

# Consumer protection afforded to juristic persons to section 14 of the CPA

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"Be still and know that I am God" Palms 46:10

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## **ABSTRACT**

The promulgation of *Consumer Protection Act 68 of 2008* (CPA) became the first consumer law extending protection to juristic persons in South Africa. This is by and large based on the fact that consumer laws acknowledge that everyone is a consumer and in need of protection. However, some transactions are not considered to be consumer contracts based on the monetary threshold. Further limitation is seen in section 14 which deals with the cancellation and renewal of fixed term agreements. Section 14 excludes juristic persons from its ambit regardless of their annual turnover or asset value. The study reveals that section 14 affords different treatment between natural and juristic persons who are consumers by excluding juristic persons from its protection even though the CPA regards juristic persons as consumers.

In the study, it is illustrated that there is a definite need to protect juristic persons when cancelling and renewing the fixed term agreements because the common law does not provide adequate protection to them when cancelling the fixed term agreements.

Juristic persons are not sufficiently protected in terms of the CPA and cannot rely on the CPA when cancelling or renewing fixed term agreements. Therefore, further investigation into the Australian consumer law is necessary as it seems to present the possible remedy on protection of juristic persons. The Australian definition of consumer has been described as positively generous in comparison to other jurisdictions, particularly South Africa. This conclusion is by and large based on the fact that the Australian definition of consumer allows for the protection of juristic persons when cancelling and renewing fixed term agreements whereas South Africa does not allow for this protection. The comparison is critical in assisting further developments of South African law, particularly in the area of consumer protection.

## **LIST OF ABBREVIATIONS**

ACL	Australia Consumer Law
ACCC	Australia Consumer and Competition Commission
ASIC Act	Australia Securities and Investment Commission Act
CPA	Consumer Protection Act
PELJ	Potchefstroom Electronic Law Journal
SA	South Africa
SALJ	South African Law Journal
Stell Merc LJ	Stellenbosch Mercantile Law Journal
UCT	Unfair Contract Terms

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## 1. Introduction

### 1.1 Background

Since the enactment of the *Consumer Protection Act* 68 of 2008 (hereafter referred to as the CPA) in March 2008, the CPA has provided a comprehensive legal framework necessary for "consumer market that is fair, accessible, efficient and sustainable for the benefit of consumers generally".<sup>1</sup> The CPA brought about significant changes for consumers such as that consumers now have statutorily recognised consumer rights and protection.<sup>2</sup> The protection is applicable to juristic persons to a large extent although there is a limitation in its application.<sup>3</sup> Naude and Eiselen argue that the extension of protection to juristic persons is usually done without limitation in other jurisdictions such as France and United Kingdom.<sup>4</sup> This is to ensure that adequate protection is provided for small and medium businesses who are regarded to be consumers.<sup>5</sup> On the one hand, not every jurisdiction provides for protection of juristic persons as consumers.

The intention of the legislature in South Africa was to include small and medium size businesses as it is evident in the memorandum which states that "the use of a threshold will mean that the protection of the Bill will extend to small shop-keepers and other businesses."<sup>6</sup> The juristic persons protected under the CPA are considered vulnerable consumers susceptible to exploitation by the suppliers.<sup>7</sup> This is evident as the CPA specifically purports to protect vulnerable consumers and the purpose of the CPA is to "promote, advance the social and economic welfare of consumers."<sup>8</sup> There are factors to be taken into consideration in order to determine whether a consumer is vulnerable. Barnard submits that the CPA protects vulnerable consumers listed

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<sup>1</sup> Barnard J For whom the bell tolls: The application of section 14 of the Consumer Protection Act 68 of 2008 to residential lease agreements 164; section 3(1) of the CPA.

<sup>2</sup> See 2.3 below.

<sup>3</sup> Section 3(d) and section 1 of the CPA.

<sup>4</sup> Naude T and Eiselen S *Commentary on the Consumer Protection Act* 514.

<sup>5</sup> Naude T and Eiselen S *Commentary on the Consumer Protection Act* 514.

<sup>6</sup> *Explanatory Memorandum on the Objects of the Consumer Protection Bill* 2008.

<sup>7</sup> Section 3(1)b) of the CPA; Naude T and Eiselen S *Commentary on the Consumer Protection Act* 33.

<sup>8</sup> Section 3(1) of the CPA.

under section 3(1)(b) which include low income consumers who may be the small and medium business as they are protected by the CPA.<sup>9</sup>

The factors to be taken into account by courts when considering whether the transaction was fair and if the consumer is vulnerable include considering the nature of the transaction between the parties, the education of parties, experience and the party who has bargaining power.<sup>10</sup> Van Eeden and Barnard submit that it has become increasingly evident that consumers who engaged in transactions with businesses are not well informed about their rights when concluding any contract.<sup>11</sup> Aronstarm is also of the opinion that the consumers have less bargaining power when contracting with businesses and needed protection as the contract terms are unfair and unjustifiable towards consumers.<sup>12</sup> For that reason it is necessary to protect consumers when contracting with juristic persons particularly when cancelling and renewing fixed term agreements.

Understanding the application of the CPA requires interpretation of a consumer within the ambit of the CPA. The definition of consumer within the CPA includes both individual persons as well as juristic persons. Section 1 of the CPA defines a consumer as:

A person who enters into the transaction with the seller in the ordinary course of supplier's business, unless such a transaction is exempt from application of the CPA.<sup>13</sup>

In addition, a consumer also includes a juristic person, and is defined as "a body corporate or partnership and/or an association".<sup>14</sup> However, the Act does not apply to juristic persons if their annual turnover or assets are beyond the monetary threshold set by the Minister of Trade and Development.<sup>15</sup> The threshold is currently

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<sup>9</sup> Barnard J *For whom the bell tolls: The application of section 14 of the Consumer Protection Act 68 of 2008 to residential lease agreements* 168.

