application of member States’ respective competition and consumer protection laws.\textsuperscript{517} In the same vein, the Declaration requires members States to take the necessary steps to adopt, strengthen and implement the necessary competition and consumer protection laws in their respective countries.\textsuperscript{518} In order to ensure effective cooperation on competition and consumer protection, SADC mandates its Secretariat to establish a standing Competition and Consumer Policy and Law Committee (CCOPOLC) to implement the system of cooperation between member States. Some of the functions of CCOPOLC that have a bearing on consumer protection are to foster cooperation in the field of consumer protection, and to consider the link between trade, competition and consumer protection policies in the promotion of growth and alleviation of poverty.\textsuperscript{519}

In the financial sector, SADC Member States signed the Protocol on Finance and Investments in 2006.\textsuperscript{520} The Protocol strives to encourage cooperation and coordination among Member States regarding exchange controls, information and communications technology, and regulatory and supervisory policies among the Central Banks of SADC’s Member States.\textsuperscript{521} The Protocol also

\begin{itemize}
\item \textsuperscript{515} Section 2 of the SADC Protocol on Trade, 1996
\item \textsuperscript{516} Article 17 of the SADC Protocol on Trade, 1996
\item \textsuperscript{517} Section 1(a) of the SADC Declaration on Regional Cooperation in Competition and Consumer Policies
\item \textsuperscript{518} Section 1(b) of the SADC Declaration on Regional Cooperation in Competition and Consumer Policies
\item \textsuperscript{519} Article 2(b) and (v) of the Protocol on Trade, 1996
\item \textsuperscript{520} SADC Protocol on Finance and Investment, 2006. Available at: www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf. [Accessed on 08 May 2016].
\item \textsuperscript{521} Article 6 of the SADC Protocol on Finance and Investment, 2006.
\end{itemize}
puts an obligation on Member States to develop harmonised standards of practice and regulations, and to ensure that all SADC Central Banks follow common procedures and operational frameworks.522

SADC has taken steps to ensure that legal and regulatory measures are in place to ensure financial stability in the region. Therefore, pursuant to Annex Eight (8) of the SADC Protocol on Finance and Investments, the Committee of Central Bank Governors (CCBG) in the Southern African Development Community (SADC)523 signed a Memorandum of Understanding (MoU) that facilitates co-operation and co-ordination in the area of banking, regulatory and supervisory matters.524 In order to facilitate effective implementation of the MoU, the SADC Committee of Central Bank Governors (CCBG) established the SADC Subcommittee of Banking Supervisors (SSBS) to spearhead the process. The SSBS proposed the drafting of a Model Banking Law for the region in order to achieve the objective of harmonisation of banking regulatory and supervisory practices across the SADC region.525

The SSBS Steering Committee constituted a Working Group to spearhead the development of the Model Banking Law.526 The Working Group conducted a survey in the region regarding the state of consumer protection in the financial sector. It found that some of the member states have a

522 Ibid.
523 The Committee of Central Bank Governors (CCBG) was established in terms of Article 10 of the SADC Treaty to foster cooperation among Central Banks in SADC Region.
526 The researcher is a member of the Working Group that is tasked with the development of the Model Banking Law. The Working Group held a meeting in Dar es Salaam, Tanzania on 27 to 29 July 2015 to draft the Model Banking Law.
general consumer protection law that also applies to financial institutions. Most of the member states’ laws do not provide for the establishment of the office of the Ombudsman and where one is established, such office is not specific to the whole financial sector. The Working Group therefore recommended for a model law that provides clear consumer protection rules regarding financial products and services.

It is anticipated that the envisaged law will incorporate provisions that seek to achieve, among others, the promotion of effective product disclosure in order to provide consumers with relevant information for making informed financial decisions and to facilitate comparison of financial products and services by consumers; it should also provide for the promotion of responsible credit granting and control over-indebtedness. The law should also provide consumers with access to an affordable and efficient mechanism for recourse, such as an independent financial Ombudsman or equivalent institution with effective enforcement capacity. The independent financial Ombudsman would deal with complaints that could not be handled satisfactorily by the respective financial institutions. It is expected that Member States will incorporate provisions of the model banking law into their domestic laws, and to harmonise these laws among member states with the view to promote regional development and economic integration in SADC region.

Another notable initiative in the area of consumer protection in SADC is the consumer protection project led by FinMark Trust. FinMark Trust is an independent trust based in South Africa and

\[529\] Ibid, page 29.
funded primarily by UKAid\textsuperscript{531}. The main purpose of FinMark Trust is to promote financial inclusion and regional financial integration in order to increase access to financial services for the un-served and underserved population.\textsuperscript{532} As part of its mandate, FinMark Trust commissioned a study in June 2015 on Consumer Protection in SADC focusing on financial consumer protection. The study reviewed, among others, the effectiveness of laws and implementation of consumer protection laws in SADC; the supervisory capacity of supervisory and oversight bodies, including mechanisms to monitor consumer protection and market conduct of financial service providers; and the effectiveness of institutional capacity to implement and enforce consumer protection frameworks.\textsuperscript{533}

The above mentioned study was commissioned in recognition of the fact that as countries seek to increase financial inclusion and embrace more consumers into the formal financial sector it is important to understand whether the consumer protection regulatory frameworks and implementation thereof are effective to protect consumers in the financial sector.\textsuperscript{534} The study should therefore assist authorities in SADC to understand consumer protection challenges facing the region, develop minimum requirements for protecting low income consumers, and establish a framework that allows countries in the region to assess the adequacy of consumer protection in the financial sector.

\textsuperscript{534} ibid

Namibia became a member of the United Nations in April 1990, and consequently became a party to the United Nations Declaration of Human Rights (UNDHR), 1948. The UNDHR is a general rights treaty with no specific articles addressing consumer protection. Elements of consumer protection, however, fall within the universally recognised rights such as the rights to security, privacy, family, assembly and association, access to public services, social security, adequate standard of living, education, and an effective remedy for violations of rights. The UNDHR forms part of the laws of Namibia by virtue of Article 144 of the Constitution and therefore the country is obliged to take steps to protect the human rights outlined in the Declaration.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and came in force from 3 January 1976. The Covenant commits State Parties to work toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living.

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

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535 These rights are enshrined in the UNDHR.
It is submitted that complaints by consumers against financial service providers involve violation of economic rights of consumers. While these rights are recognised in Namibia, they are not prominently outlined in the Constitution as other fundamental rights such as political rights. It is further submitted that despite Namibia having ratified the International Convention on Economic, Social and Cultural Rights (ICESCR) which commits member countries to work toward the granting of economic, social, and cultural rights to individuals, the promotion of consumer protection issues, which are largely part of economic rights, has not gained prominence in the past.

