

Responsive governance: Consumer protection legislation and its effect on mandatory and default rules in the contract of sale

*Luanda Hawthorne**

1 Introduction

The sovereignty of human rights has been vindicated recently by the revolutions in Tunisia and Egypt, the present civil war in Libya and the turbulence in other North African and Middle Eastern countries, such as Yemen and Bahrain. It is significant that the preponderance of grievances was of an economic nature and that the immediate trigger is held to have been consumer dissatisfaction resulting from the exorbitant increase in the cost of living in these areas. This exemplifies the truism that human dignity is an elusive concept with multiple facets. The solution of the Bahrain government to pay each citizen a once-off amount of money can be viewed as an insult to the human dignity of their citizens, rather than recognition of their human rights.

Promulgation of Consumer Protection legislation gives effect to recognition of the need to develop and employ innovative means to fulfill the rights of historically disadvantaged persons and to promote their full participation in society.¹ Consumer legislation driven by the Constitutional imperative to social transformation transcends the public-private divide by recognising and giving effect to Human Rights and acknowledging that the law of contract involves distributive justice.²

*Professor. Department of Private Law. Unisa.

¹Preamble to the Consumer Protection Act 8 of 2008; Liebenberg *Socio-economic rights adjudication under a transformative Constitution* (hereafter referred to as '*Socio-economic rights*') (2010) 23; 59.

²Hawthorne 'The "new learning" and transformation of contract law: Reconciling the rule of law with the constitutional imperative to social transformation' (hereafter referred to as '*New learning*') (2008) *SAPR/PL* 77.

In this paper I will examine the phenomenon of responsive governance in the form of consumer protection legislation in South Africa as propelled by the Constitution and the Bill of Rights. I will concentrate on the proactive legislation introducing robust consumer protection reforms aimed at the elimination of exploitation and coercion, and deal with the most striking changes pertaining to the contract of sale.

2 The impetus towards responsive governance: The Constitution and the Bill of Rights

The response by the South African Government may be attributed to the fact that the new democratic order is founded on recognition of human rights, and the increasing awareness that realisation of civil and political rights has not been accompanied by the same realisation within the domain of socio-economic rights. Human dignity is the founding value of the South African state³ and the objective of the Constitution is to achieve social justice⁴ and free the potential of each person. The pre-eminence of human dignity is in essence a reflection of the fact that human dignity is the most important human right from which all other fundamental rights derive.⁵ Not only is human dignity inherent to every human being, inalienable and independent of the state, human dignity is also the only absolute right, which can neither be suspended nor limited.⁶ Unanimously held to be the paramount human right, the interdependence principle⁷ recognises that all

³Section 1(a) Act 108 of 1996 states that: 'The Republic of South Africa is one sovereign, democratic state founded on ... [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'. Consequently, the achievement of equality and the advancement of human rights and freedoms is part of human dignity.

⁴Preamble to the Constitution. Hawthorne 'New Learning'(n 2) 77; Botha 'The legitimacy of legal orders (3): Rethinking the rule of law' (hereafter referred to as 'Rule of Law') (2001) *THRHR* 523; Liebenberg *Socio-economic rights* (n 1) 27.

⁵Woolman 'Dignity' in Woolman, Roux and Bishop (eds) *Constitutional law of South Africa* (2009) (hereafter 'Constitutional law') 36-1; Botha 'Human dignity in comparative perspective' (hereafter referred to as 'Human dignity') (2009) 2 *Stell LR* 171; Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand LR* 650; in *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35, O'Regan J held that: '[H]uman ... dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. ...'; also in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 144 the court held that dignity, together with the right to life, is: 'the most important of all human rights, and the source of all other personal rights'. This also applies to the German Basic Law (*Grundgesetz*). Cherednychenko *Fundamental rights, contract law and the protection of the weaker party* (2007) 248 n 44.

⁶Sections 36 and 37 and s 7(3). As stated in s 36(1) of the Constitution the other human rights can be limited but only to 'the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'; Botha 'Human dignity' (n 5) 198.

⁷Pieterse 'The legitimizing/insulating effect of socio-economic rights' (2007) 22 *Canadian Journal of Law and Society* 1 at 2 (n 4);

human rights are 'universal, indivisible and interdependent and interrelated',⁸ albeit that all other human rights derive and represent detailed refinements of human dignity.⁹ In consequence, the interaction of human dignity with all generations of human rights is recognised¹⁰ and in South Africa the effect of human dignity on socio-economic rights is extremely significant.¹¹ Thus, human dignity inspires socio-economic rights which in turn are legislated into positive law in order to achieve and guarantee human dignity.

3 Human dignity

It is thus submitted that promulgation of consumer protection reforms are part of the government's campaign against poverty within the crusade for human dignity. However, human dignity is a multifaceted concept. Woolman¹² proposes five definitions, on the basis of which a theory of 'dignity' is developed. He holds that the five definitions have, as basis, that '[w]e recognize all individuals as ends-in-themselves capable of self-governance'. Other authors refer to the value of an individual¹³ and the relation between individual and state.¹⁴ However, both Woolman¹⁵ and Nussbaum¹⁶ are authorities for the view that human dignity is far more than the right to vote or a right to formal equality or a right to be responsible for one's own acts. Within the ambit of Woolman's description of human dignity,¹⁷ the latter demands recognition for all individuals to be an end in themselves, who are entitled to concern and respect, to self-determination, self-governance and collective responsibility for the material conditions for agency. The American legal philosopher

⁸In *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 para 23, Yacoob J held that the Constitution enshrines civil, political, social and economic rights and that all the fundamental rights are inter-related and mutually supporting. See also *Dawood v Minister of Home Affairs* (n 5) para 35 where the court held that human dignity 'is a value that informs the interpretation of many, possibly all, other rights'; *S v Mamabolo* 2001 3 SA 409 (CC) para 41. Article 5 of the Vienna Declaration and Programme of Action A/CONF/157/23 (1993-07-12).