<sup>10</sup> Section 52(2)(b) of the CPA.

<sup>11</sup> Van Eeden E and Barnard J *Consumer protection law in South Africa* 40.

<sup>12</sup> Aronstarm *Consumer Protection, Freedom of contract and the law* 14.

<sup>13</sup> Section 1 of the CPA; Exemptions of the CPA are listed in section 5(2) and section 5(3) of the CPA.

<sup>14</sup> Section 1 of the CPA.

<sup>15</sup> *Government Notice No 293 of 1 April 2011.*

set at an annual turnover or assets to a value not exceeding R2 million.<sup>16</sup> This is especially applicable to fixed term agreements.

From the definition of a consumer, it is important to highlight that prior to the enactment of the CPA, juristic persons were protected and governed by different legislations and common law depending on the type of transaction concluded. For instance, *Companies Act*<sup>17</sup> regulated transaction between the companies, *Sectional Titles Property Act*<sup>18</sup> regulated body corporates and *Trust Property Control Act*<sup>19</sup> regulated trusts. However, juristic persons as consumers needed protection when cancelling or renewing fixed term agreements and the above legislation did not provided adequate protection in this regard.

The CPA does not provide the duration of fixed term agreements but in terms of the regulations promulgated under the CPA, fixed term agreements have a maximum duration of 24 months from date of signature.<sup>20</sup> Thus, they have a definite period and a fixed date as to when they expire. The expiry and/or renewal thereof are regulated in terms of section 14 of the CPA.<sup>21</sup>

### ***1.2 Legal issues involved in terms of Section 14***

The exclusion of the application of section 14 of the CPA to juristic persons leaves them unprotected albeit that they are considered consumers. On face value, it would seem that all juristic persons, regardless of size, are excluded from the protection afforded to consumers in terms of section 14(1). For instance, where a juristic person with an annual turnover of less than R2 million enters into a lease agreement with another, section 14 will not be applicable to their contract although such a juristic person is considered a consumer in terms of section 5(2)(b).<sup>22</sup> This creates a problem in respect of consumer protection and the rights of juristic persons when cancelling and/or renewing of the fixed term agreements under section 14 of the CPA. Cognisant of the fact those juristic persons below the threshold will still be

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<sup>16</sup> *Government Notice No 293 of 1 April 2011.*

<sup>17</sup> *Companies Act 71 of 2008.*

<sup>18</sup> *Sectional Titles Property Act 95 of 1986.*

<sup>19</sup> *Trust Property Control Act 11 of 2018.*

<sup>20</sup> *Regulation 5(1)(a) Government Notice No 293 of 1 April 2011.*

<sup>21</sup> Section 14 of the CPA.

<sup>22</sup> Section 14(1) of the CPA(see 1.3 below).

protected under the CPA although there is a limitation in terms of section 14 which will be the focus of this study.<sup>23</sup>

The wording of the section 14 states "this section does not apply to transactions between juristic persons."<sup>24</sup> The conjunction which is used being "between" denotes that both parties to the transaction need to be juristic persons for the agreement to be excluded from the application of the CPA under section.<sup>25</sup> Naude and Eiselen correctly state that where both the supplier and the consumer are juristic persons, the CPA will not apply.<sup>26</sup> So, a juristic person as a consumer to a fixed term agreement will rely on section 14 when cancelling or renewing the agreement. Australia had a similar challenges relating to fixed term agreements, which has subsequently been rectified.<sup>27</sup>

### ***1.3 Protection of juristic persons as consumers in Australia***

Historically, juristic persons in Australia were precluded from terminating and/or renewing fixed term agreements as they were not considered to be consumers and as such were not entitled to terminate and/or renew fixed term agreements.<sup>28</sup> The justification was based on the fact that juristic persons structured their contracts to be to their advantage based on the common law principle that people had freedom to sign contract with anyone and agree to the terms stipulated.<sup>29</sup>

Australian consumers are afforded rights and protection in terms of the *Competition and Consumer Act* commonly referred to as the *Australian Consumer Law (ACL)*.<sup>30</sup> In terms of section 3 of the ACL, a consumer is defined as anyone who acquires the goods and services at a price less than \$40 000 for home consumption or use.<sup>31</sup> According to the definition, this is a consumer contract as the goods acquired are for home consumption and not for resale. Therefore, the juristic persons are excluded from the protection when cancelling and renewing the fixed term agreements.

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<sup>23</sup> Section 14(1) of the CPA.

<sup>24</sup> Section 14(1).

<sup>25</sup> Section 14(1) of the CPA.

<sup>26</sup> Naude T and Eiselen S *Commentary on the Consumer Protection Act* 144.

<sup>27</sup> Section 23(4) of the ACL.

<sup>28</sup> Section 23(1)(b) of the ACL.

<sup>29</sup> Cheshire G.C, C.H.S. Fifoot and M.P. Furmston *The Law of Contract* 36.

<sup>30</sup> *Competition and Consumer Act* 2010.

<sup>31</sup> Section 3(2) of the ACL.

On 12 November 2016 the *Treasury Legislation Amendment Act (Small Business and Unfair Contract Terms)* 2015 extended the consumer protection in the ACL to include juristic persons as section 23 allowed only one party to cancel and/or renew the contract. Juristic persons are now protected and governed by section 23 of the ACL when cancelling and/renewing their contracts whereas in South Africa, juristic persons are not protected.<sup>32</sup>

Fixed term agreements have a definite period of when they commence and terminate.<sup>33</sup> Under section 23(1) of the ACL, unfair contract terms contained in fixed term agreements are considered void and can be terminated under section 23.<sup>34</sup> The ACL differs from the CPA in terms of cancellation and renewal of fixed terms by allowing juristic persons to cancel and/or renew fixed term agreements without limitation.

