

The Protection of Small Enterprises in South Africa: A Comparison with Jurisdictions in the USA, India and the UK

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Abstract

Small enterprises form the backbone of many economies. However, despite their contribution to sustained economic growth, most small enterprises fail within five years. The Consumer Protection Act 68 of 2008 (CPA) in South Africa encompasses a mechanism that provides protection to small enterprises as consumers. This article assesses the extent of protection that is provided to small enterprises as consumers in terms of the CPA and seeks to establish whether this protection is warranted. Desktop research was conducted to draw a comparative analysis with three other jurisdictions, namely Michigan in the United States of America, India and the United Kingdom. The article posits that protecting small enterprises as consumers under the CPA is warranted. However, the article recommends revisiting the threshold applicable to juristic persons under the CPA and also applying it to franchisees that operate as juristic persons.

Keywords: comparative analysis; consumer protection theory; consumer thresholds; franchisees; juristic person consumers; small enterprises



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Introduction

Small enterprises form the backbone of many economies, given their contribution to economic growth and sustainable development.¹ In developing countries in particular, small enterprises can also play a fundamental role in poverty eradication and economic transformation, if correctly supported.² Despite these benefits, small enterprises often face several threats to their survival.³ Reasons for this can range from the lack of sufficient resources (financial and non-financial) to a general ignorance of the regulatory frameworks that affect the operations of small enterprises. It therefore makes sense to ensure that small enterprises are protected by the law, where possible.

Take, for example, a small baking enterprise operated in rural South Africa by an entrepreneur who sustains her family by supplying scones (*dikuku*) and other baked goods to the community. Assume that the owner of the small enterprise bought flour that turned out to be unfit for purpose because it was contaminated or had expired. If the supplier of the flour implemented a strict ‘no returns policy’, the small enterprise would be without an accessible remedy. Because of a lack of knowledge or bargaining power, it is unlikely that the small baking enterprise could ‘strong-arm’ the supplier into agreeing to return or replace the flour. A lawsuit might also be unfeasible because of a lack of financial and other resources. If this small baking enterprise had bought enough flour to last a month and all the flour was unfit for use, the consequences would be detrimental and long-lasting. This hypothetical example highlights the importance of consumer protection for small enterprises.⁴ To this end, South African legislation has been enacted to provide protection to small enterprises.

The key legislation that will be assessed in this article is primarily the Consumer Protection Act 68 of 2008 (CPA). This Act will be assessed along with the National Small Enterprise Act 102 of 1996 (NSEA). The article analyses these statutes to

1 See AO Ayandibu and J Houghton, ‘The role of small and medium scale enterprise in local economic development’ (2017) 11(2) *Journal of Business and Retail Management Research* 133, 135; CJ Higgs and T Hill, ‘The Role That Small and Medium-Sized Enterprises Play in Sustainable Development and the Green Economy in the Waste Sector, South Africa’ (2018) 2 *Wiley Business Strategy and Development* 29.

2 Ayandibu (n 1) 133–5.

3 *ibid* 136.

4 A business of this nature would fall within the scope of a vulnerable consumer, which the Consumer Protection Act 68 of 2008 seeks to protect as part of its key objectives. In this regard, section 3(1)(b) of the Act provides as follows:

‘The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

...

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—

(i) who are low-income persons or *persons comprising low-income communities*;

(ii) who *live in remote, isolated or low-density population areas or communities*.’

(Own emphasis)

determine if they are likely to meet their stated goals and how they compare with similar legislation in other countries.

Broadly speaking, South African law recognises two categories of small enterprises: those with separate legal personality ('incorporated small enterprises') and those without it ('unincorporated small enterprises').⁵ Incorporated small enterprises include corporations such as companies, close corporations and co-operatives, whereas sole proprietorships and partnerships are prevalent forms of unincorporated small enterprises.⁶ Regardless of the form they assume, small enterprises can operate in both the formal and the informal sectors of the economy.⁷ Surprisingly, the protection that small enterprises are afforded as consumers in terms of the CPA varies. This is discussed in detail below.⁸

Small enterprises occupy a dual role in the consumer protection context. On the one hand, they render goods and services to the public as suppliers.⁹ On the other, they consume or use goods and services as consumers.¹⁰ In this article, the focus is on their role and protection as consumers. Importantly, this article also conducts a comparative analysis with other jurisdictions to determine whether small enterprises should be protected as consumers. The comparative analysis starts by assessing the international consumer protection guidelines as set out by the United Nations (UN). Then the applicable laws of the state of Michigan in the United States of America (USA), India and the United Kingdom (UK) are assessed.¹¹ The research methodology adopted throughout this article is desktop research.

5 See TH Mongalo and T Scott *Corporate Law and Corporate Governance: An Overview of Business Undertakings in South Africa* (2nd edn, Van Schaik 2023) 80.

6 Mongalo (n 5) 13 and 15.

7 In the South African context, for example, law firms can operate in the formal sector as a sole proprietorship or as a personal liability company. Similarly, a hawker can operate as a sole proprietor in the informal sector.

8 See the section 'Unincorporated Small Enterprises, Incorporated Small Enterprises and Franchisees'.

9 CPA s 1 defines a 'supplier' as 'a person who markets goods and services'. 'Marketing', under the CPA s 1 connotes not only the promotion of goods or services but also the provision of those goods or services.

10 CPA s 1 defines a 'consumer' to include: franchisees, persons to whom goods or services are promoted or supplied, persons who enter into transactions, as well as the recipients or beneficiaries of such transactions, regardless of whether that recipient or beneficiary is a party to the agreement.

11 The rationale behind selecting the United Kingdom and the USA is because they are developed nations with longstanding consumer protection laws. The state of Michigan was selected because the protection of businesses under the Michigan Consumer Protection Act 331 of 1976 (MCPA) has been contentious and has been extensively litigated in the Michigan courts. This makes Michigan a useful jurisdiction to assess for the purposes of this research. India was selected because it is a developing country that has a consumer protection framework slightly older than South Africa's. Despite the fact that India's current legislation is a 2019 statute, this was preceded by a comprehensive 1986 statute. South Africa's first comprehensive consumer protection legislation was passed in 2008 and only came into full force and effect on 31 March 2011.

The next section explains what a small enterprise is, for the purpose of this article.

The National Standard for a Small Enterprise

The NSEA commenced on 27 June 1997 with the objective of, among other things, establishing the Small Enterprise Development Agency (SEDA) and providing guidelines for the promotion of small businesses by organs of state.¹² The Act establishes a national standard for types of enterprise that would qualify as ‘small’. In South Africa, the definition of a ‘small enterprise’ varies depending on the applicable regulatory framework.¹³ Factors such as the total number of employees, annual turnover¹⁴ or asset value¹⁵ are considered when categorising an enterprise as ‘small’.¹⁶ In terms of employee number, a small enterprise generally connotes an enterprise that has fewer than 50 employees.¹⁷ However, the annual turnover or asset value tends to vary, depending on the sector and applicable laws.¹⁸ Here, the focus will be on the qualification criteria set out in the main statute regulating small enterprises, namely the NSEA.

The NSEA defines the term ‘small enterprise’¹⁹ as—

[A] separate and distinct business entity, together with its branches or subsidiaries, if any, including co-operative enterprises, managed by one owner or more predominantly carried on in any sector or subsector of the economy mentioned in column 1 of the Schedule and classified as a micro-, a small, or a medium enterprise by satisfying the criteria mentioned in columns 3 and 4 of the Schedule.²⁰

What can be observed from this definition is that the NSEA: (a) appears to restrict its scope of regulation to incorporated small enterprises; and (b) accords a wider meaning to the term, by making it inclusive of three subgroups, namely micro-, small and medium enterprises.²¹ This observation is deduced from the description of a small enterprise as a business entity that is ‘separate and distinct’, which alludes to a separate

12 Preamble to the NSEA.

13 Ayandibu (n 1) 134, who also discusses what would constitute a small enterprise for tax purposes. The employee number of 50 is also consistent with the scale used to measure small enterprises in terms of the NSEA; see the NSEA Schedule in the Appendix.

14 This refers to the gross revenue of the enterprise.

15 This refers to the gross value of the enterprise’s assets.

16 NSEA Schedule—see the Appendix.

17 Ayandibu (n 1) 133–4.

18 For example, the qualification threshold for a small enterprise differs for the Income Tax Act 58 of 1962 (which regulates various aspects of taxation) and the NSEA (which pertains to small enterprises), respectively.