⁹*Dawood v Minister of Home Affairs* (n 5); Botha 'Human dignity' (n 5) 177 and 199.

¹⁰Pieterse (n 7) 2.

¹¹The Preambles of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both acknowledge that civil, political, social and economic rights are sourced from human dignity. Liebenberg *Socio-economic rights* (n 1).

¹²Woolman 'Dignity' (n 5) at 36-6.

¹³Nieuwenhuis *Tussen privacy en persoonlijkheidsrecht: Een grondrechtelijk en rechtsvergelijkend onderzoek* (2001) 86.

¹⁴Cherednychenko (n 5) 249 is of the opinion that: 'human dignity is thus about the State serving individuals and not individuals serving the State'.

¹⁵Woolman 'Dignity' (n 5) at 36-6.

¹⁶Nussbaum 'Human dignity and political entitlements' in *Human dignity and bioethics: Essays commissioned by the President's Council on Bioethics* (hereafter 'Entitlements') (2008) 351; see in general *Women and human development: The capabilities approach* (2000).

¹⁷Woolman 'Dignity' (n 5) at 36-6.

Martha Nussbaum¹⁸ has identified ten core capabilities essential for a life worthy of human dignity. It is her opinion that the availability of these capabilities to all citizens constitutes the threshold of minimum social justice. This is not the place to elaborate on these basic tenets and a summary of her ten 'Central Human Capabilities' suffices. These are the following: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. Most of her core capabilities are reflected in the Bill of Rights,¹⁹ and the Constitutional Court emphasises a wider concept of human dignity which may well have influenced responsive governance culminating in promulgation of consumer protection legislation.²⁰

4 The Constitutional Court and human dignity

The interpretation of human dignity by the Constitutional Court has been within the paradigm set out by Woolman and Nussbaum. Thus, the Constitutional Court has emphasised the value and worth of all individuals as members of society,²¹ and has linked human dignity to socio-economic rights.²² In the landmark decision of *Government of the Republic of South Africa v Grootboom*,²³ Jacob J interpreted human dignity as embodying the citizens' right to basic minimum conditions, not only

¹⁸Nussbaum 'Entitlements' (n 16) 377.

¹⁹The first capability described as life is reflected in s 11 which protects all citizens' right to life. Her description of 'bodily health' is covered by ss 26 and 27 which deal with housing, health care, food, water and social security respectively. 'Bodily integrity' is dealt with in s 12 which covers freedom and security of the person. The right to 'senses, imagination and thought' is described robustly, but may be based upon the right to education (s 29), freedom of religion, belief and opinion (s 15), freedom of expression (s 16), freedom of assembly, demonstration, picket and petition and freedom of association (s 18). 'Practical reason' is reflected in the constitutional right to freedom of expression (s 16) and freedom of religion, belief and opinion (s 15). 'Affiliation' constitutes an extension of the right to freedom of association (s 18), to political rights (s19), and the right to equality (s 9). 'Control over one's environment' is adequately dealt with in s 24 which deals with environmental rights, s 19 which covers political rights and s 25 which concerns property rights.

²⁰Braithwaite *Restorative justice and responsive regulation* (2002) 29 holds that the aim of responsive governance is that governments should be sensitive to the citizens they wish to regulate before deciding whether a greater or lesser interventionist response is required.

²¹*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 29; Woolman 'Dignity' (n 5) ch 36, 36-7; Botha 'Human Dignity'(n 5) 182; *S v Makwanyane* 1995 3 SA 391 para 328, in which O'Reagan J held that 'The importance of dignity as a founding value of our new Constitution cannot be over-emphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern'; *Khosa v The Minister of Social Development* 2004 6 SA 505 (CC) para 52.

²²In *Khosa v The Minister of Social Development* 2004 6 SA 505 (CC) para 52, Mokgoro J states that: '... as a society we value human beings and want to ensure that people are afforded their basic needs ...'. Liebenberg *Socio-economic rights* (n 1) 52.

²³2000 11 BCLR 1169.

of survival but also to reach their full potential. He held²⁴ that: 'Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2. The realisation of these rights is also key to ... the evolution of a society in which men and women are equally able to achieve their full potential'. The learned judge emphasised that 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality',²⁵ and thus laid down dogma which resorts in constitutional theory.²⁶

5 The Consumer Protection Act

In the light of the constitutional imperatives and the enlightened interpretation thereof by the Constitutional Court, promulgation of consumer protection legislation can be considered to be a building block in the struggle against poverty and one of the Government's responses to the demand for human dignity. The constitutional emphasis on guaranteeing socio-economic rights is reflected in the Preamble to the Consumer Protection Act²⁷ where high levels of poverty, illiteracy and other forms of social and economic inequality are recognised alongside abuse and exploitation in the marketplace. These factors justify the need to give effect to internationally recognised consumer rights and to the international law obligations undertaken by the republic.²⁸ It can be argued that promulgation of consumer protection legislation constitutes a robust attempt by Government to give effect to socio-economic rights. This legislation introduces new rules which enables consumers to protect their interests, to obviate a lack of choice and weak consumer bargaining strength, to redress the balance between the interests of the parties²⁹ and is an important step

²⁴*Id* para 3. See also Liebenberg 'The value of human dignity in interpreting socio-economic rights' (hereafter 'Value of human dignity') (2005) *SAJHR* 1; Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 2 *SAJHR* 451.