#### ***1.4 Research methodology***

This study is mainly based on a literature study of relevant textbooks on consumer law and primary legal sources such as legislation and case law. Furthermore, certain legal principles regarding consumer protection in Australia, where similar problems were encountered and rectified, will be compared to the position in South Africa to determine whether South Africa can benefit there from. Consumer protection afforded to juristic persons in Australia is critical in assisting South African law to develop particularly in the area of consumer protection in respect of cancellation and renewal of fixed term agreements. The investigation into the Australian consumer law would be necessary as it seems to present a possible remedy on protection of juristic persons.

#### ***1.5 Research question***

A comparison between the Australian position as to the consumer protection of juristic persons in respect of fixed term agreements will be compared to that of the South African position in this regard. This will assist to determine to what extent, if

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<sup>32</sup> Section 23(1) of the ACL.

<sup>33</sup> Section 23 of the ACL.

<sup>34</sup> Section 23(1) of the ACL.

at all, does section 14 of the CPA should provide consumer protection to juristic persons as consumers in fixed term agreements.

### **1.6 Framework**

The study comprises of various chapters in order to investigate and find appropriate solutions. Chapter 2 critically discusses consumer protection of juristic persons from a South African perspective. The aim of the chapter is to look into the definition of a consumer, as well as to whether it includes juristic persons. The chapter will further determine whether juristic persons are considered to be consumers in respect of the renewal and expiry of fixed term agreements under section 14 of the CPA. Chapter 2 will also discuss the common law position when cancelling and renewing the fixed term agreements. Chapter 3 deals with consumer protection of juristic persons from an Australian perspective, and the extent to which the definition of a consumer has been structured to include juristic persons when concluding fixed term agreements. Further cancellation and renewal of fixed term agreements will be explored in terms of the ACL. It will also deal with the application of the ACL and explore the approach of the ACL in defining a consumer. Chapter 4 is a comparison of the South African and Australian legal positions on consumer protection of juristic persons in respect of cancellation and termination of fixed term agreements. Furthermore, certain legal principles in respect of consumer protection in Australia, where similar problems were encountered and rectified, will be compared to the position as experienced in South Africa to determine whether South Africa can benefit. The fifth and final chapter will provide a conclusion to the study as well as recommendations while answering the question to what extent section 14 of the *Consumer Protection Act 68* of 2008 should provide protection to juristic persons as consumers when renewing or terminating fixed term agreements, if at all.

## **2. Consumer Protection of Juristic Persons from a South African Perspective**

### **2.1 Introduction**

The concept of consumer protection is relatively new in South Africa as historically there was no law which covered it holistically.<sup>35</sup> Woodroffe is of the view that the concept of consumer protection is ancient, despite the fact that codification of the CPA developed later on.<sup>36</sup> In an attempt to ensure that there is equality between parties when cancelling and renewing contracts, the South African government established the CPA which brought about significant changes such as protecting juristic persons as consumers.<sup>37</sup>

The definition of consumer within the CPA includes both individual consumers as well as juristic persons, although there is a limitation in respect of juristic persons.<sup>38</sup> The CPA limits protection of juristic persons and provides that if the annual turnover or assets value exceeds R2 million, the CPA will not be applicable.<sup>39</sup> The juristic person will no longer be regarded a consumer under the CPA once the threshold is exceeded. Another limitation is seen under section 14 of the CPA. Section 14 provides for renewal and termination of fixed term agreements with a maximum duration of 24 months from date of signature, but it does not apply to juristic persons regardless of their annual turnover or asset value.<sup>40</sup>

This chapter will discuss the common law position on termination and renewal of fixed term agreements.<sup>41</sup> The chapter will also define a consumer within the CPA in order to establish whether juristic persons can rely on the CPA for protection when cancelling and renewing fixed term agreements.<sup>42</sup>

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<sup>35</sup> Wooddroffe G & Lowe R *Consumer Law and Practice* 1.

<sup>36</sup> Wooddroffe G & Lowe R *Consumer Law and Practice* 1.

<sup>37</sup> The preamble of the CPA: Parish R *Consumer Protection and Ideology of Consumer Protectionist* 233.

<sup>38</sup> Van Eeden *The Consumer Protection Law in South Africa* 44.

<sup>39</sup> *Government Notice No 293 of 1 April 2011*.

<sup>40</sup> Regulation 5(1)(a) *Government Notice No 293 of 1 April 2011*.

<sup>41</sup> See 2.2 below.

<sup>42</sup> See 2.3 below.

## **2.2 Common law**

Historically there was no legislation in South Africa to protect consumers against unfair or unjust contracts until 1998 when the South African Law Commission established that courts should intervene in cases of unjust contract terms.<sup>43</sup> This was based on the fact that consumers lacked bargaining power which resulted in unfair terms in the contract being inserted. The extents to which a court may intervene to ensure fairness and reasonableness of the contract is, however, not clear.<sup>44</sup> It is submitted that the principle of good faith is used to attain fairness and reasonableness in considering whether the terms and conditions of the contract contravenes public policy or not.<sup>45</sup> As a result, the courts will uphold and enforce the contract between the parties when it is satisfied that it is not contrary to public policy, illegal or immoral.<sup>46</sup>

### *2.2.1 Freedom of contract*

The notion of *pacta sunt servanda* and freedom of contract are fundamental principles in common law, which entails that the parties are free to contract with anyone on the terms to which they agree upon and the agreement is to be kept.<sup>47</sup> The assumption is that the parties have the same bargaining power.<sup>48</sup> Such contracts are based on the take it or leave it basis because consumers do not have the bargaining power to negotiate.<sup>49</sup> The assumption that parties have the same bargaining power is however, not always true as the supplier has more power than the consumer which results in unfair terms being inserted in the contract.<sup>50</sup> This is because suppliers have more experience and education about the contracts unlike

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<sup>43</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 71.