### 6.5 Consumer International

Consumer International (CI) is an independent international federation of consumer groups founded in 1960. The organisation currently has over 240 member organisations in 120 countries around the world. Its membership ranges from different independent consumer organisations to semi-voluntary associations providing information and advice about basic services. As indicated, in chapter 5, Namibia Consumer Trust is a member of the Consumer International, having joined the organisation on 05 December 2012.

The objects of Consumer International are, among others, to stimulate the development of charities and voluntary organisations dealing with consumer issues; to promote education by promoting an

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understanding of consumer rights and responsibilities; and to promote public health by, among others, promoting the appropriate and proper regulation of products and services. Consumer International is guided by the eight basic consumer rights which include right to safety; right to information; right to make informed choices; right to be heard; right to a healthy environment; right to a fair settlement and redress; and right to consumer education.

In 2012, Consumer International launched its Strategic Plan for 2013 to 2015 focusing on financial services, food safety, consumers’ access to reliable, affordable and safe communication networks; and consumer justice and protection. With regard to financial services, the programmer focuses mainly on consumers’ access to safe, fair and competitive financial services; fair contracts; information disclosure; and redress and dispute resolution. Through such programme, consumers are sensitised to compare products and services of banks, and to switch banks in order to get better deals. The organisation also campaigned for increased competition in the financial sector world-wide to reduce the cost of international money transfers. Consumer International also launched the campaign under the theme “Know Your Money: How to provide financial education in Africa”. The campaign focused on financial education activities in Kenya and Tanzania to help consumer groups provide financial education to consumers in their respective countries.

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543 Ibid, page 2
544 Ibid, page 3
6.6 Alliance for Financial Inclusion (AFI)

The Alliance for Financial Inclusion (AFI) established in 2008 is a non-statutory global network of financial inclusion policy-making bodies in developing countries. AFI membership comprises of 115 central banks and other financial regulatory institutions from 94 countries. AFI provides its members with a platform of sharing, developing and implementing their knowledge and skills regarding financial inclusion policies. AFI has various financial inclusion working groups such as the Working Group on Digital Financial Services, the Working Group on Small and Medium Enterprises (SME) Finance, and the Consumer Empowerment and Market Conduct Working Group which involves consumer protection issues in the financial sector.

The AFI established the Consumer Empowerment and Market Conduct Working Group in 2011 as a platform for policy makers in the AFI Network to explore policy and regulatory issues related to financial consumer protection. The Working Group was established in recognition of the importance of the empowerment and protection of financial consumers in securing access to financial services and improving its quality. Since its launch in 2011, the Working Group has been working towards developing common understanding of best practices in consumer protection that can be adopted by member organisations to strengthen their national financial consumer protection programmes. The Working Group focuses on the following key areas, namely: transparency and

549 The Bank of Namibia is a member institution of the Consumer Empowerment Working Group and the author represented the Bank at the Working Group meeting held in September 2013 in Kuala Lumpur, Malaysia.
disclosure; responsible lending practices; help and redress for financial consumers; financial literacy and awareness; institutional framework and supervision, and sales and marketing practices.550

Regarding transparency and disclosure, the Working Group found that most countries have transparency and disclosure regulations that apply to financial services. These regulations need to be reviewed regularly to evaluate their effectiveness in supporting informed decision making by consumers.551 The Working Group also established that a mere disclosure of a cost of financial product may not be sufficient. The Working Group recommended that financial service providers should formulate a separate mandatory disclosure form on key terms and conditions which must be disclosed before the agreement between a consumer and a service provider takes effect.552 Further, the Working Group recommended that financial regulators should prescribe a formal procedure for disclosing information to ensure that the consumers receive adequate information about financial services or products.

Some jurisdictions and member organisations of the AFI that already have disclosure requirements on the cost of financial services practices in existence may provide a learning opportunity to other members in this regard. For example, the Bank of Namibia requires all banking institutions to disclose all bank fees and charges to ensure that consumers take informed decisions when engaging in financial transactions with banking institutions.553 The Bank also collects, annually, information on fees and charges through statutory returns as required by the Determinations on the Disclosure

552 Ibid, page 2.
of Bank Charges, Fees, and Commission (BID – 13). The information submitted to the Bank is analysed and verified by the Bank’s Examiners. In line with its objective of enhancing public information and transparency in the banking sector, the Bank publishes, annually, comparative reports reflecting the fees and charges as reported by the banking institutions. Other member organisations can learn from the Bank of Namibia in this regard.

The Consumer Empowerment and Market Conduct Working Group has recommended that disclosure requirements must apply to both banking and non-banking financial service providers.554 This disclosure includes pre-contractual disclosure to assist consumers in assessing the costs relating to financial product or service; contractual disclosure to inform consumers of important features of financial products or service; and disclosure throughout the term of the agreement mainly involving outstanding balances and all fees charged by consumer.555

The AFI Consumer Empowerment and Market Conduct Working Group regards that a reliable and robust redress mechanisms is a core component of an effective consumer protection framework.556 According to AFI, an ideal effective consumer protection framework involves establishing internal and external complaint-handling procedures that ensure that disputes between consumers and financial service providers are dealt with fairly and expeditiously. A complaint-handling mechanism should therefore be independent, transparent and provided at no cost to consumers.

554 Guideline Note No. 6, page 3.
For the redress mechanisms to be effective, the *Guiding Note* of the Consumer Empowerment and Market Conduct Working Group recommends for the financial regulators to prescribe minimum standards for internal complaint resolution processes. The complaint resolution processes within a particular banking or non-banking institution should be assigned to a specific department or section that will be responsible for handling customer complaints lodged against that particular financial institution.\(^{557}\) All complaints should be recorded in a register which should be available to the regulator for regular inspection.\(^{558}\) Financial service providers are required to provide periodic statistics to the regulators showing the number of complaints reported and the manner in which they were resolved.

According to AFI, consumers should be informed about the complaint resolution mechanism available at the financial services provider’s premises and the external dispute resolution mechanisms through which consumers can lodge their complaints if they are not satisfied with the manner in which their complaints were handled by the financial service providers.\(^{559}\) In the case of Namibia, banking institutions are required to inform consumers about their rights to refer their complaints to the Bank of Namibia if they feel that their complaints were not satisfactorily resolved.\(^{560}\)

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\(^{558}\) Ibid, page 3.


AFI has recognised that general consumer protection laws do not adequately address the needs of consumers of financial services. Therefore, there is a need to formulate consumer protection frameworks that address the peculiar needs of consumers of financial products and services. AFI has, however, acknowledged that consumer protection legal frameworks of individual jurisdictions are unique and may not be interchangeable from country to country. In the process of structuring an appropriate consumer protection legal framework, it is recommended that respective countries should consider factors such as, the stage of market development of the particular country, products and services used by unsophisticated and vulnerable populations such as illiterate persons and low income earners in the society.