²⁵Paragraph 44.

²⁶Liebenberg 'The interpretation of socio-economic rights' in Woolman *Constitutional law* (n 5) 33-37; Liebenberg 'Value of human dignity' (n 24) 4.

²⁷Act 68 of 2008.

²⁸The Preamble of the Consumer Protection Act 68 of 2008. The Preambles of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights acknowledge that civil, political, social and economic rights are sourced from human dignity. In the South African context, the Preamble to the Constitution specifies that South African citizens aim to establish a society based on social justice and fundamental human rights and, furthermore, to improve the quality of life of all citizens and free the potential of each person. Our fundamental values are 'human dignity, the achievement of equality and the advancement of human rights and freedoms' s 1(a) Act 108 of 1996.

²⁹Willet *Fairness in consumer contracts* (2007) 33.

towards the goal of providing citizens with a life characterised by human dignity. The Consumer Protection Act (hereafter referred to by the acronym CPA) aims to achieve a fair marketplace and a responsible consumer with the creation of certain fundamental consumer rights. This paper will limit the discussion to the transformation of the common law contract of sale.

6 The impact of the CPA on the common law contract of sale

Within the classical model, consumer contracts occupied no special place and traditionally standard contracts ruled supreme in the marketplace. However, as the social market concept descended to the Southern hemisphere the classical dogmas of freedom and sanctity of contract have been put to the test by legislation in pursuit of social justice. The CPA applies to agreements between a consumer and a supplier in the ordinary course of the latter's business.³⁰ The legislation appears to have had a serious effect on the contract of sale, where in the past consumers had little or no bargaining power regarding the terms of their agreements since standard contracts are usually drafted in such a way as to contract out of common law default rules.³¹

6.1 *Mandatory versus default rules*

The rules of the law of contract are divided into a small, important group of mandatory, also referred to as immutable or inalienable, rules and the larger category of default rules.³² As the title indicates immutable rules cannot be changed by contractual agreement, but default rules govern the relationship between the parties unless they explicitly agreed to the contrary.³³ Immutable rules are also referred to as background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, pre-formulated, preset, presumptive, standby, standard-form or supplementary rules³⁴ or *naturalia*, and such rules are terms implied by law defining the rights and duties of the contracting parties.³⁵ These rules are found in the general principles of the law of

³⁰ Sv 'consumer' in Definitions.

³¹ Hawthorne 'Contract law's choice architecture: The hidden role of default rules' (2009) *THRHR* 1.

³² Clark 'Contracts, elites, and traditions in the making of corporate law' (1989) *Columbia LR* 3 fn 9 explains: 'For those who haven't been exposed to this jargon from the world of computers, "default rules" are the rules that a program follows in "default" of an explicit choice by the user to have some other principle apply. For example, your word processing program may set paper margins of 1 inch on all sides unless you take the trouble to learn the relevant commands and set the margins otherwise'.

³³ Farnsworth *Contracts* (2004) 414. Ayres and Gertner 'Filling gaps in incomplete contracts: An economic theory of default rules' 1989 *Yale LJ* 87.

³⁴ Ayres and Gertner (n 33) 91 fn 25.

³⁵ Joubert *General principles of the law of contract* (1987) 65; Van der Merwe *et al Contract general principles* (hereafter Van der Merwe *et al*) (2007) 278; Kerr *The principles of the law of contract*

contract or in the rules applying to a specific contract.³⁶ It has been argued that default rules were developed to introduce notions of substantive fairness into the law of contract,³⁷ but the American view³⁸ is that default rules represent the contract terms which the majority of contracting parties would have agreed upon if they had anticipated the contingency and the transaction cost had been zero. In consequence, default rules are referred to as majoritarian default rules,³⁹ and find their justification in the argument that both inefficient contracts and the transaction costs are minimised.⁴⁰ Default rules leave the contracting parties the freedom to reach a contrary agreement,⁴¹ which opportunity has been fully exploited by the standard contract.⁴²

(2002) (hereafter *Principles*) 338 esp 339 where he refers to the *naturalia* as the 'residual' rules to describe rules added to contracts by the law where the parties fail to make contrary provision. Christie *The law of contract in South Africa* (2006) 159.

³⁶Van der Merwe *et al* (n 35) 278 define default rules as 'the terms which the law – in the absence of agreement to the contrary – invariably and as a matter of course implies into each contract'. Pothier *Traite des obligations* (transl Evans 1802) ss 6-8 describes them as rules, though not expressly mentioned, and it being of the nature of the contract that they shall be included and understood and differ from the *essentialia* inasmuch as the contract may subsist without them and they may be excluded by the express agreement of the parties; Christie (n 35) 159.

³⁷Van Warmelo 'n *Inleiding tot die studie van die Romeinse reg* (1971) 292; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 339–340; *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531DH; *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 (SCA) 321.

³⁸Easterbrook and Fischel 'The economic structure of corporate law' (1989) *Columbia LR* 14. They state at 15 that: 'Corporate law should contain the terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low'. See also Easterbrook and Fischel 'Corporate control transactions' (1982) *Yale LJ* 698 702 and 'The proper role of a target's management in responding to a tender offer' (1981) *Harvard LR* 1161 1182; Hillman *The richness of contract law: An analysis and critique of contemporary theories of contract law* (1997) 225. Goetz and Scott 'The mitigation principle: Toward a general theory of contractual obligation' (1983) *Virginia LR* 967 971 also proffer the opinion that default rules should be those that most bargainers prefer.