<sup>44</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 71.

<sup>45</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 72.

<sup>46</sup> Modiba M T *The influence of the Consumer Protection Act 68 of 2008 on the concept of plain language in standard form contracts* 21.

<sup>47</sup> Modiba M T *The influence of the Consumer Protection Act 68 of 2008 on the concept of plain language in standard form contracts* 1.

Stoop PN *The consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts* 1304.

<sup>49</sup> Mupangavanhu Y *Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008* 121.

<sup>50</sup> Du Plessis L *Theoretical (dis-) position strategic leitmotifs in constitutional interpretation in South Africa* 1334.

the consumer who may not have adequate resources to seek legal opinion about the contract.<sup>51</sup>

Once the parties have affixed their signature on the contract, it becomes binding on them.<sup>52</sup> The signature is a conclusive indication that the person who signed understood the contents of the agreement.<sup>53</sup> In *Afrox Health Care Bpk v Strydom* it was held that the person who signs the agreement does so at their own risk and is bound by the terms therein as if they have been aware and consented to them.<sup>54</sup>

In the light of the above, both the supplier and the consumer including juristic persons are bound by the agreement and cannot cancel it once the signature has been affixed unless there is a material breach.<sup>55</sup> Where the other party cancels the contract without any justification, the innocent party is entitled to claim and require performance or damages arising from the breach.<sup>56</sup>

The CPA has addressed these issues by introducing amongst others, when contract can be terminated and the number of days a notice should be given prior to termination of the agreement.<sup>57</sup> The CPA also defines a term that is unfair and unreasonable to include term that is one sided.<sup>58</sup> In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* the parties entered into a lease agreement and the respondent failed to make payment for rentals due.<sup>59</sup> As a result the appellant cancelled and evicted the respondent without further notice. The court *a quo* held that eviction is unfair and unreasonable but the Supreme Court held that

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<sup>51</sup> Stoop PN *The consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts* 1103.

<sup>52</sup> Hutchison and Pretorius *The Law of Contracts in South Africa* 14.

<sup>53</sup> *Smit v Pretorius and others* (33801/2001) [2014] ZAGPPHC 632.

<sup>54</sup> *Afrox Health Care Bpk v Strydom* 2002 (6) 21 SCA para 18.

<sup>55</sup> Barnard J *The influence of the Consumer Protection Act 68 of 2008 on common law of sale* 37; see 2.2 above.

<sup>56</sup> *Victoria Falls and Transvaal Co & Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 para 22; see 2.2.3 below.

<sup>57</sup> Section 14(2) of the CPA.

<sup>58</sup> Section 48(2) of the CPA.

<sup>59</sup> *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 para 23.

parties must honour their obligations they agreed upon when the contract was voluntarily and freely entered into.<sup>60</sup>

### 2.2.2 *Caveat subscriptor*

*Caveat subscriptor* is whereby a party is presumed to have read the contents of the agreement and is aware of the terms and had the intention of entering into the contract which is binding.<sup>61</sup> Once the contract has been signed, it creates legally binding obligations between the parties on the terms the parties have agreed upon.<sup>62</sup> Maxwell argues that this principle was created to preclude parties from escaping liability of the contract.<sup>63</sup> Therefore, a juristic person is bound by the terms of a contract based on *caveat subscriptor* as common law continues to govern transactions that are not within the ambit of the CPA.<sup>64</sup> It can be realised that the fixed term agreements once signed, they bind the consumer and cannot be terminated under the common law except where there is material breach and the aggrieved party can claim damages.<sup>65</sup>

The damages to be paid are calculated according to the loss incurred due to the breach of contract or the loss suffered.<sup>66</sup> The aggrieved party may also claim penalty for the cancellation of the contract but cannot claim both the damages and the penalty in order to avoid unjust enrichment unless the contract allows it.<sup>67</sup> The court in *Murcia Lands cc v Erinvale Country Estate Home Owners Association*<sup>68</sup> held that the penalty should not be excessive and not prejudice the other party or be seen as a punishment. The method to be used to determine whether the penalty was excessive is to determine what would be the position of the innocent party (plaintiff)

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<sup>60</sup> African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours and others 2011 (3) SA 511 (SCA) para 16.

<sup>61</sup> Van der Berg M *Formalities in the law of contract and their impact on visually impaired consumers* 30.

<sup>62</sup> G.C. Cheshire, C.H.S. Fifoot and M.P. Furmston *The Law of Contract* 36; Van der Merwe and Van Huyssteen *Contract General Principles* 23.

<sup>63</sup> Maxwell *Obligations and Terms* 34.

<sup>64</sup> Melville *The Consumer Protection Act* 22.

<sup>65</sup> Van der Berg M *Formalities in the law of contract and their impact on visually impaired consumers* 30.

<sup>66</sup> *Wireless Rentals (pty) Ltd v Stander* 1965(4) SA 753 para 324.

<sup>67</sup> *Custom Credit Corporation (pty) Ltd v Shembe* (1972) 3 ALL SA 489 para 17.

<sup>68</sup> *Murcia Lands cc v Erinvale Country Estate Home Owners Association* (2004) 4 ALL SA 656 para 3

had the other party (defendant) not breached the contract.<sup>69</sup> In *Plumbago Fincancial Services (pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance*<sup>70</sup>, the parties entered into a lease agreement of 5 years and the lessee failed to pay monthly installments and the court held that, had the lessee not defaulted, the lessor would not have suffered damages. So the lessee had to compensate the lessor.