6.7 The Consultative Group to Assist the Poor (CGAP)

The Consultative Group to Assist the Poor (CGAP) is a global partnership of 34 leading organizations that seek to advance financial inclusion. CGAP’s main objective is to improve the lives of poor people by stimulating innovations and advancing programmes that promote responsible, sustainable, and inclusive financial markets.

563 Ibid, page 5.
565 Financial inclusion refers to a state in which all working age adults have access to credit, savings, payments and insurance from formal service providers. See CGAP. Global Standard Setting Bodies and Financial Inclusion for the Poor. Available at: http://www.gpfi.org/sites/default/files/documents/SSBs%20paper.pdf. [Accessed on 08 May 2016]. Financial inclusion mainly focuses on access to financial services and consumer protection. See Namibia Financial Sector Strategy 2011-2021, page 25.
According to CGAP, consumer protection is an essential element of inclusive financial systems to ensure transparent financial services, fair treatment of consumers by financial service providers and confidence in the financial system. Thus, in CGAP’s views, the main objectives of financial consumer protection should focus on transparency, fair treatment, risk mitigation, and effective recourse mechanism.

In order to realise the above objectives, CGAP has formulated the consumer protection principles that articulate the standards of care that consumers should expect to receive when doing business with a financial service provider. The principles cover aspects such as appropriate product design; prevention of over-indebtedness; transparency; responsible pricing; fair and respectful treatment of clients; privacy of client data; and mechanisms for complaint resolution.

The above mentioned principles outline specific expectations which service providers should meet in order to ensure that their products and services comply with minimum requirements for financial consumer protection. Financial service providers are required to design products and services that are appropriate to consumers. Lending institutions should conduct comprehensive affordability assessment to determine that clients have the capacity to repay the loan without becoming over-indebted.

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571 The Smart Campaign. Client Protection Principles. (Principle 1 - Appropriate product design and delivery)
In line with CGAP’s Consumer Protection Principles, it is submitted that the setting of fees and charges of financial products should be set in a cost reflective manner, and sufficient and timely information on banks fees should be provided to consumers to enable them to make informed decisions. Financial service providers should treat their customers fairly and respectfully and there should be mechanisms to resolve complaints in the event of a dispute between a service provider and a consumer. It is further submitted that the privacy and confidentiality of individual client data should be respected and consumer data should only be disclosed and disseminated in accordance with the laws and regulations of individual jurisdiction. Such data should only be used for the purposes specified at the time the information was collected or as permitted by law, unless otherwise agreed with the client.

The above mentioned principles serve as guidelines for effective consumer protection legal framework. While they merely serve as guidance, they have been incorporated in national consumer protection laws of various countries. Thus, for example, the Consumer Protection Act, 2008 of South Africa has requirements relating to disclosure of information to consumers and mechanisms for dispute resolution. In Namibia, these principles are contained in the Determination on Disclosure of Fees and Charges (BID -13); the Credit Bureau Regulations, 2014; the proposed Consumer Protection Bill, 2015; and the Financial Services Adjudicator Bill, 2015.

572 Section 23 and sections 70-72 of the Consumer Protection Act, 2008 (Act 68 of 2008)
573 Section 2 of BID-13
574 Regulation 24 of the Credit Bureau Regulations, 2014
575 Section 18 of the Consumer Protection Bill, 2015
6.8 The Group of Twenty (G-20)

The Group of Twenty, or the G-20 as it is commonly known, is an international forum for governments and central bank governors from 20 developed countries of the world. G-20 was created in response to the global financial crisis of 1997-1998. The main objectives of G-20 are to coordinate policies between its members in order to achieve global economic stability and sustainable growth; and to promote financial regulations that reduce risks and prevent future financial crises.

The members of the G-20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union (EU) represented by the European Commission. There were no set criteria to determine which countries would join the Group but membership was rather determined by individual countries’ significance to the global economy and their ability to contribute to global economic and financial stability.

576 Section 2 of BID-13
576 Regulation 24 of the Credit Bureau Regulations, 2014
576 Section 18 of the Consumer Protection Bill, 2015
580 ibid, page 20.
The G-20 is committed to financial consumer protection and its commitment is expressed in the
developed as a response to the G-20 Finance Ministers’ and Central Bank Governors’ call to
develop common principles on consumer protection in the field of financial services.\footnote{OECD. G-20 High Level Principles on Financial Consumer Protection, page 1.} They were
designed to assist G-20 countries and other interested economies to enhance financial consumer
protection.

The G-20 High Level Principles on Financial Consumer Protection were formulated in almost
similar manner like other international principles for financial consumer protection, such as
CGAP’s Consumer Protection Principles, discussed in the previous section. The G-20 Principles
deal with aspects such as equitable and fair treatment of consumers; disclosure and transparency
of information; financial education and awareness; responsible business conduct of financial
services provider; protection of consumer assets against fraud and misuse; protection of consumer
data and privacy; complaints handling and redress; and competition.\footnote{OECD. G-20 High Level Principles on Financial Consumer Protection, page 5.}

The above mentioned principles are not meant to substitute any existing international principles
and/or guidelines, but do complement existing initiatives in enhancing financial consumer
protection.\footnote{OECD. G-20 High Level Principles on Financial Consumer Protection, page 4.} G20 members and other interested countries are urged to review their national
frameworks for financial consumer protection and promote international co-operation to support the strengthening of financial consumer protection in line with the principles.

6.9 Preliminary conclusion

This chapter has analysed regional and international instruments and bodies which are relevant to consumer protection. The chapter has revealed that Namibia ratified the SADC Treaty and United Nations treaties such as the United Nations Declaration on Human Rights (UNDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties have provisions which have bearing on consumer protection, some are more direct and relevant, while others have less relevance. These instruments form part of the law of Namibia by virtue of Article 44 of the Constitution.

The chapter also discussed international bodies involved with financial consumer protection, such as the Alliance for Financial Inclusion (AFI), the Consultative Group to Assist the Poor (CGAP), and the Group of Twenty (G-20). These bodies provide guidance and technical support to interested countries (members and non-members alike) to strengthen their financial consumer protection frameworks. Namibia should adopt the provisions of the above instruments and the consumer protection principles of the international bodies to strengthen its financial consumer protection programs.
CHAPTER 7: REPORT ON THE EMPIRICAL FINDINGS OF THE STUDY

7.1 Introduction

This chapter presents the findings of the empirical study conducted by the researcher to determine the adequacy and effectiveness of consumer protection legal framework in the Namibian financial sector. In order to obtain a comprehensive view regarding the effectiveness of consumer protection framework in the sector, questionnaires were developed to guide the study. The questionnaires were distributed to selected research subjects comprising of representatives of consumer groups and officials dealing with customer complaints at the Bank of Namibia and NAMFISA. Face-to-face interviews were conducted with individual customers of commercial banks and micro lenders using structured questionnaires.