19 Defined as ‘small business’ prior to the 2004 amendment of the NSEA.

20 NSEA s 1. For the sake of completeness, the Schedule referred to in the definition is attached as an Appendix.

21 *ibid.*

legal persona.²² Furthermore, when the South African legislature wishes to include natural persons within the meaning of a small enterprise, it does so expressly.²³ It would be interesting to see how the definition in the NSEA might be interpreted by the courts in so far as it applies to unincorporated small enterprises. A drawback of the current inferred meaning of the definition is that it appears to ignore the existence of unincorporated small enterprises, such as sole proprietorships. This is despite the fact that small enterprises in the informal sector are often unincorporated.²⁴ Nonetheless, the apparent focus of the NSEA on incorporated small enterprises will be useful for this article's assessment of the threshold that is imposed on juristic person consumers under the CPA.²⁵

For further discussions in this article, a small enterprise will be understood as encompassing unincorporated small enterprises, as is recognised under the CPA, as well as incorporated small enterprises, falling within the micro- and small enterprise subgroups only. The micro- and small enterprise subgroups have fewer than 50 employees in their organisations, with an annual turnover that does not exceed the applicable sector-specific threshold.²⁶

22 See Mongalo and Scott (n 5) 80.

23 See definition of 'small, micro and medium-sized enterprise' in terms of the Income Tax Act 58 of 1962, ss 1 and 12E(4) read together with the Sixth Schedule to that Act. In this regard, s 1 of the Income Tax Act, 1962 defines a 'small, medium or micro-sized enterprise' as any— '(a) person that qualifies as a micro business as defined in paragraph 1 of the Sixth Schedule; or (b) any person that is a small business corporation as defined in section 12E(4)'.

A 'micro business' is defined in the Sixth Schedule as follows:

'2. Persons that qualify as micro businesses

(1) A person qualifies as a micro business if that person is a—

(a) *natural person* (or the deceased or insolvent estate of a natural person that was a registered micro business at the time of death or insolvency); or

(b) *company*,
where the qualifying turnover of that person for the year of assessment does not exceed an amount of R1 million.' (Own emphasis)

Finally, section 12E(4) provides, in the relevant part, that—

“‘small business corporation’ means any close corporation or co-operative or any private company as defined in section 1 of the Companies Act or a personal liability company as contemplated in section 8(2)(c) of the Companies Act if at all times during the year of assessment all the holders of shares in that company, cooperative, close corporation or personal liability company are natural persons ...’

24 E Etim and O Daramola, 'The Informal Sector and Economic Growth of South Africa and Nigeria: A Comparative Systematic Review' (2020) 6(4) *Journal of Open Innovation: Technology, Market, and Complexity* 1–2.

25 See the section 'Unincorporated Small Enterprises, Incorporated Small Enterprises and Franchisees'.

26 See Schedule in the Appendix. Medium-sized enterprises are excluded from the scope of this article as it is submitted that enterprises that have at least 51 employees and high turnover thresholds were not intended to benefit from the protection of the CPA.

Reasons Behind Consumer Protection Law

Consumer protection, at least in the South African context, has not always been a foremost consideration in the law of contracts.²⁷ The introduction of consumer protection law required a balance between two competing philosophies: social, interventionist philosophy and self-reliance philosophy.²⁸ The social, interventionist philosophy acknowledges a more fairness-orientated approach. It supports the enactment of laws with the view to reorganising and ordering commercial relationships to safeguard the interests of vulnerable consumers.²⁹ In contrast, the self-reliance philosophy follows a laissez-faire approach or the classic theory of contract, which encompasses contractual freedom, party autonomy and the sanctity of contracts.³⁰ Opponents of the introduction of consumer protection law argue that including fairness in consumer transactions disrupts the efficiency of decision-making and imposes regulatory costs that are ultimately passed on to the consumer.³¹ Even so, the cost of a completely free-market economy presents even greater risks to the consumer, from low-quality and potentially deadly goods to difficulties with the enforcement of rights concerning goods and services. These risks justify the potential compliance cost.

As highlighted by Hawthorne, even after South Africa moved into its democratic constitutional dispensation, the fairness approach was acknowledged by the judiciary in theory, but not implemented in practice.³² This necessitated the introduction of consumer protection law, specifically the CPA, to introduce a more fairness-orientated approach to consumer transactions in South Africa.³³ As such, consumer protection law in South Africa now addresses, *inter alia*, issues of standard form contracts (including unfair contract terms), unequal bargaining power (through provisions such as the right to fair and honest dealings) and information asymmetry (through provisions that concern the right to disclosure and information).³⁴ Due to the introduction of the CPA, the fairness approach is now infused into South Africa's consumer protection dispensation at both a substantive and a procedural level.³⁵

Small Enterprises as Consumers

The CPA is the main South African statute that focuses squarely on matters of consumer protection. The statute came into full force and effect on 31 March 2011 and operates

27 L Hawthorne, 'Public Governance: Unpacking the Consumer Protection Act 68 of 2008' (2012) 75(3) THRHR 345.

28 E van Eeden and J Barnard *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017) 1–2.

29 *ibid.* See also Hawthorne (n 27) 361.

30 Van Eeden and Barnard (n 28) 1–2.

31 *ibid.* 2.

32 Hawthorne (n 27) 346–52.

33 *ibid.* 361.

34 Van Eeden and Barnard (n 28) 1–2.

35 Hawthorne (n 27) 361.

in tandem with other consumer protection legislation.³⁶ The CPA applies to all transactions that are concluded in South Africa unless a transaction is specifically excluded from its scope.³⁷ For the CPA to apply, a transaction must be concluded in the ordinary course of business³⁸ and there should be evidence of a ‘supplier and consumer relationship’.³⁹ Importantly, the CPA provides consumers with protection during all the phases of consumer transactions: (a) at the promotion or marketing phase before the agreement is concluded;⁴⁰ (b) at the conclusion of the agreement;⁴¹ and (c) after the conclusion of the agreement.⁴²

The CPA aims to ensure that the socio-economic welfare of consumers in South Africa is encouraged and elevated through:

- Creating a legal framework that promotes a ‘fair, accessible, efficient, sustainable and responsible’ consumer market⁴³
- Protecting vulnerable consumers⁴⁴
- Promoting business practices that are fair⁴⁵
- Ensuring that consumers are protected from improper and disadvantageous trade practices⁴⁶
- Ensuring that consumer awareness and information is improved and promoting consumer behaviour that is responsible and well informed⁴⁷
- Utilising education, advocacy and activism to promote consumer confidence, empowerment and consumer responsibility⁴⁸
- Providing a consensual dispute resolution system in respect of consumer transactions that is ‘consistent, accessible and efficient’⁴⁹

36 This includes the Measurement Units and Measurement Standards Act 18 of 2006; the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; the Merchandise Marks Act 17 of 1941; the Electronic Communications and Transactions Act 25 of 2002; the National Credit Act 34 of 2005; the Protection of Personal Information Act 4 of 2013; the Alienation of Land Act 68 of 1981; and the Property Time-Sharing Control Act 75 of 1983. In light of this, this article focuses on a general comprehensive consumer protection framework as provided for by the CPA.

37 For instance, the CPA will not apply to transactions set out in s 5(2) of its provisions.

38 The term ‘ordinary course of business’ is not defined in the CPA; however, factors to be considered in determining whether a business is in the ordinary course of business are set out in the case of *Doyle v Killeen and Others* [2014] ZANCT 43 para 59.

39 *Eskom Holdings Limited v Halstead-Cleak* (599/2015) [2016] ZASCA 150 para 24.

40 CPA Part E (Right to Fair and Responsible Marketing).

41 *ibid* Part F (Right to Fair and Honest Dealing) and Part G (Right to Fair, Just and Reasonable Terms and Conditions).

42 *ibid* Part H (Right to Fair Value, Good Quality and Safety).

43 *ibid* s 3(1)(a).

44 *ibid* s 3(1)(b).

45 *ibid* 3(1)(c).

46 *ibid* 3(1)(d).

47 *ibid* 3(1)(e).

48 *ibid* 3(1)(f).

49 *ibid* 3(1)(g).