### *2.2.3 Cancellation of fixed term agreements in common law*

The contract in common law could be cancelled where it is against public morality; there was fraud, duress or undue influence.<sup>71</sup> Further, fixed term agreements can be cancelled where the party to the contract has committed a material breach warranting automatic termination, and where there is a clause permitting the aggrieved party to cancel such a contract in accordance with the principles of law of contract.<sup>72</sup> Fixed term agreements expire at the agreed period which can be determined from the agreement.<sup>73</sup> That is, the agreement terminates automatically when the period set has lapsed and afterwards operates on monthly basis. In *Trioparizi v Bulawayo Municipality* it was stated that:

If the parties have agreed upon a definite time for the expiry of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time.<sup>74</sup>

However, where the contract does not stipulate the time frame, such agreement will be terminated by giving the other party a reasonable notice or any other notice the parties have agreed upon in the initial agreement.<sup>75</sup> In *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd*<sup>76</sup>, Plaaskem purported to terminate the contract but the notice was rejected by Nippon as having no effect because their contract did not

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<sup>69</sup> *Plumbago Fincancial Services (pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance* 2008(3) SA 47 para 9.

<sup>70</sup> *Plumbago Fincancial Services (pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance* 2008(3) SA 47 para 13.

<sup>71</sup> Van Eeden E *Consumer protection law in South Africa* 235.

<sup>72</sup> Huyssteen *Contract General Principles* 23 ;Kerr AJ *Sale and Lease* 501.

<sup>73</sup> *Standard Bank Sa Ltd v Nomzingsi Princess Mnyipiza* 468/2014 para 5.

<sup>74</sup> *Trioparizi v Bulawayo Municipality* 2016 HC 3080-13 para 325.

<sup>75</sup> Cooper WE *Landlord and Tenant* 2<sup>nd</sup> ed (Juta Cape Town 1994) 61-65.

<sup>76</sup> *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) para 3.

state that it could be terminated by giving a reasonable notice.<sup>77</sup> In the court *a quo* it was held that there was no tacit term implied that the contract could be cancelled within reasonable time therefore the notice was invalid and of no legal effect. The Supreme Court held that the tacit term was imputed and the contract could be terminated by giving a reasonable notice.<sup>78</sup>

Further, in *Bredenkamp and Others v Standard Bank of South Africa Ltd*, the appellant sought an interdict to restrain the bank from terminating or closing the account of a customer after issuing a reasonable notice.<sup>79</sup> The court *a quo* held that the bank should exercise its powers fairly and in good faith despite the clause in the contract which states that the bank can close the account without a reason. In the appeal court the principle of fairness was rejected and it was held that the bank had the right to terminate the contract and close the account based on the contract which parties had agreed upon. The court in *Botha v Rich* rejected this approach and accepted that unreasonableness and unfairness were sufficient grounds to not enforce the contract.<sup>80</sup>

Given the common law position on the termination of fixed term agreements, it is also important to explore whether the CPA affords juristic persons protection when terminating fixed term agreements.

### **2.3 Application of the Consumer Protection Act**

The CPA applies to transactions that occur in the ordinary course of the supplier's business as long as the transaction is not excluded of its application.<sup>81</sup> The CPA also applies to juristic persons when the criteria set have been met although there are limitations in its application.<sup>82</sup> The CPA does not apply to juristic persons when the turnover or asset value exceeds R2 million.<sup>83</sup> Also section 14 exclude juristic persons

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<sup>77</sup> *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) para 7.

<sup>78</sup> *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA) para 21.

<sup>79</sup> *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2009(5) SA 304 para 51.

<sup>80</sup> *Botha v Rich* 2014 (4) SA 124 para 34.

<sup>81</sup> Section 5(2)(3) of the CPA.

<sup>82</sup> Section 1 of the CPA.

<sup>83</sup> Section 5(2)(b) of the CPA.

from protection when terminating or renewing fixed term agreements regardless of their annual turnover or asset value.<sup>84</sup>

### *2.3.1 Definition of a consumer*

A broad definition is given to the concept of a consumer in the CPA. It includes natural persons, juristic persons, user or the beneficiary of the goods and services.<sup>85</sup> Firstly a consumer is defined in section 1 of the CPA as a person who enters into a transaction in the ordinary course of business as long as the transaction is not exempt from the application of the CPA as per section 5(2) and section 5(3). Exempt transactions include goods and services provided by the state and transactions that exceed R2 million in the case of a juristic person.<sup>86</sup> Secondly the definition of a consumer is further extended to include juristic person who is defined as "a body corporate or partnership or an association and/or a trust".<sup>87</sup> However, there is a limitation in this regard. The CPA does not apply to juristic persons if their annual turnover or asset value is beyond the monetary threshold set by the Minister of Trade and Development.<sup>88</sup> The threshold is currently set at an annual turnover or asset value not exceeding R2 million.<sup>89</sup>

The threshold determined by the minister poses problems in respect of the calculation of the asset value or annual turnover. The annual turnover and asset value may be different at different times depending on the nature of goods sold or services rendered.<sup>90</sup> This raises the question as to whether the position of the juristic person has to be determined every time the goods and services are supplied as the set threshold is very low. The monetary threshold is set very low in order to extend protection to small businesses who may have little knowledge or lack of funds to seek advice on the contract they enter into.<sup>91</sup> In other words, the juristic person can

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<sup>84</sup> Section 14(1) of the CPA.

<sup>85</sup> Barnard J For whom the bell tolls: The application of section 14 of the Consumer Protection Act 68 of 2008 to residential lease agreements 169.

<sup>86</sup> Section 5(3) of the CPA.

<sup>87</sup> Section 1 of the CPA.

<sup>88</sup> Section 5(2)(b) of the CPA.

<sup>89</sup> Regulation 5 *Government Notice No 293* of 1 April 2011.

<sup>90</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 84.