The research subjects comprised of individual customers of financial institutions as opposed to corporate customers. Throughout this study, the focus of consumer protection is largely on natural persons because it is believed that corporate customers have resources required to enforce their rights against financial institutions if such rights have been violated. The position adopted by the researcher is in line with the scope of consumer protection legislation in countries surveyed in this study, namely, South Africa, Zambia, Australia and Malaysia, where the scope of consumer protection laws is restricted to natural persons as consumers and not on corporate entities. Furthermore, generally, the definition of consumer is restricted to persons who buys goods or services for personal use and not for business purposes, and for this reason the researcher

See Standard Credit Corporation Ltd v Strydom 1991 (3) SA 644(W) in which the court stated that the credit receiver ceases to be a consumer if he does not intend to use the goods himself.
deemed it fit to interview individual customers and not corporate entities. The exclusion of corporate entities is also supported by the fact that the jurisdiction of the envisaged Financial Services Adjudicator will be limited to complaints lodged by natural persons against financial institutions, and not complaints lodged by corporate entities.

The interviews were held in Khomasdal and Katutura suburbs of Windhoek during October 2015 with individual customers of financial institutions particularly, banks and microlenders. The interviews were held in Windhoek because the head offices of financial institutions against which consumers submit complaints are based in Windhoek. Although only comprised of residents of Windhoek, the study population is considered representative because it consisted of people from different socio-economic environment.

The research sample consisted of twenty two (22) respondents comprising of eighteen (18) individual customers of financial institutions, two (2) customer complaint officers/managers of the regulatory authorities and two (2) representatives of consumer groups. The research subjects were selected based on their apparent diverse views on consumer protection issues in the financial sector. Individual customers of financial institutions were preferred because they are regarded as primary sources of information on the subject matter. Women and the elderly particularly formed the majority of the research subjects as their rights to access finance are perceived to be of great interest, particularly in view of the findings of the FinScope Survey of 2011 which revealed that women had limited access to finance in comparison with men586.


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Consumer groups were considered interesting research subjects because of the advocacy role they play in broader consumer protection issues. Consumer protection/complaint officers and managers at the Bank of Namibia and NAMFISA provide consumer protection views from regulatory perspective and therefore their views on the effectiveness of consumer protection legal tools are deemed significant in this study.

It is the researcher’s considered views that the research sample provides balanced and objective assessment on the effectiveness of the consumer protection legal framework in the financial sector in Namibia.

7.2 Key research questions

The overall objective of the research was to provide information about the effectiveness of consumer protection in the financial sector from consumer, consumer advocacy and regulatory perspectives. The research was generally aimed at determining whether the consumer protection legal framework in the Namibian financial sector was adequate and effective, and if found ineffective, what were the shortcomings and the potential corrective measures that would be put in place to address identified deficiencies.

The research specifically addressed the following questions:
(a) Do consumers experience any problems when they transact with financial service providers?

(b) What are the areas that need improvement in order to ensure effective consumer protection framework in the financial sector?

(c) How can the regulators in the financial sector ensure that consumers of financial services and products are adequately protected?

(d) How can consumer groups and other non-governmental organisations assist in ensuring that consumers in the financial sector are adequately protected?

(e) How do consumers understand the role of the regulators in the financial sector in protecting the interests of consumers?

(f) What are the key consumer protection issues in the financial sector that need urgent consideration?

(g) What do consumers do in the event that they experience problems with products or services offered by financial service providers?

(h) Are consumers aware of their rights, and do they know how and to whom to complain in the event of a dispute arising between them and financial service providers?

Table. 1: Number of responses per research question in percentage

<table>
<thead>
<tr>
<th>Research questions</th>
<th>Responses by respondents in percentage (%)</th>
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<tbody>
<tr>
<td>(a) Do consumers experience any problems when they transact with financial service providers?</td>
<td>90%</td>
</tr>
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</table>
(b) What are the areas that need improvement in order to ensure effective consumer protection framework in the financial sector?

(c) How can the regulators in the financial sector ensure that consumers of financial services and products are adequately protected?

(d) How can consumer groups and other non-governmental organisations assist in ensuring that consumers in the financial sector are adequately protected?

(e) How do consumers understand the role of the regulators in the financial sector in protecting the interests of consumers?

(f) What are the key consumer protection issues in the financial sector that need urgent consideration?

(g) What do consumers do in the event that they experience problems with products or services offered by financial service providers?

(h) Are consumers aware of their rights, and do they know how and to whom to complain in the event of a dispute arising between them and financial service providers?

The above questions formed the basis of the study and, as earlier indicated, were directed to research subjects to obtain their views on the effectiveness of consumer protection framework in the financial sector. The response rate of the study was 95%.
7.3 Challenges faced with the empirical study

The researcher faced few challenges during the data collection process. There was a significant delay from some data subjects in returning responses to the questionnaire. The researcher had to make regular follow-ups reminding research subjects of the importance of having all completed questionnaires returned for analysis. The researcher also highlighted the importance of their responses and the value they would add to the study and to overall reshaping of consumer protection framework in the financial sector in Namibia.

The researcher received favourable responses from officials who deal with customer complaints at the Bank of Namibia and NAMFISA as well as from the Namibia Consumer Trust, the biggest consumer advocacy group in Namibia. The other consumer group, the Namibia Consumer Protection Group opted not to return responses despite follow-ups and reminders by the researcher. However, the researcher is confident that the views expressed and the inputs provided by the Namibia Consumer Trust represent the views of the majority of consumers by virtue of the Trust being the biggest consumer advocacy group and having represented Namibian consumers at various international consumer protection fora.

The individual consumers who formed part of the research subjects generally rendered positive cooperation to the researcher during the interviews. This was particularly due to the fact that the questionnaires were generally shorter in length and the interviews were conducted in a relatively shorter period of time. However, some individual research subjects were initially suspicious, expressing concerns that the researcher might be an agent of a political party recruiting new
members. This was particularly in consideration of the fact that regional councils and local authority elections were held in November 2015 and some political parties were hard at work conducting political mobilisation recruiting new members and canvassing for votes.

These concerns were allayed when the researcher identified himself to be a student of the University of Namibia and explained in detail the purpose of the research emphasising that the research was purely for academic purposes and that the information gathered would be kept strictly confidential.

Ultimately, the data collection process was successful and the researcher was convinced that data generated during the process would significantly contribute to the realisation of the objectives of the study.