- Providing a system of redress that is ‘accessible, consistent, harmonised, effective and efficient’.⁵⁰

A number of these purposes are directly beneficial to small enterprises. The most important ones are protecting vulnerable consumers, promoting fair business practices and ensuring that small enterprises are more confident and empowered. Categorising small enterprises as consumers in this context is reasonable as they face the same challenges as vulnerable natural person consumers.⁵¹ From a policy perspective, the inclusion of small enterprises as consumers was expressly communicated during the drafting process of the CPA. The aim was to ensure that ‘small [shopkeepers] and other businesses’ are protected when making routine operational purchases.⁵²

The CPA defines a ‘consumer’ as a person to whom goods and services are marketed, or who enters into a transaction, in the ordinary course of business.⁵³ Furthermore, a person who is a user or beneficiary of the goods or services, despite not necessarily being a party to a transaction that concerns the supply of those goods or services, would also be considered as a consumer.⁵⁴ Finally, franchisees are also protected as consumers in terms of the CPA.⁵⁵

In the definition of ‘consumer’, reference is made to a ‘person’. A ‘person’ is defined in the CPA as including a juristic person.⁵⁶ Under the CPA, a juristic person would be considered as a consumer if it has an asset value or annual turnover of less than the threshold of ZAR2 million.⁵⁷ Therefore, in order to benefit from the protection of the CPA, small enterprises that operate as juristic persons would ordinarily need to fall within this threshold requirement. Interestingly, franchisees are not subject to this threshold requirement.⁵⁸

The advantage of being protected under the CPA as a consumer is that certain enforceable rights are afforded to consumers under the CPA. These consumer rights include: (a) the right to equality in the consumer market; (b) the right to privacy; (c) the

50 *ibid* s 3(1)(h).

51 Take for example the baking small enterprise illustration provided earlier under ‘Introduction’ or the spaza shop example provided later under ‘Should Small Enterprises Be Protected as Consumers?’.

52 Para 3.2 of the Memorandum of Objects on the Consumer Protection Bill, 2008. See also E de Stadler and S Eiselen ‘Section 5’ in T Naudé and S Eiselen (eds) *Commentary On the Consumer Protection Act* (Juta Original Service 2014) 5–14.

53 CPA s 1.

54 *ibid* s 1.

55 *ibid* s 1. See also M Martinek ‘Review: Tanya Woker—The Franchise Relationship Under South African Law’ (2013) 2 *Journal of South African Law* 391; T Woker *The Franchise Relationship Under South African Law* (Juta 2012) 45–9 and 56.

56 CPA s 1 defines a ‘juristic person’ to include: (a) a body corporate; (b) a partnership or association; or (c) a trust as contemplated in the Trust Property [Control] Act [57 of] 1988.

57 Threshold Determination (GN 294 (1 April 2011) in GG 34181).

58 CPA s 5(7). This is discussed further in the section ‘Unincorporated Small Enterprises, Incorporated Small Enterprises and Franchisees’.

right to choose; (d) the right to disclosure and information; (e) the right to fair and responsible marketing; (f) the right to fair and honest dealing; (g) the right to fair, just and reasonable terms and conditions; and (h) the right to fair value, good quality and safety.⁵⁹ Franchisees also benefit from specific protections, such as disclosure requirements for the conclusion of a franchise agreement⁶⁰ and mandatory provisions within a franchise agreement.⁶¹ However, certain provisions in the CPA explicitly do not apply to franchise agreements.⁶²

A major challenge that many consumers experience under the CPA relates to the enforcement of the legislation. The lack of clarity on (a) whether there is an implied hierarchy when enforcing consumer rights and (b) the mandate of certain enforcement bodies has been litigated in the courts on more than one occasion.⁶³ However, a detailed analysis on these challenges of the CPA falls outside the scope of this article.

What follows is a comparative analysis of the meaning that is attributed to the term ‘consumer’ and whether this extends to small enterprises in other jurisdictions too. This will be assessed in the context of the United Nations Guidelines for Consumer Protection, 2016 (UN Guidelines) along with consumer protection laws in the state of Michigan in the USA, India and the UK. The purpose of including the UN Guidelines in this analysis is to provide an international backdrop and point of departure. Michigan and the UK are both jurisdictions in developed countries with a longstanding history of consumer protection. Finally, India was selected as a foreign jurisdiction because it is a developing country, similar to South Africa, with a well-developed consumer protection law framework. This may provide helpful insights into the levels of protection that is granted to South African small enterprises under the CPA.

59 See CPA Parts A–H, Ch 2. It is submitted that the rights listed from points (b) to (h) would be beneficial to a small enterprise because these rights seek to ensure that small enterprises have adequate information and are treated fairly when entering into transactions. For the same reason, natural person consumers benefit from the protection of the CPA. However, an in-depth analysis of each of these rights and the sections of the CPA that fall under each one is outside the scope of this article.

60 CPA Regulations (GN R293 (1 April 2011) in GG 34180), reg 3.

61 CPA Regulations 2011, reg 2 (n 60).

62 CPA sections that are not applicable: s 17 Consumer’s right to cancel advance reservation, booking or ordering; s 19 Consumer’s rights with respect to delivery of goods or supply of service; s 33 Catalogue marketing; s 38 Referral selling; and s 47 Over-selling and over-booking. Franchise agreements are expressly excluded from the wording of each of these provisions and are also excluded from the definition of ‘consumer agreements’ in s 1.

63 *Imperial Group (Pty) Ltd v Dipico* 2016 ZANHC 1; *Joroy 4440 v Potgieter* 2016 (3) SA 465 (FB); *Imperial Group t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government and Others* 2016 (3) SA 564 (FB); *Motus Corporation v Wentzel* [2021] ZASCA 40; *Barnado v National Consumer Commission and Others* [2021] ZAGPPHC 531.

International and Foreign Legal Position on the Protection of Enterprises As Consumers

UN Guidelines for Consumer Protection

The current UN Guidelines are the third iteration of the document and constitute an ‘international soft law instrument’ that is non-binding in nature.⁶⁴ Despite its being non-binding, Benöhr submits with merit that the guidelines have the potential to ensure that consumer protection is improved at both the international and the national level.⁶⁵ The objectives of the UN Guidelines include assisting countries in achieving sufficient consumer protection for their population;⁶⁶ facilitating production and distribution patterns that take account of consumer needs and desires;⁶⁷ encouraging high levels of ethical conduct in the process of producing and distributing goods and services to consumers;⁶⁸ assisting countries in curbing abusive business practices that have an adverse effect on consumers;⁶⁹ facilitating the development of independent consumer groups;⁷⁰ furthering international cooperation in consumer protection;⁷¹ encouraging the development of market conditions that give consumers greater choice at lower prices;⁷² and promoting sustainable consumption.⁷³ On the whole, the guidelines are a welcome effort to provide an international benchmark for consumer protection law.⁷⁴ The UN Guidelines also, quite importantly, acknowledge that member states have unique domestic needs that must be addressed in their domestic consumer protection laws.⁷⁵

The UN Guidelines define a ‘consumer’ as ‘... a natural person, regardless of nationality, acting primarily for personal, family or household purposes, *while recognizing that Member States may adopt differing definitions to address specific domestic needs*’.⁷⁶ (Own emphasis) The UN Guidelines thus recognise at the outset that

64 UN Guidelines (United Nations Conference on Trade and Development, July 2016) 3 <https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf> accessed 9 March 2024. See I Benöhr, ‘The United Nations Guidelines For Consumer Protection: Legal Implications and New Frontiers’ (2020) 43 Journal of Consumer Policy 117.

65 Benöhr (n 64) 121.

66 UN Guidelines (n 64) Art 1(1)(a).

67 *ibid* Art 1(1)(b).

68 *ibid* Art 1(1)(c).

69 *ibid* Art 1(1)(d).

70 *ibid* Art 1(1)(e).

71 *ibid* Art 1(1)(f).

72 *ibid* Art 1(1)(g).

73 *ibid* Art 1(1)(h).

74 Initially, the first iteration of the UN Guidelines was met with contempt by certain consumer law experts, see M Weidenbaum ‘The case against the UN Guidelines for Consumer Protection’ (1987) 10(4) Journal of Consumer Policy 425.

75 South Africa, the United States of America, the United Kingdom and India are all member states of the United Nations, see <<https://www.un.org/en/about-us/member-states#gotoI>> accessed 8 June 2024.

76 UN Guidelines (n 64) Art 3.

different member states may adopt definitions best suited for their domestic needs. Under these guidelines, a consumer is restricted to natural persons acting for non-commercial purposes. Therefore, whether incorporated or not, businesses were not an intended target for protection under the UN Guidelines. As will become clear below, however, member states have relatively divergent approaches to how they define a ‘consumer’ and, ultimately, who they protect in their consumer legislation.