<sup>91</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 84.

be considered a consumer at one time, and at other times not qualify as a consumer when the asset value is beyond the monetary threshold.<sup>92</sup>

From the definition of the juristic person and the threshold set, it can be realised that the juristic persons protected are small business. In South Africa however, there is no uniform definition for a small business as the definition differs from one industry to another.<sup>93</sup> The number of employees a business employs may differ as well, however, it is generally accepted that the small business employs less than fifty people.<sup>94</sup>

The legislation is leaving juristic persons unprotected by only considering the nature of their product sold which might render the turnover to exceed R2 million, and thus narrowing the protection provided for in the CPA. For instance, where a juristic person sells houses as a developer, the turnover might be over R2 million in a year when the value of the sold property is high. In such a case the juristic person will not be protected by the CPA because it was a business contract but in the event the turnover is less than R2 million a year, such a juristic person will be protected.

Unfortunately, the CPA does not define a business contract, but rather consumer agreement. A consumer agreement is defined as "an agreement between the supplier and a consumer for the sale of goods and services."<sup>95</sup> Goods relate to "anything marketed for human consumption."<sup>96</sup> Thus, consumer contracts are provided for by the CPA and not business contracts. A business contract is essential to juristic persons as the goods purchased can be resold and the consumer protection can still be afforded to a juristic person.<sup>97</sup> With regards to the consumer contract, goods acquired must be for consumer consumption in order for protection to be afforded to a juristic person.<sup>98</sup> The implication is that, when a juristic person enters into an agreement for purposes of reselling the goods, such a transaction will

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<sup>92</sup> *Parliamentary Research Unit synopsis of submission 5.*

<sup>93</sup> Charmes, J. *A Critical Review of Concepts, Definitions, and Studies in the Informal Sector.*

<sup>94</sup> Section 1 *National Small Business Act* of 1996 as amended by the *National Small Business Amendment Acts* of 2003 and 2004.

<sup>95</sup> Section 1 of the CPA.

<sup>96</sup> Section 1 of the CPA.

<sup>97</sup> UNCTAD *Manual on Consumer Protection* 39

<sup>98</sup> Section 1 of the CPA.

not be governed by the CPA as it is a business contract and not a consumer contract. Further, juristic persons cannot rely on section 14 for cancellation or renewal of a business contract.

Thirdly, the definition of a consumer includes the beneficiary, recipient or user of goods or services purchased.<sup>99</sup> In *Eskom Holding Limited v Halsteak-Cleak*<sup>100</sup>, the facts were that the plaintiff was electrocuted by an overhanging line while he was cycling with his friends and as a result sustained severe burns and made a claim to Eskom. Eskom denied liability on the grounds that the plaintiff was not a consumer. On appeal, the court held that according to the CPA, a consumer is "a person whom goods or services are marketed in the ordinary course of supplier's business". The court further held that the consumer has to be the user or beneficiary of the goods or services offered and in this instance, the respondent was not the beneficiary or user of the services offered by Eskom.

### *2.3.2 Goods acquired in the ordinary course of business*

The Act further regulates or facilitates transactions or activities of the supplier and the consumer which occur during the ordinary course of business, unless such a transaction is exempt from the application of the CPA.<sup>101</sup> The CPA does not define when a transaction is done in the ordinary course of business, but in *Van Zyl & others NNO v Turner another NNO*<sup>102</sup> the court held in order to determine whether the transaction was concluded in the ordinary course of business, all the circumstances must be looked at including the actions of both parties to the transaction.<sup>103</sup> For instance, when Mrs. X sells her own car for R90 000 to Mr. P, such a transaction will not be regulated by the CPA as it did not occur in the ordinary course of business as Mrs. X does not sell cars for a living. In the event where Mrs. X ordinarily sells cars on a day to day basis such transactions will be governed by

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<sup>99</sup> *Eskom Holding Limited v Halsteak-Cleak* 2017(1) SA 333 (SCA) para 23.

<sup>100</sup> *Eskom Holding Limited v Halsteak-Cleak* 2017(1) SA 333 (SCA) para 14-24.

<sup>101</sup> Section 5(1)(a) of the CPA.

<sup>102</sup> *Van Zyl & others NNO v Turner another NNO* 1998 (2) SA 236 para 34.

<sup>103</sup> *Van Zyl & others NNO v Turner another NNO* 1998 (2) SA 236 para 34

the CPA and can be terminated under section 14 by giving notice twenty days before termination.<sup>104</sup>

In *Eskom Holding Limited v Halsteak-Cleak* the court held that according to the CPA, a consumer is "a person whom goods or services are marked in the ordinary course of supplier's business".<sup>105</sup> In this instance, the respondent was not a beneficiary of services and did not purchase services in the ordinary course of supplier's business as he sustained injuries while cycling. Further in *Transcend Residential Property Fund Limited v Mati*, facts briefly facts are that Mati entered into a lease agreement in March 2017 and in May 2017, the respondents failed to make payment of rentals due.<sup>106</sup> As a result the landlord issued a letter of demand demanding the tenants to make payment but they failed to do so. The landlord later terminated the lease after 20 days from the day of letter of demand was issued due to breach of contract and failure to rectify the breach. It was discovered that Mati never occupied the premises but Onu did. The court held that both Mati and Onu are the consumers as defined by the CPA. The court held further that a consumer is a person who enters into the contract with the supplier or the beneficiary of the services or goods. Therefore Onu was the beneficiary and as a result, he was a consumer and therefore entitled to pay rentals due.

#### **2.4 The extent of protection afforded to juristic persons**

As discussed above, the threshold determination leads to uncertainty of protection offered to juristic persons.<sup>107</sup> The threshold is used to distinguish between small and larger corporations which may have financial strength to seek a legal advisor to advice on legal matters whereas smaller business may not have access to a legal advisor due to a lack of financial resources.<sup>108</sup> It can therefore be concluded that the protection in the CPA is intended to protect the juristic persons with an asset value below R2 million.<sup>109</sup> This is not the case under section 14 as juristic persons are

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<sup>104</sup> Section 14(2)(bb) of the CPA.