³⁹Ayres 'Preliminary thoughts on optimal tailoring of contractual rules' (1993) *Southern California Interdisciplinary LJ* 1 at 5.

⁴⁰It is generally agreed that the main economic function of default rules is to enable the parties to reduce the costs of specifying terms in their contract. Korobkin 'The status quo bias and contract default rules' (1998) *Cornell LR* 610 614; Van der Merwe *et al* (n 35) 283; Lubbe and Murray *Contract* (1988) 422 fn 1; Goetz and Scott 'The limits of expanded choice: An analysis of the interaction between express and implied contract terms' (1985) *California LR* 261; Posner *Economic analysis of law* (1998) 101.

⁴¹For example, the default rules in the Uniform Commercial Code are majoritarian defaults, UCC § 1-102(3) (1995): 'The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement'; Korobkin (n 40) 611 fn 6.

⁴²Hopkins 'Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice' (2003) *TSAR* 150; Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155; Collins

The CPA has introduced several amendments to the common law rules of the contract of purchase and sale. The rules most seriously affected concern the *essentiale* of price, the default rules regarding defective goods and risk. Furthermore, the CPA has also altered the law of delict with the introduction of strict liability within the supply chain. This paper will deal with these aspects of the CPA.

7 Mandatory and default rules affected by the CPA

7.1 Price

Since the abolition of *laesio enormis*⁴³ parties to contracts have been free in the determination of the purchase price. Section 48 of the CPA prohibits a supplier from providing goods at an unfair, unjust or unreasonable price.⁴⁴ For the determination of fairness, reasonableness and justice the CPA provides⁴⁵ that a contract or term⁴⁶ is unfair, unreasonable or unjust if it is excessively one-sided in favour of someone other than the consumer,⁴⁷ or if the term is so adverse to the consumer as to be held to be inequitable,⁴⁸ if reliance on false, misleading or deceptive representation⁴⁹ or a statement of opinion by the supplier led to the detriment of the consumer,⁵⁰ or if the transaction or agreement was subject to the notice required in terms of section 49(1) of the CPA and the term, condition or notice is unfair, unreasonable, unjust or unconscionable.⁵¹

The law of contract (2003) 119; Grubb and Furmston (eds) *The law of contract* (2003) 41; Rakoff 'Contracts of adhesion: An essay in reconstruction' (1963) *Harvard LR* 1174 at 1175.

⁴³Section 25 of the General Law Amendment Act 32 of 1952. See also *Tjollo Ateljees Bpk v Small* 1947 1 SA 485 (T) at 488.

⁴⁴Section 48(1)(a). Section 48(1)(b) prohibits marketing or contracting in an unfair, etc, manner and thus deals with procedural fairness. Section 48(1)(c) repeats s 48(1)(a)(ii) and narrows the scope of the terms by stating that a supplier must not require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer – (i) to waive any rights; (ii) assume any obligation; or (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

⁴⁵Section 48(2).

⁴⁶Section 48(2) 'a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust ...'.

⁴⁷Section 48(2)(a).

⁴⁸Section 48(2)(b).

⁴⁹Section 48(2)(c) as contemplated in s 41.

⁵⁰Section 41(1)(a) states that: 'If the consumer relied upon any false, misleading or deceptive representation regarding a material fact or a statement of opinion to the detriment of the consumer'. This also applies to any exaggeration, innuendo or ambiguity regarding a material fact or any failure to disclose a material fact which could qualify as a deception (s 41(1)(b)). It will also be considered to be unfair if a supplier fails to correct an apparent misconception on the part of the consumer, which amounts to a false, misleading or deceptive representation (s 41(1)(c)).

⁵¹Section 48(2)(d)(i). Section 48(2)(d)(ii) deals with the situation where the notice required in terms of s 49, was not drawn to the attention of the consumer in a satisfactory manner, which constitutes a meter for procedural fairness.

Section 48 illustrates the problems faced by the legislator, namely the inability to define what exactly is unjust, unfair, or unreasonable. The Act lists excessive one-sidedness in favour of the supplier,⁵² so adverse to the consumer as to be inequitable,⁵³ and detrimental to the consumer.⁵⁴ In fact the Act defines that a term or contract is unfair, unreasonable or unjust,⁵⁵ if the term/contract is inequitable, unfair, unreasonable, or unjust.⁵⁶ This gives few or no guidelines for the determination of a fair reasonable and just price and it is submitted that reference to the medieval canonical doctrine of a just price was not what the legislator intended. The mere fact that a contract resulted in detriment to the consumer may bring any ill-considered, unaffordable, unnecessary transaction within the scope of the Act. It is submitted that the Act has left the determination of what a just price is in today's economic environment to the courts and the Consumer Protection Commission and it is to be hoped that case law will provide objective criteria without delay.

7.2 Risk rule

In terms of the South African common law, the contract of sale does not transfer ownership, but a separate juristic act of delivery is required.⁵⁷ Since in many instances, especially in the event of major purchases, a certain timespan will pass between conclusion of the contract and delivery, the question relating to the risk during this period has always been acute. Although ownership still vests in the seller, South African law has followed Roman law, which means that the default

⁵²It is assumed that this is the meaning of s 48(2)(a) in favour of any person other than the consumer or other person to whom goods or services are to be supplied.