United States of America—Michigan

In US general consumer protection law, the common-law position on consumer contracts may be gleaned from the Restatement of the Law, Consumer Contracts,⁷⁷ which was last updated in September 2022. The Restatement reaffirms the US common law of contracts as applied by the US courts in relation to consumer contracts.⁷⁸ The Restatement defines a ‘consumer’ as ‘an individual acting primarily for personal, family, or household purposes’.⁷⁹ This definition is aligned with the UN Guidelines, as it recognises a consumer as an individual, generally understood to be a natural person, who is acting for non-commercial purposes.

The definition provided in the Restatement is also aligned with the one provided in the Uniform Commercial Code (UCC).⁸⁰ The UCC has uniformly adopted state law that regulates various aspects of commercial contracts, including the laws of sale and lease.⁸¹ In alignment with US common law, the UCC also restricts the meaning of ‘consumer’ to natural persons who are not acting for commercial purposes. The Michigan Consumer Protection Act 331 of 1976 (MCPA) follows a similar approach. The MCPA uses the term ‘consumer’ and ‘party’ interchangeably; however, the terms do not appear to have been defined. The MCPA aims to, *inter alia*, prohibit certain conduct that may adversely affect consumers, and provide remedies and redress where such conduct has transpired.⁸² The conduct that is regulated under the MCPA relates to ‘trade and commerce’, defined in the Act as—

[T]he conduct of a business providing goods, property, or service primarily for *personal, family, or household purposes* and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. ‘Trade or commerce’ does not include the purchase or sale of a franchise as defined in section 2 of the franchise investment law, 1974 PA 269, MCL 445.1502, but does include a pyramid

77 Hereafter referred to as ‘Restatement’.

78 Restatement of the Law, Consumer Contracts §1 TD No 2 REV (2022) §1(b). See also O Bar-Gill, O Ben-Shahar and F Marotta-Wurgler ‘Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts’ (2017) 84(1) The University of Chicago LR 14.

79 Restatement (n 78) §1(a)(1).

80 Uniform Laws Annotated UCC, §1-201(b)(11) defines a ‘consumer’ as ‘an individual who enters into a transaction primarily for personal, family, or household purposes’.

81 See UCC Arts 2 and 2a.

82 Editors’ notes MCPA Ch 445.

promotional scheme as defined in section 2 of the pyramid promotional scheme act, MCL 445.2582.⁸³ (Own emphasis)

This definition states that the scope of the MCPA is restricted to personal, family or household purposes, as is the case in the Restatement. Unlike the CPA, the MCPA does not apply to franchise agreements, which are regulated comprehensively under a separate framework. South Africa chose not to follow this approach when considering its own regulation of franchises.

Whereas the scope of the MCPA seems to be limited by the restriction of trade or commerce to the provision of goods or services for ‘personal, family, or household purposes’, there appears to be uncertainty about whether businesses may sue under the MCPA.⁸⁴ There is authority to the effect that an individual consumer who buys goods or services and uses them primarily for business purposes cannot sue under the Act.⁸⁵ Accordingly, the general approach seems to be that enterprises, including small enterprises, are not protected if the goods or services are being used for business or commercial purposes. A personal purpose must be established.

However, whether businesses can sue under the MCPA as consumers has been contentious in the Michigan courts.⁸⁶ The case of *Catallo Associates, Inc v MacDonald and Goren, PC*,⁸⁷ for example, considered an alleged violation of the MCPA by Catallo Associates Inc (Catallo), which was hired to assist with furnishing installations at MacDonald and Goren (a law firm). The allegation by the law firm was that Catallo had charged it excessively in contravention of the MCPA, which constitutes unlawful

83 MCPA s 2(g).

84 See GM Victor, ‘The Michigan Consumer Protection Act: What’s Left After *Smith v. Globe?*’ (2003) 82(9) Michigan Bar Journal 23.

85 *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999). In this case, it was alleged that the MCPA was not applicable to the transaction because Zine had purchased the truck in question primarily for business use. The court held as follows:

‘*Catallo* was wrongly decided and [found] that the trial court erred in denying Chrysler’s motion for summary disposition. Zine testified at his deposition that he is self-employed as a sales representative. He stated he bought the truck “for this business application” and “primarily for my business,” he described the truck as a business asset, he had a cargo box installed for storing equipment samples, he had it modified with a hydraulic lift gate, apparently to aid in the loading and unloading of the samples, and he had the name of his company painted on the side of the truck. Zine added that it was “also for my personal needs,” e.g., going to the grocery store or post office or “haul[ing] my two sons around,” but said over eighty percent of the miles he put on the truck were attributable to business driving and admitted that he claimed a business deduction for depreciation of the vehicle. We conclude that reasonable minds could not differ in concluding that Zine purchased the truck primarily for business rather than personal use and therefore hold that Chrysler was entitled to summary disposition on this ground.’

86 Victor (n 84) 23.

87 186 Mich App 571 (1990), 465 North Western Reporter, 2d series 29.

‘unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce’.⁸⁸

The court first referred to the definition of ‘trade or commerce’ as set out in the MCPA.⁸⁹ The court then highlighted that there was precedent in the court of appeals to the effect that ‘the phrase “primarily for personal, family, or household purposes” modifies the words “goods, property or service” so that the inquiry must be whether the goods, property or services sold were sold primarily for personal, family, or household purposes’.⁹⁰

The court accepted that ‘personal’ meant ‘of or relating to a particular person’. In the MCPA, ‘person’ is defined as ‘an individual, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity’.⁹¹ Bearing in mind the definition the court had adopted for ‘personal’, the court held that, in the context of the MCPA, ‘personal’ should mean ‘of or relating to a particular person, corporation, trust, partnership, incorporated or unincorporated association or other legal entity’.⁹² Accordingly, the court held that the law firm was a ‘person’ under the MCPA and the furnishings were intended for the use of the law firm.⁹³ As such, the furnishings that had been provided by Catallo were primarily for personal use and reliance could be placed on the MCPA.⁹⁴

However, in two subsequent decisions, namely the *Robertson v State Farm Fire & Casualty*⁹⁵ and the *Jackson County Hog Producers v Consumers Power Co*⁹⁶ cases, which were respectively decided at federal and state level, the courts determined that the MCPA could not be extended to allow businesses to sue under its provisions. The court in *Robertson* considered a matter concerning the enforcement of an insurance policy over personal and commercial property.⁹⁷ This included a dairy farm that had collapsed, resulting in subsequent harm and substantial loss in business profit.⁹⁸ The plaintiffs alleged that the agent of the defendant had misrepresented that their insurance policy was valid. However, after filing their claim, the plaintiffs were informed that they were not insured and that the defendant would not reimburse the plaintiffs for their loss.⁹⁹ The plaintiffs sought to hold the defendant liable on three

88 *ibid.*

89 *ibid.*

90 *ibid.* See also *Noggles v Battle Creek Wrecking, Inc.*, 153 Mich App 363, 395 NW2d 322 (1986).

91 MCPA s 2(1)(d).

92 *Catallo* (n 87).

93 *ibid.*

94 *ibid.*

95 890 F Supp. 671 (1995).

96 234 Mich App 72 (1999).

97 *Robertson* (n 95) 680.

98 *ibid* 573.

99 *ibid.*

counts; however, the court in *Robertson* only focused on the alleged violation of the MCPA.¹⁰⁰

The court in *Robertson* began with an assessment of the exemption provisions in the MCPA in light of the claim being one of insurance. It held that the MCPA would apply despite the exemption provisions.¹⁰¹ This ruling is, however, not critical for the purposes of this article. What is important is the court's consideration of whether the transaction was within the scope of 'trade or commerce' as contemplated in the MCPA.