<sup>105</sup> *Eskom Holding Limited v Halsteak-Cleak* 2017(1) SA 333 (SCA) para 23.

<sup>106</sup> *Transcend Residential Property Fund Limited v Mati and another* (2008) ZAWCHC 40 para 13.

<sup>107</sup> Parish R *Consumer Protection and Ideology of Consumer Protectionist* 234.

<sup>108</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 69.

<sup>109</sup> *Memorandum on the objects of the consumer protection Bill* 80.

excluded from protection of section 14 when cancelling or renewing their contracts.<sup>110</sup> However, the turnover or asset value will differ from industry to industry.<sup>111</sup> The juristic persons whom the CPA seeks to protect may exceed the threshold set at different times, depending on the annual turnover or asset value.<sup>112</sup> Thus, legislature should increase the threshold in order to protect consumers, including juristic persons, in order to ensure all consumers are protected in the CPA.

It is a mile stone that certain juristic persons receive limited protection under the CPA; but the problem arises with regard to the definition of a consumer. The definition of a consumer creates a problem by differentiating between individual consumers and juristic persons when cancelling or renewing fixed term agreements as discussed below.<sup>113</sup> This differentiation is not justified and the explanatory memorandum does not state it as well.

Another problem and crucial factor is the size of a juristic person used in order to determine whether it should be protected.<sup>114</sup> Under the CPA, size is quantified by the annual turnover or asset value of a juristic person at the time of the transaction.<sup>115</sup> If at the time of the transaction, the juristic person exceeds the prescribed threshold due to annual sales leading to an increase in turnover, such a person will not be considered to be a consumer.<sup>116</sup> Therefore, size is not an adequate indicator of vulnerability of the business as it is impractical to access the financial statements of another each time the supplier concludes a contract.<sup>117</sup> Further, disclosing the annual turnover or asset value in order to ascertain whether a juristic person can be classified as a consumer would reveal confidential information of the business.<sup>118</sup> Against this background, juristic persons under the threshold will still have protection

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<sup>110</sup> Section 41 of the CPA.

<sup>111</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 69.

<sup>112</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 83.

<sup>113</sup> See 2.5 below.

<sup>114</sup> Section 5 (2)(b) of the CPA

<sup>115</sup> Section 5 (2)(b) of the CPA.

<sup>116</sup> Section 5 (2)(b) of the CPA

<sup>117</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 84.

<sup>118</sup> Hale R *Consumer transactions: equitable models for individuals with decision making impairments* 25.

under the CPA but cannot rely on section 14 for protection. It is therefore necessary to discuss the implication of section 14 on juristic persons.<sup>119</sup>

## ***2.5 Implication of section 14 on juristic persons in respect of fixed term agreements***

Consumers are no longer bound by contracts they wish to terminate as the CPA gives them the right to cancel the agreement. The consumer may terminate the franchise agreement within 10 business days of signing and there is no penalty in that regard.<sup>120</sup> The consumer may also terminate a booking or reservation but the CPA does not provide the time limit.<sup>121</sup> The penalty charged has to be reasonable and the factors to be taken into consideration include the value of the transaction and the notice to be given amongst other things.<sup>122</sup> The consumer may also terminate the contract if the goods are defective six month from the date of delivery.<sup>123</sup> However, for purposes of this study termination and renewal of fixed term agreements will be discussed.

### *2.5.1 Termination of a fixed term agreement*

The expiry and renewal of fixed term agreements are regulated in terms of section 14 of the CPA. It should be noted that the contract automatically terminates upon its expiry or by giving the supplier a notice of twenty business days, which must be in writing, stating the intention to terminate such contract before expiry date.<sup>124</sup> The supplier is also required to give twenty days' notice stating the intention to terminate the fixed term agreement.<sup>125</sup> The CPA makes provision for fixed term agreements which are for maximum duration of 24 months and after termination such agreements are on a month to month basis.<sup>126</sup>

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<sup>119</sup> See 2.5 below.

<sup>120</sup> Section 7(2) of the CPA.

<sup>121</sup> Section 17(2) of the CPA.

<sup>122</sup> Section 17(4) of the CPA.

<sup>123</sup> Section 56(2)(b) of the CPA.

<sup>124</sup> Section 14(2)(b) of the CPA.

<sup>125</sup> Section 14(2)(bb) of the CPA.

<sup>126</sup> Section 14(2)(d) of the CPA.

On the other hand, section 14 excludes juristic persons from protection regardless of their annual turnover or asset value.<sup>127</sup> The implication thereof will be that juristic persons may terminate or renew their contracts in the manner prescribed between the parties.<sup>128</sup> In the event a juristic person wants to cancel the contract and the other party does not consent to such cancellation, a juristic person cannot rely on section 14 for protection as they are totally excluded. They are excluded regardless of their annual turnover or asset value which is used to determine whether they are consumers.<sup>129</sup>

### *2.5.2 Consequences of cancellation of a fixed term agreement*

When the contract is terminated there may be some consequences which include making payment of outstanding monies.<sup>130</sup> When the consumer terminates a contract, such a person is not exempt to make any payments of any amounts owed to a supplier up until the date of cancellation.<sup>131</sup> That is, the consumer is not liable for payment for any remaining period after cancellation of such contract, but is liable for any outstanding monies due to the supplier up to the date the agreement is cancelled.<sup>132</sup> For example, if a consumer cancels his or her gym contract in December but had defaulted on October and November, such a person will be liable for the payment of those two months.

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<sup>127</sup> Section 14(1) of the CPA: (1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.  
(2) if a consumer agreement is for a fixed term  
(a) that terms must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;  
(2) if a consumer agreement is for a fixed term.  
(a) that terms must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;  
(b) despite any provision of the consumer agreement to the contrary  
(i) the consumer may cancel that agreement  
(aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or  
(bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or  
(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time

<sup>128</sup> See 2.5 above.