⁵³Section 48(2)(b).

⁵⁴Section 48(2)(c).

⁵⁵Section 48(2). Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if – (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in s 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in s 49 (1), and – (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of s 49.

⁵⁶*Ibid.*

⁵⁷Mostert, Joubert en Viljoen *Die koopkontrak* (1972) 79; Kerr *The law of sale and lease* (2004) 235; Du Bois Wille's *principles of South African law* (2007) (hereafter *Wille's Principles*) 894; *Kleynhans Brothers v Wessels' Trustee* 1927 AD 271 at 282; *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* AD 369 at 398; *Lendalease (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 4 SA 464 (A) at 489.

rule regarding the risk⁵⁸ relative to the goods sold rests on the buyer.⁵⁹ *Periculum est emptoris* means that the purchaser suffers the loss resulting from damage to or destruction of the property sold or any disadvantage attaching to it through no fault of the seller,⁶⁰ such as expropriation or the imposition of excise duty,⁶¹ once the sale was *perfecta* or complete.⁶² A sale is *perfecta* once the purchase price has been determined (or determinable by a simple calculation); the thing being sold has been ascertained; and the agreement is unconditional.⁶³ It is obvious that the legal technicalities between conclusion and perfection of the contract of sale and the fact that the object bought has not been delivered, are beyond the comprehension of many consumers. Moreover, legal doctrine has never arrived at a persuasive explanation of the risk rule.

It is thus applauded that, in terms of section 19(2)(c) of the CPA,⁶⁴ all goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them. However, the Act stipulates 'acceptance of delivery in accordance with this section' and continues with the introduction of a deeming provision.⁶⁵ In

⁵⁸ *Wille's Principles* (n 57) 895; Mackeurtan's Sale of goods in South Africa (hereafter Mackeurtan) (ed by Hackwill) (1984) 194.

⁵⁹ *Wille's Principles* (n 57) 894; Wessels *The law of contract in South Africa* (1951) para 4900; Mackeurtan (57) 178; Kerr (n 57) 236.

⁶⁰ Voet *Commentarius ad Pandectas* 18.6.1; Pothier *Traité du contrat de vente* paras 53-55, 56-57; Mostert Joubert en Viljoen (n 57) 78; *Wille's Principles* (n 57) 894; Wessels (n 57) para 4900; Mackeurtan (n 58) 178; *Frumer v Maitland* 1954 3 SA 840 (A) at 845C-D; *Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd* 2001 3 SA 1278 (SCA) para 13.

⁶¹ *Marais v Deare and Dietz* 1878 Buch 168; *Poppe, Schunhoff and Guttery v Mosenthal and Company* 1879 Buch 91; *Taylor and Company v Mackie, Dunn and Company* 1879 Buch 166; *Rood's Trustees v Scott and De Villiers* 1910 TPD 47; *Snyman v Fowlds* 1950 (30 SA 74 (T)); *BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd* 2004 4 SA 550 (C).

⁶² D 18 6 8; *Institutiones* 3 23 3; D 18 1 35 5; Grotius *Inleiding tot de Hollandsche rechtsgeleertheit* 3 14 34; Van Leeuwen *Censura forensis* 1 4 19 5; Voet (n 59) 18.6.2; Van der Linden *Rechtsgeleerd practicaal en Koopmans handbook* 1 15 9; Potier *Vente* paras 53-54, 56-57; Kerr (n 56) 236; Mackeurtan (n 57) 178; Mostert, Joubert en Viljoen (n 57) 81; Hamman *Die risiko by die koopkontrak in die Suid Afrikaanse reg* (1938); Bradfield and Lehmann *Sale and lease* (2010) 43 *Frumer v Maitland* 1954 3 SA 840 (A) at 845C-D; *Fitwell Clothing v Quorn Hotel* 1966 3 SA 407 (RA) at 409; *Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd* 2001 3 SA 1278 (SCA) at para [13].

⁶³ Voet (n 60) 18 6 1; Grotius (n 62) 3 14 43; Pothier (n 60) *Vente* 308; Kerr (n 57) 237; *Wille's Principles* (n 57) 894; *Grobbelaar v Van Heerden* 1906 EDC 229 at 232; *Garvin NNO v Sorec Properties Gardens Ltd* 1996 1 SA 463 (C).

⁶⁴ Section 19(2)(c). Goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section.

⁶⁵ Section 19(4). The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances: (a) When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods; or (b) when the goods have been delivered to the consumer, and – (i) the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of them; or (ii) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them, subject to subsection (5).

accordance with the deeming provision a consumer can be regarded as having accepted delivery even without actual delivery, namely, when she expressly or implicitly communicates so to the supplier.⁶⁶ This does raise the question as to what constitutes implicit communication. When the goods have been delivered, acceptance thereof is construed by an act of the consumer in relation to the goods inconsistent with the supplier's ownership of them.⁶⁷ This raises several concerns such as the macro issue of whether the CPA alters the common law rules pertaining to the transfer of ownership,⁶⁸ it can be argued that the CPA has restored the bond between ownership and risk, which will not be discussed here. However, the concrete question as to whether placing the delivered goods on the sidewalk, which should qualify as acting inconsistently with the supplier's ownership, is deemed as acceptance of delivery, is pertinent. The last instance of deemed acceptance is when, after delivery, a reasonable time has lapsed without the consumer 'intimating' (expressly or implicitly) that delivery has been rejected.⁶⁹ This acceptance is, however, subject to the condition that on request a supplier must allow the consumer a reasonable opportunity to examine the goods in order to satisfy herself that the goods are of a type and quality reasonably contemplated in the agreement⁷⁰ or if specially-ordered reasonably conform to specifications.⁷¹ It is with respect submitted that the continuous use of the term 'reasonable' or 'reasonably' diminishes legal certainty as to the moment of the transfer of ownership.