The court rebutted the decision in *Catallo* based on four grounds. First, the court held that the use of the word 'person' in the MCPA was with reference to the persons either bringing an action (plaintiffs) or defending one (defendants).¹⁰² It was of the view that the Act had to include juristic persons within its purview of persons because most of the defendants would be businesses or corporations.¹⁰³ As such, the definition of 'person' served a broader purpose (by including juristic person defendants within its scope) that could not be used to interpret the term 'personal'.¹⁰⁴

The second ground of rebuttal was based on section 3(a) of the MCPA, which defines a 'company', as 'a person engaged in trade or commerce who provides a service contract to consumers'.¹⁰⁵ The court's view was that it would be illogical for the MCPA to restrict the potential plaintiffs to consumers, while allowing any person to bring a lawsuit under the provision. As such, the court could not follow an interpretation of the MCPA that would lead to absurd results.¹⁰⁶

The third ground of rebuttal was that the definition of 'personal', as per *Catallo*, ignores the terms that surround it, namely 'family' and 'household'.¹⁰⁷ The court's view was that such an approach does not consider the principle of interpretation whereby a general term should be interpreted in the context of the words that accompany it to avoid an unintended breadth of interpretation.¹⁰⁸ Accordingly, viewing the term in isolation, as was done in *Catallo*, provided the wider interpretation that the principle of statutory construction sought to avoid.¹⁰⁹

Lastly, the court assessed previous decisions on the application of the MCPA to businesses and business people. It was of the view that, based on previous decisions taken, the Michigan Supreme Court would have decided differently. Accordingly, the

100 *ibid.*

101 *ibid* 677.

102 *ibid* 680.

103 *ibid.*

104 *ibid.*

105 *ibid.*

106 *ibid.*

107 *ibid.*

108 *ibid.*

109 *ibid.*

court was not bound to *Catallo*.¹¹⁰ The court in *Robertson* held that the plaintiffs' purpose in purchasing the policies was primarily commercial rather than domestic, thus the MCPA was not applicable to the dispute.¹¹¹

The case of *Jackson County Hog Producers v Consumers Power*¹¹² concerned a lawsuit by the plaintiff against the defendant regarding stray voltage. The plaintiff alleged that the defendant was guilty of contravening the prohibition against 'unfair, unconscionable, or deceptive methods, acts or practices in the conduct of *trade or commerce*', which is considered unlawful.¹¹³ The court indicated that the use of electricity by the plaintiff was for business operations rather than 'primarily for personal, family, or household purposes', which meant that the MCPA was not applicable to that transaction.¹¹⁴ The court departed from the finding in *Catallo* on three grounds.

First, the court found that using the 'root word "person"' in order to determine the meaning of the word 'personal' was inappropriate. Given that the two words are different, the court's view was that the definition of the one could not control the other.¹¹⁵ Second, the court found that the definition of 'personal', as provided for in *Catallo*, ignored the context in which the word was used and, in essence, disregarded the limiting language that was used in the provision.¹¹⁶ The court's view was that the legislature's intention was to protect consumers in the context of transactions that were more intimate in nature than the transactions involved in the *Hog Producers* case.¹¹⁷ Lastly, the court also indicated that a federal court had expressly rejected the decision of the panel in *Catallo* in *Robertson*.¹¹⁸

Finally, the 2021 decision of the US district court in *FOMCO, LLC v Hearthside Grove Association*¹¹⁹ clarified that there is a distinction between a claim under the MCPA by a business competitor and a claim where the nature of the transaction is inherently outside the scope of 'trade and commerce', as defined. In this matter, FOMCO conducted business as Hearthside Grove in the real estate sector.¹²⁰ One of the property developments was named Hearthside Grove, in the state of Michigan.¹²¹ FOMCO had seemingly formed an association, called the Hearthside Grove Association, to manage

110 *ibid.*

111 *ibid* 681.

112 *Hog Producers* (n 96).

113 *ibid* para 13.

114 *ibid.*

115 *ibid* paras 14–15.

116 *ibid.*

117 *ibid.*

118 *ibid.*

119 Dist Court, WD Michigan 2021.

120 *ibid* 1.

121 *ibid.*

the common areas of the development.¹²² However, FOMCO was no longer associated with this development and it took issue with the defendants' continued use of the Hearthside Grove name and logo.¹²³ The defendants sought to have the case dismissed on the grounds that the MCPA does not apply where there is no transaction between the plaintiff and the defendant and where the plaintiff is a business entity.¹²⁴ The court indicated that the MCPA permits claims from persons who suffer a loss due to an infringement of the legislation to sue for damages.¹²⁵

As mentioned above, a 'person' in the MCPA includes a juristic person. Accordingly, the court held that businesses are not precluded from instituting claims under the MCPA and that it is not a requirement that the transaction be between the plaintiff and the defendant.¹²⁶ The court requires that a loss must be suffered because the MCPA has been infringed.¹²⁷ In this regard, the court held that the deceptive methods of the defendants, through the improper use of FOMCO's trading name, could result in a loss to FOMCO.¹²⁸ The court highlighted that the courts have allowed claims under the MCPA where a business alleges that a business competitor's conduct has resulted in confusion in the marketplace by using trademarks and domain names that are confusingly similar.¹²⁹ In so far as jurisprudence regarding the personal-purpose requirement was concerned, the court held that:

Granted, some courts have concluded that a business entity cannot bring a claim because the 'trade and commerce' regulated by the MCPA involves the conduct of a business providing goods, property, or service *primarily for personal, family, or household purposes*. However, the commercial transactions at issue in this case are for the purchase and rental of real estate by 'consumers,' ostensibly for personal purposes. Thus the personal-purpose requirement is satisfied.¹³⁰

The court disagreed with the reasoning in a previous judgment, namely that the MCPA did not provide business entities with a private right of action, as there was insufficient authority to carry its reasoning.¹³¹ According to the court, the previous judgments in this regard were fundamentally based on the nature of the transaction (ie that it did not meet the personal-purpose requirement) as opposed to the plaintiff's identity.¹³² Accordingly, a small enterprise might benefit from the protection of the MCPA only if it can show

122 *ibid.*

123 *ibid.*

124 *ibid* 2.

125 *ibid* 3.

126 *ibid.*

127 *ibid.*

128 *ibid.*

129 *ibid* 4.

130 *ibid.*

131 *ibid.* See *Watkins & Son Pet Supplies v Iams Co*, 107 F Supp 2d 883 (SD Ohio 1999). See also E Switzer, A Eggers and K Ahmed (eds), *State Consumer Protection Law* (American Bar Association, 2022) 304.

132 *FOMCO* (n 119) 4.

that it has suffered a loss because of a contravention of the MCPA. Being a business does not preclude it from having a right of action in a situation similar to FOMCO's. However, as in *FOMCO*, the underlying personal-purpose requirement should be satisfied as the basis for the commercial transactions in question.

India

In the Indian context, the Consumer Protection Act, 2019 (Indian CPA) provides for, *inter alia*, the protection of consumer interests and establishing the relevant authorities to give effect to the settlement of disputes concerning consumers in a timely and effective manner.¹³³ The Indian CPA appears to extend its protection to juristic persons without providing for an express income or other threshold. The Indian CPA defines a 'consumer'¹³⁴ as a person¹³⁵ who buys goods or uses services for consideration.¹³⁶ It also includes persons who use the goods or services with the permission of the buyer.¹³⁷ However, this definition expressly excludes persons who obtain goods or services for resale or commercial purposes.¹³⁸

The explanatory notes to the Act elaborate that 'commercial purpose' does not include the use of goods exclusively for purposes of earning a livelihood, namely, self-employment.¹³⁹ On this matter, Rachagan posits that the definition of 'consumer' in the Indian CPA covers the numerous 'petty traders, trishaw pullers, auto-rickshaw drivers', subsistence farmers and pastoralists.¹⁴⁰ Therefore, the Indian CPA makes an exception to the 'exclusion of the use of goods and services for commercial purposes' clause to create room to include small enterprises, provided that they are formed purely for earning a livelihood. Forms of enterprise that might be protected by this exception

133 Preamble to Indian CPA.

134 In terms of the Indian CPA s 2(7) 'consumer' means any person who buys goods or services for consideration or is a user of such goods or services, but excludes a person who obtains the goods for resale or for any commercial purpose. See also LA Panicker, 'Contemporary Issues of Consumer Protection' (2021) 4(2) *International Journal of Law and Management Humanities* 1904.

135 CPA India, s 2(31) defines a "person" to include—

- (i) an individual;
- (ii) a firm whether registered or not;
- (iii) a Hindu undivided family;
- (iv) a co-operative society;
- (v) an association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not;
- (vi) any corporation, company or a body of individuals whether incorporated or not;
- (vii) any artificial juridical person, not falling within any of the preceding sub-clauses.'

136 Indian CPA s 2(7).

137 See S Jothi Poorna, 'A Critical Analysis of Consumer Protection Act 2019' (2020) 15 *Supremo Amicus* 283.

138 See J Mekala Devi, 'A Study of the Emergence of Consumer Protection Act of 2019' (2020) 9(5) *International Journal of Sales and Marketing Management* 2.