7.4 Discussion of research findings

The majority of the respondents feel that the consumer protection framework in the Namibian financial sector is inadequate and ineffective. The consumer groups are of the views that a lot requires to be done to address certain consumer protection aspects. The issue of home loans requires urgent attention because consumers are inadequately protected against undesirable practices by lending institutions, particularly in the process of loan disbursement and collection. According to consumer groups, the current high property prices could be partly attributed to a lack of proper regulation of some aspects relating to home loans.

\footnote{Field note 1.}
The consumer groups argue that the regulators in the financial sector (Bank of Namibia and NAMFISA) often focus their attention to safeguarding the stability of the financial system while neglecting their equally important role of protecting the interests of consumers. They further argue that in as much as regulators seek to promote public confidence in the financial system, such efforts are meaningless because public confidence in the sector can be tainted by inadequate and ineffective consumer protection in the sector.\textsuperscript{588}

According to consumer groups, the regulators should devise meaningful strategies to improve consumer protection in the financial sector, instead of focusing on warning consumers against taking loans for consumption purposes and for acquiring luxury unproductive goods to contain escalating household debts.\textsuperscript{589} They further suggest that the regulators should conduct extensive consultations with consumers before any law that affect consumers’ interests is passed. This practice would ensure that consumers, through consumer groups, provide their inputs and that their views are duly considered by policy makers in as far as their rights and obligations in terms of contracts between them and lending institutions are concerned.

Consumer groups are also concerned about perceived lack of competition in the financial sector. They argue that there is little or no competition among financial service providers as most of them offer similar products and/or services almost at the same cost. Consumer groups indicate that it appears that financial institutions, particularly commercial banks and micro lenders, collude among themselves to offer similar products and services at the same rate to avoid economic

\textsuperscript{588} Views of consumer groups. Refer to field note 1.
\textsuperscript{589} Field note 2.
hardships that may befall a particular financial institution should it be driven out of the business as a result of fierce competition. According to consumer groups, lack of competition among financial institutions is detrimental to consumers as it prevents them from benefiting from low costs of products and services as well as from efficient service delivery. The consumer groups requested the financial regulators (Bank of Namibia and NAMFISA) to collaborate with the Namibia Competition Commission to investigate and address this matter as a matter of urgency as it can affect consumers negatively and potentially harm public confidence in the financial system.

On the question of how consumer groups and other non-governmental organisations could assist in ensuring that consumers in the financial sector are adequately protected, consumer groups indicate that there is little that they can do because there is no law in Namibia that recognises their role. They pointed out that the best consumer groups can do is to continue educating consumers about their rights regarding financial transactions. According to consumer groups, playing consumer advocacy role in the financial sector is difficult, particularly due to the fact that financial service providers are generally “hostile” towards consumer groups unlike in other sectors of the economy. Further, consumer advocacy role in the financial sector is made enormously difficult because financial transactions are generally complicated and the quality of financial service is often difficult to determine.\footnote{Field note 3.} The consumer groups submitted that the consumer advocacy role is different from other sectors such as, for example, agriculture where a sample of a product may be taken to the laboratory for analysis to determine the presence or absence of a certain organism such as genetically modified organisms (GMO).
The role of consumer advocacy in the financial sector in Namibia is also hampered by the lack of funds as consumer groups are generally not self-sufficient as far as financial resources are concerned. The consumer groups indicated that they have meagre resources that are not sufficient to enable them carry out their advocacy functions. They further stated that the government is not willing to fund their operations although it is funding some non-governmental organisations, such as the Namibia Chamber of Commerce and Industry (NCCI). Consumer groups feel that conducting consumer advocacy functions on voluntary basis without concrete funding option is not sustainable. Therefore, consumer groups suggest that the Bank of Namibia and NAMFISA should consider funding the operations of consumer groups through levies paid by financial service providers.

Generally, the officials responsible for handling customer complaints at the Bank of Namibia and NAMFISA regarded consumer protection legal framework in the financial sector as inadequate. They feel that the regulators do not have adequate legal tools to effectively deal with complaints lodged by consumers against financial service providers such as banking institutions and micro lenders. In particular, officials at the Bank of Namibia indicate that the Bank’s role in complaint resolution is restricted to mediating disputes between consumers and banking institutions. The Banking Institutions Act, 1998 as amended, does not have explicit provisions dealing with consumer protection or resolutions of complaints lodged by consumers against banking institutions. Effective enforcement mechanism is equally lacking and this makes it difficult for the

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591 Field note 5.
592 Views expressed by consumer groups. Refer to field note 3.
593 Views expressed by officials responsible for handling complaints at the Bank of Namibia and NAMFISA.
594 Field note 6
595 Act No. 2 of 1998
regulators to impose appropriate sanctions against banking institutions in matters involving disputes between them and their customers.\textsuperscript{596}

In the absence of explicit provisions dealing with consumer protection in the current banking laws, coupled with inadequate enforcement mechanism, the Bank of Namibia uses moral suasion\textsuperscript{597} to encourage banking institutions to treat their customers fairly in line with undertakings made in the Code of Good Banking Practice.\textsuperscript{598} However, in the event that a banking institution persistently maintains that its dealing with a customer is fair and argues that it has done nothing wrong, the Bank has limited options except communicating the findings of the investigation to the complainant. The Bank may notify the customer that he may pursue other avenues such as approaching the court to seek redress if he is not satisfied with a response from the banking institution concerned. This is a costly and lengthy exercise, and very few customers have the means and resources to take on a banking institution except in very isolated cases. On the contrary, banking institutions often take customers to court for failing to honour their loan obligations even in circumstances where there are genuine disputes relating to loan agreements, for example, the instalment amount, the repayment period and the financial charges involved.

Officials at the Bank of Namibia feel that there is a lot that should be done to improve consumer protection in the financial sector. Some of the issues that would improve consumer protection in

\textsuperscript{596} Refer to field note 6 above.
the financial sector is the establishment of the Financial Services Adjudicator as a single body that would handle complaints by customers against financial service providers in the entire financial sector.\textsuperscript{599} The Financial Adjudicator Bill, 2015 has already been finalised and is expected to be tabled in Parliament in 2016. In the meantime, officials feel that they should be fully empowered to deal with customer complaints. The passing of the Banking Institutions Bill, 2016 through Parliament which is replacing the current Banking Institutions Act, 1998, should be accelerated, and various determinations and regulations containing consumer protection provisions should be revised and strengthened to enhance consumer protection efforts in the financial sector.