Furthermore, section 19(2) clearly indicates that the CPA has introduced a new default rule, which may be altered by agreement. However, section 49 of the CPA makes deviation from this rule difficult by providing that any notice to consumers or provision of a consumer agreement limiting the risk or liability of the supplier or constituting an assumption of risk or liability by the consumer, or obliging the consumer to indemnify the supplier or acknowledging any fact by the consumer, must be clearly,⁷² timely⁷³ and fairly be drawn to the attention of the consumer.⁷⁴

⁶⁶Section 19(4)(a).

⁶⁷Section 19(4)(b)(i).

⁶⁸Section s 16, 19, 20(4)(a) and (b) and 64(1)(b).

⁶⁹Section 19(4)(b)(ii).

⁷⁰Section 19(5)(a).

⁷¹Section 19(5)(b).

⁷²Section 49(3) requires writing to be 'in plain language, as described in section 22'. Section 49(4)(a) requires attention to be drawn 'in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances'.

⁷³Section 49(4)(b) requires attention to be drawn 'before the earlier of the time at which the consumer – (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or (ii) is required or expected to offer consideration for the transaction or agreement'.

⁷⁴S (5th ed) 49(5) 'The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice ...'. The same applies to notices and provisions concerning activities and facilities subject to risk of an unusual character, which a reasonable

7.3 Defective goods, implied warranty of quality

The common law regarding the instance where a purchaser bought defective or unsuitable goods is fragmented, straddling both the law of contract and the law of delict. The area of the law pertaining to the purchase of defective or unsuitable goods involves implied guarantees, which may depend on the expertise of the seller or the capacity of the manufacturer. In this regard the CPA provides a skeleton of mandatory rules, which it fleshes out with a plethora of default rules. The standard contract is prevalent in retail sales, with the overall result that consumers will be baffled and confused and will have to rely on extensive and expensive legal advice to enforce their rights concerning warranties.

7.3.1 Common law

A consumer who buys a product with a defect which makes it unsuitable for the purpose for which it was sold and bought has, in terms of the common law, the right to refuse delivery and rescind the contract of sale, since the normal duty of the seller is to deliver goods suitable for the purposes for which they are sold and bought.⁷⁵ However, as this normal duty emanates from a default rule, it is possible for the parties to agree that the seller does not warrant that the goods sold will be suitable. Standard contracts often contain a clause stating that the buyer (or lessee, or whatever relevant party) has carefully inspected the goods and is satisfied with their condition.

Having accepted delivery, the position of the buyer does not improve as acceptance of delivery is construed as condonation of all patent defects, that is, those defects which would have been discovered by careful inspection.⁷⁶ In respect of so-called latent defects, the common law default rules in the form of the aedilician actions provide the buyer with a choice between cancellation of the contract, which means the return of the goods and a price⁷⁷ refund where the thing sold is completely unfit for the purpose for which it was bought or a price reduction to the actual value where the purchased thing can still be used.⁷⁸ As stated, these are default rules and the insertion of the words “as is” into the so-called conditions of sale excludes these pro-consumer remedies.⁷⁹

consumer could notice and that could result in serious injury or death (s 49(2)). Using the word ‘risk’ in the same section, but clearly with different meanings might be confusing to consumers.

⁷⁵Grotius (n 62) 3 15 7; Voet (n 60) 21 1 3; Mackeurtan (n 58) 134; Wessels (n 58) para 4590; Mostert, Joubert en Viljoen (n 57) 185; 237; Kerr (n 57) 16; *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400; *Dibley v Furter* 1951 4 SA 73 (C) at 80-82; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) at 683; *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 1 SA 344 (A); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

⁷⁶Mackeurtan (n 58) 94; Kerr (n 57) 118; *Wille’s Principles* (n 57) 897.

⁷⁷Kerr (n 57) 113.

⁷⁸Mostert Joubert en Viljoen (n 57) 199; 210; 218; Kerr (n 57) 127.

⁷⁹*Wille’s Principles* (n 57) 892; Mostert, Joubert en Viljoen (n 57) 206; *De Wet v Manual 1 Menz* 501; *O’Brein v Palmer* 2 EDL344; *Levisseur v Bloemfontein Municipality* 1880 OFS 40; *Uhlman v*

The buyer's position against the seller is more advantageous if the seller professes to have expert knowledge relative to the thing sold or gives an express warranty.⁸⁰ In such an instance the buyer could institute a claim for breach of contract and demand damages, that is, her actual financial loss.⁸¹ Such a merchant seller would be liable for consequential damage caused to the purchaser by the latent defect regardless of the fact that the seller was unaware of the defect.⁸²

In addition to the above remedies which derive from the contract between the parties, the buyer can institute a claim against the manufacturer of the product. In this instance a distinction must be made between a claim based on a guarantee⁸³ given by the manufacturer and the delictual claim the buyer or any third party affected has against the manufacturer for injury or damage caused by defective goods.⁸⁴

The manufacturer's guarantee is intended to save time and money by eliminating the claim from the consumer to the retailer who, in turn, would seek redress from the manufacturer. However, reliance on this guarantee may often prove detrimental as the consumer may well exchange her common law rights against both retailer and manufacturer (by a waiver of her common law remedies) against the promises a manufacturer makes in her warranty. Retailers often insist that acceptance of the manufacturer's guarantee absolves them from liability for defective goods. These guarantees may well exclude claims against the manufacturer for injury or damage. Moreover, normally, guarantees introduce short periods within which the consumer can claim on the basis of the guarantee, and sometimes guarantees offer to pay only for new parts and not for labour. Thus, standard contracts generally severely limit, be it in the form of manufacturers' guarantees or retailers' conditions of sale (stating that no warranties or representations regarding the goods have been made), the legal obligations of both manufacturers and retailers.