139 Para (a) of the explanatory notes.

140 S Rachagan, 'Development and Consumer Law' in G Howells, I Ramsay and T Wilhelmsson *Handbook of Research on International Consumer Law* (2nd edn, Edgar Elgar 2018) 42.

include both incorporated and unincorporated small enterprises that have not scaled their operations and are run solely for generating a livelihood. However, it may be difficult to determine when the consumer has crossed the line from operating for generating a livelihood to operating for commercial or resale purposes. It would be interesting to see how the courts determine this distinction in the Indian context, but there does not appear to be case law that has specifically dealt with this point. It is laudable that the Indian CPA recognises the need to extend protection to small enterprises, albeit in limited circumstances.

India's Micro, Small and Medium Enterprise Development Act, 2006 (MSMED Act) was enacted with the purpose of, *inter alia*, 'facilitating the promotion and development and enhancing of competitiveness of micro, small and medium enterprises'.¹⁴¹ The Act came into force on 2 October 2006.¹⁴² For the purposes of this statute, small enterprises are classified according to monetary investment values in certain instances.¹⁴³ The MSMED Act established a national board for micro-, small and medium enterprises, which serves the purpose of, among other things, assessing the factors that affect the 'promotion and development' of small enterprises so as to enhance their competitiveness and impact.¹⁴⁴ The measures the MSMED Act has introduced to promote, enhance and develop the competitiveness of small enterprises include preferential procurement policies for small enterprises and progressive credit policies and practices.¹⁴⁵ The MSMED Act also regulates delayed payments to small enterprises.¹⁴⁶

In the event that neither the MSMED Act nor the Indian CPA applies, an enterprise will have recourse to other legislative frameworks, such as the Sale of Goods Act, 1930. However, standard legislation, such as the Sale of Goods Act, 1930, does not necessarily consider the dynamics that specifically apply when dealing with small enterprises. These include the existence of an information asymmetry and unequal bargaining position when engaging with larger enterprises, especially. However, a further discussion of alternative legislation that does not have a small enterprise or consumer focus falls outside the scope of this article.

United Kingdom

The United Kingdom's Consumer Rights Act 2015 (CRA) provides for, *inter alia*, consumer rights and the protection of consumer interests. It generally applies to contracts between traders and consumers.¹⁴⁷ The CRA defines a 'consumer' as an individual acting 'wholly or mainly outside' of their 'trade, business, craft or

141 MSMED Act preamble

142 See footnote to MSMED Act s 1(2).

143 MSMED Act s 7.

144 *ibid* s 5(a).

145 *ibid* ch IV.

146 *ibid* ch V.

147 CRA Part 1 (Consumer contracts for goods, digital content and services) and Part 2 (Unfair terms).

profession'.¹⁴⁸ Furthermore, the repeal provisions of the CRA make it clear that legislation such as the Supply of Goods (Implied Terms) Act 1973, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1994 apply only to business-to-business or consumer-to-consumer transactions.¹⁴⁹ Therefore, the clear intention of the UK legislature is to cover only contracts between consumers and businesses, where the consumer is a natural person who is, in essence, not acting in a business or work capacity. Consequently, most small enterprises, regardless of their form, would not ordinarily benefit from the consumer protection provisions of the CRA.

Although not protected under the CRA, enterprises, including small enterprises, are specifically protected under the Enterprise Act 2016. This Act seeks to promote enterprise and economic growth, while also regulating certain labour matters, such as Sunday work and restrictions on exit payments in the public sector.¹⁵⁰ Furthermore, the Enterprise Act specifically makes mention of 'small business' and defines this term as an undertaking that: (a) has fewer than 50 staff members; (b) meets the small business threshold; and (c) is not a public authority.¹⁵¹ The first requirement is similar to that under South Africa's NSEA. In terms of the second requirement, an enterprise is considered meeting the business threshold condition 'if it has a turnover, or balance sheet total, of an amount less than or equal to the small business threshold'.¹⁵² The small business threshold is meant to be set out in the Small Business Commissioner (Scope and Scheme) Regulations 2017.¹⁵³ However, the furthest that the SBC scope regulations seem to go is to expound on the meaning of 'small business', taking into account the staff headcount requirements, without referring to a specific threshold. The business threshold condition is meant to apply to an enterprise if the SBC scope regulations require that the threshold condition applies to all enterprises. Alternatively, it will apply where 'the relevant undertaking falls within a description of undertakings to which SBC scope regulations apply that condition'.¹⁵⁴ Regrettably, the threshold requirements are unclear in the SBC scope regulations, which might be an oversight of the legislature.

The Small Business Commissioner was established under the Enterprise Act to provide small businesses with general advice and information.¹⁵⁵ Its further purpose is to assist small enterprises with complaints that relate to payment matters when supplying goods or services to larger businesses and to provide recommendations in this regard.¹⁵⁶

Enterprises that would not qualify as small enterprises under the Enterprise Act could rely on the business-to-business legislation, as referred to earlier. However, these

148 *ibid* s 2(3).

149 *ibid* s 24.

150 See introductory text of Enterprise Act 2016.

151 Enterprise Act 2016, s 2(4).

152 *ibid*.

153 Hereafter the 'SBC scope regulations'.

154 Enterprise Act 2016 s 3.

155 *ibid* s 1(2)(a); see also s 12E(4).

156 *ibid* s 1(2)(b).

statutes seemingly do not have a particular focus on small enterprises generally, or on them in their capacity as consumers. Accordingly, a further discussion of these statutes is not within the scope of this article.

Comparative Analysis

Should Small Enterprises Be Protected as Consumers?

From the discussion of the various jurisdictions, it is evident that the protection of small enterprises as consumers is not a universal aim. In fact, approaches to consumer protection are quite divergent. Although South Africa protects small enterprises as consumers, the level of protection differs depending on whether the small enterprise is operating as an incorporated or an unincorporated entity. Incorporated entities will be protected if they fall within the threshold of a ZAR2 million asset value or annual turnover, but unincorporated small enterprises benefit from unlimited protection. A further distinction is made where a corporate entity is acting as a franchisee, in which case no limit applies.

The Indian CPA's protection of small enterprises is, to a very limited extent, similar to that of South Africa. In India, a consumer is considered to be a person, including a juristic person without a threshold limitation, who buys goods or services for consideration. The proviso is that such a person should not be acting for commercial or resale purposes—they would be protected if they were using the goods exclusively to generate a livelihood.

The position in the state of Michigan is slightly more nuanced. At the federal level, as stated in the Restatement of the Law, Consumer Contracts¹⁵⁷ and under common law, a 'consumer' is restricted to an individual acting primarily for personal, family or household purposes. At the state level, the MCPA does not specifically define the term 'consumer'; however, it restricts its scope of application to 'the conduct of a business providing goods, property, or service primarily for *personal, family, or household purposes* ...'. (Own emphasis) The courts have considered whether a business can sue under the provisions of the MCPA. The current authority appears to be that a business may only sue under the MCPA if the underlying transaction meets the personal-purpose requirement and if the business ultimately has standing to sue under the MCPA.¹⁵⁸

In contrast, the approach in the UK is stricter in that the CRA applies only to individuals 'acting wholly or mainly' outside their 'trade, business, craft or profession'. Under the UK's CRA, there is no scope for small enterprises to benefit from any protection.

An observation from this analysis is that there is a level of harmonisation between the developed nations under discussion on the one hand, and the developing nations.