Public awareness of consumer protection aspects in the financial sector should be strengthened and the role of the regulators in this regard should be clearly explained.\textsuperscript{600} While it is critical to educate consumers about their rights as far as financial transactions are concerned, it is equally important to highlight the consumers’ responsibilities to honour their obligations in terms of the loan agreements entered between them and lending institutions. The respondents feel that consumer protection efforts would only be meaningful if both consumers and financial institutions understand their rights and responsibilities involving financial transactions.\textsuperscript{601}

Individual respondents who are consumers of financial services almost share similar views as that of consumer groups. They feel that they are not protected against unfair practices by some financial service providers. They express views that in most instances the regulators fail to take swift and stern actions against commercial banks, micro lenders and other financial institutions that treat

\textsuperscript{599} Field note 7.
\textsuperscript{600} Field note 8.
\textsuperscript{601} Field note 9.
consumers unfairly. Although they could not support their views with concrete facts, some of the respondents hinted that the regulators protect the interests of financial institutions while failing to protect consumers’ interests.602

On the question of what should be done to improve consumer protection in the financial sector, the majority of consumers responded that the law should be strengthened to make it more responsive to customer complaints. Others felt that the regulators should be empowered to take serious actions against financial institutions that contravene the law.603 They suggested that some of the enforcement actions which the regulators should be empowered to take against financial institutions that contravene the laws are sanctions such as fines, ordering the institution to reimburse the customers for losses suffered, and in serious cases, withdrawal of a license. Respondents also felt that the process of complaint resolution is long and therefore they suggest that the process be streamlined to make sure that customer complaints are resolved within a shorter period of time to avoid inconvenience and, in some cases, financial losses on the part of consumers.604

Some consumers do not know how and where to complain in the event of a dispute arising between them and financial institutions. Those that know where to complain are often hesitant to lodge their complaints because of a communication barrier. They indicate that their inability to communicate properly in the official language makes it difficult for them to approach relevant institutions to have their complaints resolved. They suggest that there should be a mechanism to assist

602 Field note 10.
603 Field note 11.
604 Field note 12.
complainants who are unable to communicate in the official language to lodge their complaints in
the vernacular languages. Furthermore, respondents propose that the regulators intensify public
education on financial issues to educate consumers on consumer protection aspects relating to
financial transactions.  

7.5 Preliminary conclusion

This chapter has outlined the findings of the survey conducted by the researcher to determine the
effectiveness of consumer protection framework in the financial sector in Namibia. The study
subjects were individual consumers, customer complaints officers/ managers at the Bank of
Namibia and NAMFISA as well as the representatives of consumer groups.

The findings reveal that the consumer protection framework in the financial sector is ineffective
and does not adequately safeguard the interests of consumers. The majority of the respondents feel
that prompt action need to be taken to ensure that consumers of financial services are protected
against unfair treatment by some financial institutions. Respondents suggest that laws regulating
financial transactions should be reviewed and strengthened so as to be more responsive to the
needs of consumers. Regulators need to be legally empowered to enforce sanctions against
financial institutions that contravene the laws and treat consumers unfairly. Such sanctions should
be stringent enough to deter financial institutions from treating consumers in a deceitful manner.

\footnote{Field note 13.}
The findings also reveal that the establishment of the Financial Services Adjudicator would improve consumer protection aspects in the financial sector. The Financial Services Adjudicator would be responsible for handling complaints lodged by consumers against financial institutions, including financial institutions that fall outside the regulatory mandate of the Bank of Namibia and NAMFISA. The respondents therefore suggest that the setting up of this institution be accelerated.

The majority of the respondents are of the view that consumer protection in the financial sector can only be meaningful if consumers are aware of their rights. They propose that consumer education be intensified to educate consumers about their rights and other aspects relating to financial transactions which are inherently complex and difficult to understand.

Finally, the findings reveal that some consumers do not know how and where to complain in the event of a dispute arising between them and financial institutions. There is thus an urgent need to create awareness and sensitise the public on the institutions responsible for complaints resolution and the process involved in this regard.
CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

CONCLUSION

This chapter is a summary of the arguments presented in the study. Recommendations are made to the financial regulators and other key stakeholders on how to improve consumer protection in the financial sector. The main aim of this study was to demonstrate the need to strengthen consumer protection in the Namibian financial sector in order to ensure that the interests of consumers are safeguarded.

The focus of the investigation was on whether the consumer protection framework in the financial sector was adequate and effective in protecting consumers of financial services. In the problem statement of chapter one of this study, it was stated that there were gaps in the consumer protection legal framework in the financial sector which made it difficult for regulators and other policy makers to realise consumer protection objectives. The hypothesis of this study is that if consumer protection framework in the financial sector is strengthened, interests of consumers would be safeguarded. This would ultimately result in consumers and prospective investors having great confidence in the financial system. However, in order to achieve the set objectives, the consumer protection mandate of financial regulators needs to be strengthened to empower them to take appropriate actions against financial institutions that treat consumers unfairly.

Chapter two of this research provided an overview of consumer protection in various economic sectors of the economy. The broader overview of consumer protection in these sectors was deemed
necessary given the similarity of challenges faced by consumers of goods and services in various economic sectors. The chapter revealed that although some pieces of legislation in various sectors contain some consumer protection provisions, these laws do not provide proper enforcement mechanisms. Consumer protection laws in some sectors are fragmented and subjected to different regulatory oversight. The chapter further revealed that some sectors, such as retail and real estate sectors, are not properly regulated resulting in consumers in these sectors being subjected to unfair treatment by some service providers.

In chapter three of this research, we paid attention to consumer protection in the financial sector. The chapter highlighted shortcomings in financial services laws and made suggestions on how such shortcomings could be addressed to ensure adequate protection of consumers. It was pointed out that consumers of financial services require special protection because of the complexity of financial transactions. It was further pointed out that the Bank of Namibia and NAMFISA have limited mandates and enforcement powers as far as consumer protection in the sector was concerned. However, it was noted in this chapter that various initiatives were underway to strengthen consumer protection framework in the financial sector.

Chapter four was devoted to an examination of the national initiatives impacting on financial consumer protection. The chapter particularly discussed the role played by various interest groups in the financial consumer protection and stakeholders such as the Ministry of Industrialisation, Trade and Small and Medium Enterprises (SME) Development; the Law Reform and Development Commission; Namibia Competition Commission; and civil society groups, such as consumer groups, in consumer protection issues. It was revealed that the Ministry of Industrialisation was in
the process of drafting the Consumer Protection Bill which, once enacted, would harmonise consumer protection issues in various sectors of the economy. The chapter concluded that the roles played by various stakeholders had an impact on consumer protection issues and their inputs should be critically considered in the process of formulating the consumer protection legislation for Namibia.

In chapter 5, we discussed how consumer protection in the financial sector is handled in four jurisdictions being South Africa, Zambia, Malaysia and Australia. The discussion revealed that these countries have comprehensive consumer protection laws providing for consumer protection. However, consumer protection legal frameworks in these countries are characterized by similar shortcomings. Thus, in South Africa and Australia, there is a lack of effective enforcement mechanisms; while Zambia and Malaysia face regulatory fragmentation and overlaps that render consumer protection ineffective. There is therefore, even in these countries, a need for close cooperation between the various regulatory bodies to ensure that consumer interests are safeguarded.