Grindley-Ferris 1947 2 SA 459 (K); *Knight v Trollip* 1948 3 SA 1009 (N); *Trust Bank van Afrika Bpk v Bekker* 1961 3 SA 236 (T).

⁸⁰De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 Lubbe (ed) (1992) (5th ed) 339-340; Mackeurtan (n 58) 160; Wessels (n 58) para 4798-4798; *Wille's Principles* (n 57) 899; *Hackett v G and G Radio and Refrigerator Corp* 1949 3 SA 664 (A) at 690; *Minister van Landbou-tegniese Dienste v Scholtz* 1971 3 SA 188 (A).

⁸¹Mostert, Joubert en Viljoen (n 57) 244; *Wille's Principles* (n 57) 899.

⁸²Voet (n 60) 21 1 10; Pothier *Vente* (n 60) para 214; De Wet and Van Wyk (n 80) 342; Mackeurtan (n 58) 162; *Kroonstad Westelike Boere Kooperatiewe Vereniging v Botha* 1964 3 SA 560 (A) 571G, in which the court held that: 'liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold'; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); *D and H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 3 SA 593 (SCA); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) at para 48.

⁸³Mostert, Joubert en Viljoen (n 57) 242.

⁸⁴*Wille's Principles* (n 57) 900; Neethling, Potgieter and Visser *Law of delict* (2010) 317.

Finally, the buyer or anyone affected (servants, employees, family) has a delictual claim for damages against the manufacturer of defective goods if injury or damage has been caused by such goods.⁸⁵ This liability is based on fault and the plaintiff must prove her injury or damage, and intent or negligence on the part of the manufacturer or her employees as well as a causal link.⁸⁶ Such a delictual claim may also be instituted against the seller if she knew or should have known that a defect existed and fraudulently kept silent.⁸⁷

7.3.2 Consumer Protection Act: *Ex lege* implied warranty of quality

At first sight the CPA appears to introduce radical reforms which import a fundamental consumer right to fair value, good quality and safety.⁸⁸ The Act redefines defects as material imperfections that render goods less acceptable and characteristics that render them less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.⁸⁹ The introduction of 'failure' as a legal term (the inability of goods to perform in the intended manner or with the intended effect),⁹⁰ is followed by the abolition of the distinction between latent and patent for both product failure and defect.⁹¹ The CPA introduces a right which entitles every consumer to receive goods which are reasonably suitable for their general purposes,⁹² are of good quality, in working order and free of any defects,⁹³ and which will with normal use last a reasonable time.⁹⁴ To enforce this right, section 56 introduces an implied warranty of quality on producer, importer, distributor and retailer.

However, the CPA makes provision for the exclusion of this implied warranty which leaves only the skeleton of a mandatory implied warranty. In terms of section 55(6) the warranty does not apply if the consumer has been expressly informed that particular goods were offered in a specific condition,⁹⁵ and has

⁸⁵Neethling, Potgieter and Visser (n 84) 317 and 374.

⁸⁶Neethling, Potgieter and Visser (n 84) 317.

⁸⁷*Van der Merwe v Meades* 1991 2 SA 1 (A).

⁸⁸Part H ss 53-61.

⁸⁹Section 53(1)(a) 'defect' means – (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

⁹⁰Section 53(1)(b).

⁹¹Section 55(5)(a).

⁹²Section 55(2)(a).

⁹³Section 55(2)(b).

⁹⁴Section 55(2)(c).

⁹⁵Section 55(6)(a).

expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.⁹⁶ The skeleton of the rule which remains is thus that consumers have an implied warranty that goods will be useable and durable for a reasonable period of time and that goods will comply with any applicable standard.⁹⁷ Nevertheless, it may be argued that if the general purpose or effect of providing information such as the above, is to avoid the warranty, provision of such information could qualify as defeating the purposes and policy of the Act,⁹⁸ as misleading or deceiving the consumer,⁹⁹ or subjecting the consumer to fraudulent conduct,¹⁰⁰ or setting aside or overriding the effect of any provision of this Act¹⁰¹ which would all make such a term void.¹⁰²

Furthermore, the implied warranty of quality will also apply¹⁰³ if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier ordinarily offers to supply such goods,¹⁰⁴ or acts in a manner consistent with being knowledgeable about the use of those goods.¹⁰⁵ In these instances the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

The statutory warranty of quality is in addition to any implied common law warranty¹⁰⁶ or other statutory warranty and express contractual warranties.¹⁰⁷ This may well lead to confusion as the courts and the Consumer Protection Commission will have to deal with a number of warranties, exclusions, limitations and different definitions.

7.4 Introduction of strict liability

The delictual liability of manufacturers and certain retailers has also been influenced by the CPA. At this early stage the ruling interpretation is that section 61 of the CPA has placed strict liability on the producer, importer, distributor or retailer of any goods for any harm caused by the supply of unsafe goods,¹⁰⁸ a product failure, defect or hazard in any goods,¹⁰⁹ or inadequate instructions or

⁹⁶Section 55(6)(b).