157 Restatement (n 78).

158 FOMCO (n 119).

The developed nations, namely the UK and the USA, generally do not protect small enterprises as consumers, whereas the developing nations, namely South Africa and India, seem to be more open to providing consumer protection to small enterprises. South Africa does this more broadly, whereas India does it only where a person would enter into a transaction to generate a livelihood. Notably, Ayandibu and Houghton argue that:

In [developed] countries like the United States of America and the United Kingdom, small enterprises play an important role in the economy accounting for an estimated one third of industrial employment and a lower percentage of output. In the [developing] countries where SMEs [small and medium enterprises] dominate economically active enterprises, the SMEs prosperity is considered far more important than in the [developed] countries.¹⁵⁹

This perceived importance of small enterprises could account for the direction adopted by the developing countries that have been analysed.¹⁶⁰ As mentioned earlier, small enterprises act as a key catalyst for economic growth and poverty alleviation.¹⁶¹ They can do this by creating an environment for transferring skills, job creation, providing previously disadvantaged persons with access to markets, and contributing holistically to the process of transformation.¹⁶²

Despite the importance of small enterprises to economies, their survival rate is low, not only in South Africa but across the world; generally, they do not survive beyond five years.¹⁶³ Small enterprises face multiple financial and non-financial pressures that contribute to their shortened lifespan. This is aggravated by the fact that these enterprises do not have the resources to fend for themselves in a free-market economy that is governed by the classical theory of contract. As a result, small enterprises then

159 Ayandibu (n 1) 135.

160 For example, South Africa's Department of Small Business issued a 2022/3 report indicating that the contribution of the small enterprise sector to the gross domestic product (GDP) would be increase from 35 per cent to 50 per cent by 2024; see Department of Small Business Development, 'Annual Report 2020/1 Financial Year: Department of Small Business Development Vote No. 36' 17 <<http://www.dsbd.gov.za/sites/default/files/2021-09/DSBD2020-21-annual-report.pdf>> accessed 9 March 2024. A detailed statistical analysis would require an assessment of the small-enterprise contribution patterns across a wider period, particularly in light of the impact that COVID-19 had on the economy worldwide. This analysis would also need to be conducted for each jurisdiction that was included in this comparative research. It would further need to assess whether there is a direct correlation between the protection of small enterprises as consumers and their growth as enterprises. However, this falls outside of the scope of this article.

161 P Agupusi, *Small Business Development and Poverty Alleviation in Alexandra South Africa* (Paper for Second Meeting of the Society For the Study of Economic Inequality, 2007) 2; A Brink and M Cant, *Problems Experienced by Small Businesses in South Africa* (Paper for Small Enterprise Association of Australia and New Zealand 16th Annual Conference, Ballarat, 2003) 1, which indicate that the SME sector is regarded as a driving force for economic growth in both developing and developed countries.

162 See Agupusi (n 161) 8.

163 Brink and Cant (n 161) 1.

require the protection that consumer legislation extends to consumers so that they can hopefully survive and fulfil their role in the economy. It is submitted that limiting the protection afforded by the CPA to persons generating a livelihood, as is the case in India, or completely excluding small enterprises from the scope of consumer protection legislation, as is done in the UK, or following the USA's approach of excluding small enterprises subject to exceptional circumstances where there is an underlying personal-purpose requirement, would work against the goal of growing the contribution of small enterprises to the South African economy.¹⁶⁴

By way of further illustration, a spaza shop¹⁶⁵ is one of the common forms of small enterprise that operates particularly in the township areas of South Africa. If a spaza shop procures supplies for resale from a wholesaler, it would ordinarily not be in a position to negotiate the terms and conditions of its agreement with the wholesaler. Therefore, unfair contract terms and unfair business dealings by the wholesaler would severely prejudice the spaza shop. These could span from misrepresentations during the marketing phase to the provision of substandard products that are not fit for use or resale.

The power imbalance in such a scenario is easy to understand. The wholesaler, being a larger enterprise, would naturally be better resourced. Such resources would be applied towards getting legal advice when preparing the standard contract terms for its mass sales. The resources would further be applied in defending any lawsuits against it. The spaza shop's position would be in stark contrast to that of the wholesaler's. The owner of the spaza shop might have insufficient knowledge regarding its common-law contract rights, such as claiming a reduction in the purchase price for substandard goods or demanding a refund.¹⁶⁶ The ill-fated spaza shop owner might even be reluctant to pursue litigation against the wholesaler when considering the value of the claim, which is often nominal compared to the high costs of litigation.¹⁶⁷ Apart from spaza shops, a number of other small enterprises are operated by low-income persons in low-income or rural communities or by persons who may have limited fluency in a particular language, such as English.¹⁶⁸ It is thus not surprising that small enterprises may qualify as the

164 Department of Small Business Development (n 160).

165 Small shops in South Africa, which mostly occur in townships, operating from a person's backyard or a shipping container.

166 See *Dibley v Furter* 1951 (4) SA 73 (C) at 82D and *Phame v Paizes* 1973 (3) SA 397 (A) 409G–410A.

167 CPA s 69 provides for the enforcement of consumer rights. It also provides a number of dispute resolution forums that can be approached by consumers, which would include the spaza shop in this instance. Some of these dispute resolution forums, such as the Consumer Goods and Services Ombud (GCSO), allow a consumer to lodge and pursue a complaint free of charge, which is critical to ensuring access to justice for indigent consumers.

168 Unless specifically provided for in legislation, the law prevents the attribution of the characteristics of the owners of the corporation to the corporation itself, see *Dadoo v Dadoo* 1920 AD 530. Without ignoring the principle of separate legal personality as enunciated in *Salomon v Salomon & Co* [1897] AC 22, it is submitted that incorporated small enterprises can still meet the requirements of a vulnerable consumer by taking into account the relevant operating address, annual turnover, access

vulnerable consumers that the CPA specifically caters for through the rights it affords consumers.

In light of this, the protection of small enterprises as consumers under the CPA is indeed warranted. When small enterprises are afforded some level of protection by consumer protection legislation, they have access to an array of rights and remedies. This is necessary to provide small enterprises with support and to promote their sustainability.

Unincorporated Small Enterprises, Incorporated Small Enterprises and Franchisees

While it has been established that the protection of small enterprises is warranted, the thresholds applicable to incorporated small enterprises under the South African CPA deserve further scrutiny. As mentioned earlier, unincorporated small enterprises are afforded the full scope of protection under the CPA, whereas incorporated small enterprises are protected only if they meet the threshold requirement of an asset value or annual turnover of less than ZAR2 million.¹⁶⁹

India does not impose a threshold on juristic persons that fall within the scope of the Indian CPA as consumers. However, that statute's application in the small business context is narrow: it applies only to persons seeking to generate a livelihood and does not ordinarily apply to persons who obtain goods or services for resale or commercial purposes. Such a set-up would not be ideal in the South African context, where small enterprises are expected to increase their contribution to the country's economic growth.¹⁷⁰

The UK provides a threshold as part of the criteria for a small enterprise, including an employee number threshold, as does South Africa's NSEA. Imposing thresholds of this nature on small enterprises in South Africa is thus not a novel practice. The threshold as determined by the Minister should be in keeping with the intention of the CPA, namely the protection of small enterprises as consumers. This threshold is necessary to avoid a situation where all enterprises are protected as consumers under the CPA. Such extensive coverage would simply be misaligned with the purpose of the CPA.

For perspective, the initial iteration of the NSEA¹⁷¹ had lower thresholds for what would qualify as a micro-, very small, small and medium-sized enterprise. Unlike the current NSEA, where the lowest threshold for a small enterprise is ZAR5 million, in the previous iteration, the lowest threshold was ZAR150,000 for annual turnover and ZAR100,000 for gross asset value. In terms of these lower thresholds, a number of small enterprises qualifying as such under the NSEA's national standard would also have been

to information and access to resources. Therefore, their vulnerability is not necessarily tied to those who manage and control them.

169 Threshold Determination (GN 294 (1 April 2011) in GG 34181).

170 Department of Small Business Development (n 160).

171 Formerly known as the National Small Business Act 102 of 1996.

protected as consumers under the CPA. Following the 2004 amendment to the NSEA,¹⁷² the thresholds are currently significantly higher,¹⁷³ with the lowest threshold for a small enterprise under the national standard being ZAR5 million. The increase of the threshold value for an entity to qualify as a small enterprise under the NSEA was reasonable, considering factors such as inflation and economic growth over the period between the commencement of the initial iteration of the NSEA and the 2004 amendment. However, a number of micro-enterprises that fall between the ZAR2 million and ZAR5 million threshold would currently not benefit from the protection of the CPA, which seems to be contrary to the purpose of including small enterprises within the scope of the CPA.

It may well be that when drafting the CPA, the legislature did not expressly consider the provisions of the NSEA when initially determining the threshold for juristic persons who can be protected under the CPA. Given that the legislature intended to include small enterprises in the scope of the CPA, it would be sensible to align this with the small enterprise national standard in the NSEA, as far as possible. This would also mean that the threshold was being considered contextually and was not an arbitrary determination.

The threshold determined by the Minister should consider the realities of who should be able to utilise the protection under the CPA. Unincorporated small enterprises are already entitled to benefit from the CPA's protective provisions, regardless of their turnover or asset value. Accordingly, the concern is incorporated small enterprises, which are vulnerable and worthy of protection. Considering the challenges experienced by small enterprises and the necessity to afford them adequate protection as consumers, the consideration of the threshold under the CPA should be revisited by the Minister, as is permissible under section 6 of the CPA, in order to realign the threshold determination of the CPA with the South African small enterprise landscape.