One of the common shortcomings of the consumer protection frameworks in most of these countries, was the inadequate and fragmented consumer protection legal frameworks which made enforcement and redress mechanisms difficult. However, there are lessons from other countries that Namibia could learn and use to shape its consumer protection framework which was undergoing reform. One such lesson could be the incorporation of the consumer protection and competition functions under the mandate of a single institution, as is the case in Zambia and Australia. There should, however, be proper coordination in order to ensure that these functions are properly and effectively executed.
In chapter six, we examined the regional and international instruments and bodies relevant to consumer protection. The chapter acknowledged that international treaties ratified by Namibia became part of Namibian laws by virtue of Article 144 of the Constitution. Therefore, Namibia is bound by consumer protection provisions contained in international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Guidelines on Consumer Protection and the United Nations Declaration on Human Rights, even if such provisions were not contained in domestic laws. However, although not all international instruments discussed in this chapter have express consumer protection provisions, the United Nations Guidelines on Consumer Protection contains consumer protection provisions which serve as a reference for consumer protection in various countries. The Guidelines provide a set of basic consumer protection objectives which are incorporated in national consumer protection laws worldwide. The chapter concluded that Namibia could adopt the provisions of the above instruments and the consumer protection principles of the international bodies to strengthen its financial consumer protection program.

In chapter seven, we discussed the findings of the empirical study conducted to examine the effectiveness of the consumer protection legal framework. A research using questionnaires was conducted to determine the adequacy and effectiveness of consumer protection framework in the Namibian financial sector. The findings of the research revealed the shortcomings in the consumer protection framework in the financial sector and provided possible remedial measures which might be taken to improve on consumer protection aspects in the sector. The consumer protection framework in the financial sector was found to be ineffective because the regulators do not have adequate powers to institute sanctions against financial institutions that treat consumers unfairly.

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and disregard consumer rights. It was also found that consumers lacked knowledge on financial products which made it difficult for them to make informed choices on suitable financial products. Further, the research revealed that consumers were not aware of the rights, and to whom they should complain, if they experienced problems with products and services offered by financial institutions.

RECOMMENDATIONS

This final section comprises recommendations for the financial regulators (Bank of Namibia and the Namibia Financial Institutions Supervisory Authority) and other key stakeholders to take appropriate measures to improve the state of consumer protection in the financial sector. The Bank of Namibia and NAMFISA, under the Banking Institutions Act, 1998 as amended and the Namibia Financial Institutions Supervisory Authority Act, 2001, have regulatory mandates to protect the interests of consumers of financial services and products although this mandate is inadequate. A lack of adequate consumer protection mechanisms in the financial sector has been identified as having a negative impact on the national economy and its citizens. The Namibia Financial Sector Strategy advocates for the reform of the consumer protection framework in the financial sector to ensure that consumers of financial services are adequately protected.

Therefore, in order to improve consumer protection framework in the financial sector and realise the consumer protection objectives as set out in the Namibia Financial Sector Strategy, this study recommends that:
Firstly, that the Financial Services Adjudicator should be established whose function should be to adjudicate on complaints lodged by consumers against financial institutions. In this regard, the tabling of the Financial Services Adjudicator Bill, 2015 should be accelerated to ensure that the Financial Services Adjudicator is established. The Adjudicator should provide an accessible, fair, independent and impartial dispute resolution mechanism free of charge to consumers. The Adjudicator’s determination should be binding and can be made an order of the Court. Any person who is aggrieved by the decision of the Adjudicator should have the right to appeal to the High Court. This arrangement would benefit consumers in sharp contrast to the current set up where the regulators do not have legal power to order service providers to compensate consumers.

Secondly, it is recommended that the powers of the financial regulators, that is the Bank of Namibia and NAMFISA, should be strengthened to enable them to take firm actions against financial institutions that treat consumers unfairly by, for example, failing to disclose fully the terms and conditions of the transactions with customers. In this regard, the law regulating financial services should be revised and strengthened to provide for the imposition of fines by these regulators in the event that a financial institution contravenes the law. Namibia should adopt the provisions of the international instruments such as the United Nations Guidelines on Consumer Protection and the consumer protection principles of the international bodies such as the Allied for Financial Inclusion to strengthen its financial consumer protection programmes.

Thirdly, the mandates of the Bank of Namibia and NAMFISA regarding safeguarding the interests of consumers should be strengthened and explained clearly. Some consumers have erroneous expectations that the regulators should protect the interests of consumers, whatever the case may
be, and that complaints should be adjudicated in their favour. However, in some instances complaints may be adjudicated in favour of service providers if it is found that a consumer might have failed to perform his obligations in terms of the agreement entered with the financial service provider. In terms of Article 18 of the Namibian Constitution, administrative bodies, including financial regulators, are required to act fairly and reasonably in all their dealings. Any person aggrieved by the decision of the administrative body is at liberty to seek redress through the Court. Fair and reasonable decisions on the part of the regulators may, in some cases, be construed by some members of the public and consumer organisations as “failing the consumers”, which is not necessarily the case.

Fourthly, public education of consumers should be strengthened. In this regard, all financial institutions should be encouraged to participate in financial literacy programmes spearheaded by the Ministry of Finance through the Financial Literacy Initiative. Such programs should not only educate consumers about their rights, but should also sensitise them about their obligations. Financial institutions should be obliged to be transparent and use plain language when engaging consumers.

Fifthly, close collaboration between financial regulators and consumer groups should be encouraged. In order to ensure effective consumer advocacy roles, sustainable funding and capacity building programmes should be developed for consumer groups to ensure smooth operations of their programmes.
Sixthly, Namibia should accelerate the process of enactment of the Consumer Protection Act. In this regard, the country should adopt the consumer protection frameworks of Zambia and Australia where competition and consumer protection issues fall under the mandate of a single regulatory body. However, there should be close collaboration between stakeholders to ensure that competition and consumer protection functions are properly executed. The study recommends that the envisaged Consumer Protection Act should acknowledge the role played by sectoral regulators such as the Bank of Namibia, the Namibia Financial Institutions Supervisory Authority, and the Communication Regulatory Authority of Namibia in protecting the interests of consumers. Therefore, economic sectors that have developed consumer protection mechanisms should continue to handle consumer protection in their sectors, but within the broader framework of the Consumer Protection Act.