⁹⁷Section 55(2)(c) and (d).

⁹⁸Section 51(1)(a)(i).

⁹⁹Section 51(1)(a)(ii).

¹⁰⁰Section 51(1)(a)(iii).

¹⁰¹Section 51(b)(iii).

¹⁰²Section 51(3).

¹⁰³Section 55(3).

¹⁰⁴Section 55(3)(a).

¹⁰⁵Section 55(3)(b).

¹⁰⁶Section 55(4)(a).

¹⁰⁷Section 55(4)(b).

¹⁰⁸Section 61(1)(a).

¹⁰⁹Section 61(1)(b).

warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods.¹¹⁰ The ambit of the harm for which the supply chain may be held liable is defined as death or injury¹¹¹ or illness,¹¹² any loss or physical damage to property¹¹³ as well as economic loss.¹¹⁴

However, it is submitted that the Act permits another interpretation when section 61(1)¹¹⁵ is read in conjunction with sections 61(4)(c)¹¹⁶ and 61(6)(c).¹¹⁷ Although section 61(1) provides that the supply side is liable for the harm 'irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer,' which, *prima facie* justifies the conclusion that strict liability has been introduced, subsection 61(4)(c) excludes the same liability 'if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard'.¹¹⁸ This means that the producer and importer are indeed strictly liable, but that the distributor's and retailer's liability is still based on fault. However, in respect of the distributor and retailer, the Act has introduced a presumption of fault which has reversed the burden of proof. Furthermore, such an interpretation explains section 61(6)(c) dealing with the apportioning of liability among the supply side, which apportionment is usually allocated *pro rata* according to the parties' fault. In addition to apportionment of damage, the Act also provides that in the event

¹¹⁰Section 61(1)(c).

¹¹¹Section 61(5)(a).

¹¹²Section 61(5)(b).

¹¹³Section 61(5)(c).

¹¹⁴Section 61(5)(d) refers to economic loss which results from harm contemplated ss 61(5)(a) and (b) and (c).

¹¹⁵Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of – (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

¹¹⁶Liability of a particular person in terms of this section does not arise if – (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers;

¹¹⁷Nothing in this section limits the authority of a court to – (c) apportion liability among persons who are found to be jointly and severally liable.

¹¹⁸Apart from excluding strict liability when it is unreasonable to expect the distributor and retailer to have discovered the unsafe characteristic, failure, defect or hazard of a product s 61(4)(d) also provides that liability does not arise if – the claim for damages is brought more than three years after the – (i) death or injury of a person contemplated in subsection 61(5)(a); (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection 61(5)(b); or (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection 61(5)(c); or (iv) the latest date on which a person suffered any economic loss contemplated in subsection 61(5)(d).

of damage caused by goods a court is entitled to assess whether any harm has been proven and adequately mitigated,¹¹⁹ and determine the extent and monetary value of any damages, including economic loss.¹²⁰

Nevertheless it is necessary to keep in mind that the CPA prohibits a supplier from excluding liability if the exclusion is to defeat the purposes and policy of the Act,¹²¹ if her aim is to mislead or deceive the consumer¹²² or subject the consumer to fraudulent conduct.¹²³ Furthermore, exclusion is prohibited if it would have the effect of waiving or depriving a consumer of another right in terms of the CPA,¹²⁴ or has the effect of avoiding a supplier's obligation or duty in terms of the Act,¹²⁵ or sets aside or overrides the effect of any provision of the Act.¹²⁶ Once again if strict liability is excluded in contravention of the aim of the act such exclusions will receive the penalty of becoming void.¹²⁷

8 Conclusion

It is trite to say that consumer protectionism intervenes in the marketplace. Today, however, it has become accepted that the pursuit of social justice legitimises intervention in most aspects of society. The reality of poverty and exploitation requires protective measures of which the Consumer Protection Act is the most recent attempt. This article has linked consumer protection to human dignity and argues that recent developments in the interpretation of this concept in both the academic literature and constitutional case law demands protection of the consumer against the supplier of goods and services. Limited to certain aspects situated in the contract of sale the provisional conclusion is not overly positive as the legislator requires fairness, reasonableness, equity and justice, but has surprisingly failed to provide guidelines relative to the interpretation of these elusive concepts. It is deplorable that the Law Commission's proposals as reflected in Discussion Paper 65, *Unreasonable stipulations in contract and the rectification of contracts*,¹²⁸ have not been fruitfully consulted as their interpretation of good faith could have provided direction. Another point deserving attention is that the legislature has shown reluctance to introduce mandatory rules, but the reliance on default rules seriously undermines the effectiveness of the Act as new standard contracts will soon test the limits of section 51, which

¹¹⁹Section 61(6)(a).

¹²⁰Section 61(6)(b).

¹²¹Section 51(1)(a)(i).

¹²²Section 51(1)(a)(ii).

¹²³Section 51(1)(a)(iii).

¹²⁴Section 51(1)(b)(i).

¹²⁵Section 51(1)(b)(ii).

¹²⁶Section 51(1)(b)(iii).

¹²⁷Section 51(3).

¹²⁸(July 1996).

deals with prohibited transactions, agreements, terms or conditions. The introduction of a new definition for 'defect' may not facilitate the seamless absorption of the Act into the law of contract. In conclusion, a long overdue and essential piece of legislation, which has the potential to affect society beneficially, has a *prima facie* limited impact on the law of sale.