As mentioned above, franchisees are not subject to the threshold limitation under the CPA if they are operating as incorporated small enterprises. This creates a precarious position: the same small enterprise would be excluded from the CPA protection because it exceeded the threshold requirements, but it would be afforded the full protection of franchisees under the CPA. A further inadvertent consequence of the wide application of the CPA to franchisees is that even large enterprises, acting as franchisees, would benefit as consumers under the CPA.

It ought to be mentioned that the protection of franchisees under the CPA is important because franchising arrangements can provide previously disadvantaged persons, including small enterprises, with the opportunity 'to participate in the mainstream economy'.¹⁷⁴ In addition, the franchise relationship is very nuanced. In this regard, Woker submits that—

172 National Small Business Amendment Act 29 of 2004.

173 See the Schedule in the Appendix.

174 Van Eeden and Barnard (n 28) 208.

There is an in-built power imbalance in the franchisor-franchisee relationship even if franchisees are not inexperienced entrepreneurs who may be vulnerable to exploitation. This is because of the sunk investment that franchisees make. Once franchisees are committed to a network and have made substantial investments in terms of time and resources, the power of franchisors is substantially increased and they can insist that franchisees comply with their demands.¹⁷⁵

In addition to this ‘in-built power imbalance’, other factors are at play in relation to franchise agreements. These factors include that: (a) the agreements are often standard form contracts that are difficult to renegotiate;¹⁷⁶ (b) unlike other commercial contracts, franchise arrangements tend to be very ‘intimate and interdependent’;¹⁷⁷ and (c) the relationship is also one that is long term and ongoing.¹⁷⁸ It is telling that jurisdictions such as the USA also have a level of regulation in so far as franchises are concerned.¹⁷⁹ However, it is questionable whether all franchisees, including those that are large enterprises, require the comprehensive scope of protection of the CPA.¹⁸⁰ After increasing the threshold to one that is more reflective of the current ranges for small enterprises in South Africa, it may be worthwhile for the legislature to consider whether the lack of a threshold is still suitable in relation to all franchisees. It is argued that imposing a threshold on the application of the CPA to franchisees would not be detrimental to those whom the legislation intends to protect.

A Framework For Small Enterprises

India and the United Kingdom have enacted legislation similar to the NSEA that focuses on small enterprises. Each jurisdiction provides a legislative framework that seeks to offer support to small enterprises in various ways, which is laudable. One of the NSEA’s main aims was to establish the Small Enterprise Development Agency (SEDA) in order to provide non-financial support to small enterprises. In India, the MSMED Act established a national board to monitor factors that affect the development and promotion of small enterprises. Similarly, the UK’s Enterprise Act established a Commissioner to support small enterprises by ensuring that they are well informed and assisted during dispute resolution.

The legislation is less prescriptive and proactive in so far as comprehensively addressing some of the pitfalls that consumer protection legislation handles, such as unequal bargaining power and information asymmetry. Accordingly, small enterprises remain on the back foot. However, it is unnecessary to favour one framework over another.

175 T Woker ‘The Impact of the CPA on Franchising’ in T Naudé and S Eiselen (eds), *Commentary On the Consumer Protection Act* (Juta 2014) 5.

176 Woker (n 55) 48–9.

177 *ibid* 44.

178 *ibid* 49.

179 See definition of ‘trade and commerce’ as discussed above under ‘United States of America—Michigan’.

180 Bearing in mind the provisions that do not apply to franchisees, as mentioned in n 62.

The frameworks established by the NSEA, the MSMED and the Enterprise Act, respectively, can co-exist with further mechanisms designed to protect small enterprises. In the South African context, this is done through the CPA.

Conclusion

The above discussion reflects the realities and threats faced by small enterprises in South Africa, which justifies their characterisation as consumers under the CPA. Without the benefit of access to information, resources or an equal bargaining position, small enterprises would be left to their own devices without the social, interventionist protection that is afforded to them by consumer protection legislation. This would not promote fair business practices or protect vulnerable small enterprises.

The comparative analysis has shown that, despite the working definition of ‘consumer’ provided by the UN Guidelines, different member states have indeed adopted a definition that is best suited to their domestic needs. The UK’s CRA appears to be steadfast in terms of its exclusion of small enterprises from consumer protection legislation. The South African CPA is a polar opposite in that it intentionally provides small enterprises with protection as consumers. This approach is well suited to South Africa, considering the important role that small enterprises play in the economy of a developing country.¹⁸¹

It is further submitted that a separate regulatory regime that addresses the consumer protection concerns of small enterprises would be an unnecessary duplication of resources. It would be counter-intuitive to uproot the rights and remedies from the CPA into the NSEA, when these rights and remedies are in place and enforceable under the CPA framework. Such an approach might lead to a duplication of laws, over-regulation and an increased cost of compliance for suppliers. Therefore, the incorporation of small enterprises into South African consumer protection legislation is sound.

For the reasons mentioned above, it is recommended that the monetary threshold for small enterprises that fall within the scope of the CPA be increased using the NSEA monetary thresholds as a guideline. It is further recommended that the threshold also factor in the staff component of a small enterprise, which is a telling factor regarding the growth of the entity. Under both the NSEA and the UK’s Enterprise Act 2016, small enterprises are businesses with fewer than 50 employees. An argument might even be made for the expansion of such protection towards small enterprises in the other jurisdictions considered in this article.

In so far as the regulation of franchisees as consumers is concerned, a strong argument can be made for the inclusion of franchise regulation in South African consumer protection legislation, particularly from the perspective of protecting small enterprises.

181 Ayandibu (n 1) 135–6.

However, the franchising landscape is nuanced. While it might be clear that this landscape ought to be regulated to address these nuances, it is questionable whether all franchisees should specifically fall within consumer protection legislation, as is currently the case in South Africa. Accordingly, it is recommended that the revised threshold be considered as a requirement for franchisees as well in terms of the application of the general CPA provisions. For the sake of regulatory efficiency, however, it is recommended that all franchise agreements continue to be subject to only the specific franchise-related provisions in the CPA, read together with its regulations. This will ensure that franchisees that fall beyond the revised threshold are protected in so far as franchise-related issues are concerned and will account for the power imbalances that exist in that context. This might also avoid bringing matters of persons who do not truly require protection under the CPA before consumer dispute resolution fora, thus lessening the potential for abuse of this Act's provisions.

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Appendix 1: Schedule to the National Small Enterprise Act 102 of 1996

Column 1 Sectors or subsectors in accordance with the Standard Industrial Classification	Column 2 Size or class of enterprise	Column 3 Total full-time equivalent of paid employees	Column 4 Total annual turnover (ZAR)
Agriculture	Medium	51–250	≤ 35,0 million
	Small	11–50	≤ 17,0 million
	Micro	0–10	≤ 7,0 million
Mining and quarrying	Medium	51–250	≤ 210,0 million
	Small	11–50	≤ 50,0 million
	Micro	0–10	≤ 15,0 million
Manufacturing	Medium	51–250	≤ 170,0 million
	Small	11–50	≤ 50,0 million
	Micro	0–10	≤ 10,0 million
Electricity, gas and water	Medium	51–250	≤ 180,0 million
	Small	11–50	≤ 60,0 million
	Micro	0–10	≤ 10,0 million
Construction	Medium	51–250	≤ 170,0 million
	Small	11–50	≤ 75,0 million
	Micro	0–10	≤ 10,0 million
Retail, motor trade and repair services	Medium	51–250	≤ 80,0 million
	Small	11–50	≤ 25,0 million
	Micro	0–10	≤ 7,5 million
Wholesale	Medium	51–250	≤ 220,0 million
	Small	11–50	≤ 80,0 million
	Micro	0–10	≤ 20,0 million
Catering, accommodation, and other trade	Medium	51–250	≤ 40,0 million
	Small	11–50	≤ 15,0 million
	Micro	0–10	≤ 5,0 million
Transport, storage and communications	Medium	51–250	≤ 140,0 million
	Small	11–50	≤ 45,0 million
	Micro	0–10	≤ 7,5 million
Finance and business services	Medium	51–250	≤ 85,0 million
	Small	11–50	≤ 35,0 million
	Micro	0–10	≤ 7,5 million
Community, social and personal services	Medium	51–250	≤ 70,0 million
	Small	11–50	≤ 22,0 million
	Micro	0–10	≤ 5,0 million