Finally, it is recommended that the University of Namibia should consider introducing a module in financial law (incorporating consumer protection) in the LLB degree curriculum of the Faculty of Law to equip students with knowledge regarding financial regulation. A good understanding of financial regulation by lawyers is necessary particularly in view of a recent legal battle involving the Bank of Namibia and one of the banking institutions.\textsuperscript{606}

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BIBLIOGRAPHY

Books


**Journals and Papers**


Cases

1.  *Courtney Clarke v Bassingthwaighte* 1991 (1) SA 684
2.  *Donoghue v Stevenson* (1932) AC 562
3.  *Fedgen Insurance Ltd v Leyds* 1995 (3) SA AD
7.  *Z Paulse v Sanlam Staff Umbrella Pension Fund and Sanlam Life Insurance*  
   *(Determination by the Pension Fund Adjudicator of South Africa, made on 23 April 2015)*

Statutes

*Namibian statutes*

Allied Health Professions Act, 2004 (Act No. 7 of 2004)


Banking Institutions Act, 1998 (Act No. 2 of 1998)

Banking Institutions Amendment Act, 2010 (Act No. 14 of 2010)

Competition Act, 2003 (Act No. 2 of 2003)
Communications Act, 2009 (Act. No. 8 of 2009)

Consumer Protection Bill, 2015

Constitutions of the Republic of Namibia, 1990 (Act No. 1 of 1990)

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

Credit Bureau Regulations, 2014

Determination on Standards for Basic Bank Account and Cash Deposit Fees, 2013


Financial Institutions and Markets Bill, 2015

Financial Services Adjudicator Bill, 2015

Friendly Societies Act, 1956 (Act No. 25 of 1956)


Long-Term Insurance Act, 1998 (Act No. 52 of 1998)

Magistrate’s Court Act, 1944 (Act No. 32 of 1944)


Medical and Dental Act, 2004 (Act No.8 of 2004)

Microlending Bill, 2014

Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001)
Nursing Act, 2004 (Act No. 8 of 2004)

Payment Systems Management Act, 2001 (Act No. of 2001)

Pension Funds Act, 1956 (Act No. 5 of 1956)

Pharmacy Act, 2004 (Act No. 9 of 2004)

Property Valuers Profession Act, 2012 (Act No. 7 of 2012)


Short-Term Insurance Act, 1998 (Act No. 53 of 1998)


Usury Act, 1968 (Act No. 73 of 1968)

**South Africa**

Banks Act, 1990 (Act No. 94 of 1990)

Consumer Protection Act, 2008 (Act No. 68 of 2008)

Currency and Banking Act, 1920 (Act No. 31 of 1920)

Divorce Act, 1979 (Act No. 70 of 1979)


Financial Sector Regulation Bill, 2014
Financial Services Board Act, 1990 (Act No.97 of 1990)

Financial Services Ombuds Schemes Act, 2004 (Act No. 37 of 2004)


Marriage Act, 1961 (Act No. 25 of 1961)

Mutual Banks Act, 1993 (Act No. 124 of 1993)

Pension Funds Act, 1956 (Act No. 24 of 1956)

National Credit Act, 2005 (Act No. 34 of 2005)

Long-Term Insurance Act, 1998 (Act No. 52 of 1998)


Zambia

Bank of Zambia Act, Chapter 360, Laws of Zambia

Competition and Consumer Protection Act, Chapter 417, Laws of Zambia

Insurance Act, 1997 (Act No. 27 of 1997)

Pension Scheme Regulation Act, 1996 (Act No. 28 of 1996)

Securities Act, Chapter 354, Laws of Zambia
Malaysia


Central Bank of Malaysia Act, 2009 (Act No. 107 of 2009)

Consumer Protection Act, 1999 (Act No. 599 of 1999)

Hire-Purchase Act, 1967 (Act No. 212 of 1967)

Malaysia Deposit Insurance Corporation Act, 2001 (Act No. 720 of 2001)

Money Lenders Act, 1951 (Act No. 400 of 1951)

Pawnbrokers Act, 1972 (Act No. 81 of 1972)

Australia


Australia Securities and Investments Corporation Act, 2001 (Act. No. 51 of 2001)

Competition and Consumer Protection Act, 2010 (Act No. 148 of 2010)

Internet sources


Newspaper articles


Field Notes

1. **Field note 1:** 13 October 2015,
   Executive Director of Namibia Consumer Trust
   Windhoek

2. **Field note 2:** 13 October 2015,
   Executive Director of Namibia Consumer Trust
   Windhoek

3. **Field note 3:** 13 October 2015,
   Executive Director of Namibia Consumer Trust
   Windhoek

4. **Field note 4:** 13 October 2015
   Executive Director of Namibia Consumer Trust
Windhoek

5. **Field note 5:** 13 October 2015
   Executive Director of Namibia Consumer Trust
   Windhoek

6. **Field note 6:** 13 October 2015
   Senior Customer Complaints Officer
   Bank of Namibia
   Windhoek

7. **Field note 7:** 13 October 2015
   Senior Customer Complaints Officer
   Bank of Namibia
   Windhoek

8. **Field note 8:** 29 October 2015
   Manager: Complaints
   NAMFISA
   Windhoek

9. **Field note 9:** 29 October 2015
   Manager: Complaints
10. Field note 10: 24 October 2015
A 41 years old female respondent
Wananeda, Katutura
Windhoek

11. Field note 11: 24 October 2015
A 57 years old female respondent
Okuryangava, Katutura
Windhoek

12. Field note 12: 24 October 2015
A 47 years old male respondent
Okuryangava, Katutura
Windhoek

A 61 years old female respondent
Grysblock, Katutura
Windhoek
Annexure: Research questionnaire

RESEARCH QUESTIONNAIRE

GENERAL INFORMATION

Respondent number:
Sex:
Age:

PLEASE TICK IN THE APPROPRIATE BOX

<table>
<thead>
<tr>
<th>Individual customer of a financial institution</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Official of a regulatory authority</td>
<td></td>
</tr>
<tr>
<td>Representative of a consumer group</td>
<td></td>
</tr>
</tbody>
</table>

PLEASE ANSWER THE FOLLOWING QUESTIONS AND EXPLAIN YOUR RESPONSES ON THE SPACES PROVIDED

1. Do you, as a consumer, experience any problems when you transact with financial service providers?

   ……………………………………………………………………………………………………………………………

   ……………………………………………………………………………………………………………………………

   ……………………………………………………………………………………………………………………………

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2. What are the areas that need improvement in order to ensure effective consumer protection framework in the financial sector?

3. How can the regulators in the financial sector ensure that consumers of financial services and products are adequately protected?

4. How can consumer groups and other non-governmental organisations assist in ensuring that consumers in the financial sector are adequately protected?

5. Do you understand the role of the regulators in the financial sector in protecting the interests of consumers?

6. What are the key consumer protection issues in the financial sector that need urgent consideration?
7. What do you do if you experience problems with products or services offered by financial service providers?

8. As a consumer, are you aware of your rights, and do you know how and to whom to complain in the event of a dispute arising between you and financial service providers?

Thank you for your participation.