<sup>129</sup> Section 14(1) of the CPA.

<sup>130</sup> Section 14(3)(b) of the CPA.

<sup>131</sup> Section 14(3)(b) of the CPA.

<sup>132</sup> Section 14(3)(a) of the CPA.

The supplier is also entitled to impose any reasonable penalty to the consumer for the goods and services provided "in contemplation of the agreement enduring for its intended fixed term".<sup>133</sup> There are guidelines provided to calculate the reasonable penalty to be imposed.<sup>134</sup> The factors to be taken into consideration include the value of the transaction up to the date of cancellation, the amount the consumer is still liable to pay until the date of cancellation of the contract, the duration of the fixed term and the value of the goods that are in possession of the consumer and other factors.<sup>135</sup> The penalty is not compensation for breach of contract as there was no breach which occurred but the contract was terminated.

The agreement may be cancelled due to a material failure to comply with the agreement unless the consumer has rectified aforementioned failure.<sup>136</sup> In instances where the consumer cancels the fixed term agreement before its expiry, the supplier may impose a reasonable penalty.<sup>137</sup>

### *2.5.3 Renewal of the contract*

Before expiry of the contract, the consumer is given a notice of expiry not more than eighty business days and not less than forty days before the contract expires.<sup>138</sup> If the parties have expressed interest to renew the contract, the notice will incorporate any material changes made to the contract if any.<sup>139</sup>

The consumer contract may continue beyond the expiry date set and it will be taken to have been renewed automatically unless the consumer expressly directs the supplier to cancel such agreement upon expiry date.<sup>140</sup> After the fixed term agreement has lapsed, it will continue on the month to month basis.<sup>141</sup> The said agreement, even though it was governed by section 14 during its subsistence, will

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<sup>133</sup> Section 14(3)(b)(i) of the CPA.

<sup>134</sup> Regulation 5(2).

<sup>135</sup> Regulation 5(2) of the CPA.

<sup>136</sup> Van Eeden *Consumer Law* 358; section 14(2)(b)(ii) of the CPA.

<sup>137</sup> Regulation 5(2) factors to be considered whether the penalty is reasonable include but not limited to, the transaction value up to cancellation date, the amount the consumer is liable for until cancellation and the value of goods.

<sup>138</sup> Section 14(2)(c) of the CPA.

<sup>139</sup> Section 14(2)(c)(i) of the CPA.

<sup>140</sup> Section 14(2)(c) of the CPA.

<sup>141</sup> Section 14(2)(d) of the CPA.

not be regulated by section 14 once on a monthly basis because section 14 only regulates fixed term agreements.<sup>142</sup>

On face value, it would seem that all juristic persons, regardless of annual turnover or asset value, are excluded from the protection afforded to consumers in terms of section 14(1). For instance, where a juristic person with an annual turnover of less than R2 million enters into a lease agreement for 24 months with another, section 14 will not be applicable to their contract, although such a juristic person is considered a consumer in terms of section 5(2)(b). The exclusion of the application of section 14 of the CPA to juristic persons leaves them unprotected, albeit they are considered consumers. Section 14 seemingly differentiates between consumers; it does not apply to juristic persons but applies to individual consumers. Consequently, according to section 14, juristic persons are not considered to be consumers in need of protection when concluding fixed term agreements and in such cases they have to rely on common law.<sup>143</sup>

The issue with common law is that certain discrepancies exist within the law. The protection afforded to juristic persons under common law is not adequate. According to common law, consumers are bound by the contract that they sign even if they contain unless there is a material breach to the contract.<sup>144</sup> The implication is that they cannot cancel fixed term agreements even if such an agreement contains unfair terms unless there is material breach in the agreement.<sup>145</sup> Juristic persons whose annual turnover or asset value exceeds the threshold cannot turn to the CPA for protection.

#### *2.5.4 The Application of section 14 to property transactions*

When one considers the termination and renewal of fixed term agreements, it can be concluded that it is the gym contracts or cell phone contracts it is difficult to cancel such without any fees or charges.<sup>146</sup> However, section 14 covers a wide range

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<sup>142</sup> Section 12(2)(d) of the CPA.

<sup>143</sup> See 2.2 above.

<sup>144</sup> Hutchison and Pretorius *The Law of Contracts in South Africa* 14.

<sup>145</sup> Kerr AJ *Sale and Lease* 501.

<sup>146</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 144.

of contracts or agreements and as such it is applicable to property transactions specifically, the residential lease agreements. Delpont submits that the CPA regulates the lease agreements entered into by consumers as the definition of goods in section 1 includes, amongst others, "interest in the land or any other immovable property."<sup>147</sup> For purposes of this study, the renewal and termination of lease agreements will be discussed in terms of the CPA.

Before the lease agreement expires, the landlord must give the tenant a notice at least 40 days and not more than 80 days before expiry notifying the tenant of the expiry.<sup>148</sup> The notification will include any changes that would apply if the contract is renewed. In *Mokone v Tassos properties*, parties entered into a lease agreement for a period of one year.<sup>149</sup> When the initial lease lapsed, the parties renewed their contract by inserting the dates for when it is extended to on top of the initial agreement. Later Tassos, the landlord, entered into a sale agreement with Blue Cayon and the property was transferred to Blue Cayon. In 2012 the tenant, Mokone notified Tassos that she would like to exercise her pre exemption rights and buy the property but Tassos refused. The court held that when the parties renew their contract, all the terms of the contract are renewed where parties did not specify any changes to the terms.

When parties renew their contract, it is important that they communicate intent to renew all terms or make changes to the contract about terms they no longer want to be bound by. It is common that when parties renew their contract, they do so without entering into a new agreement.

Glover and Kerr correctly comment that the CPA does not only apply to the person who entered into lease agreement but the consumer could also include the beneficiary of use of goods and services.<sup>150</sup> In *Transcend Residential Property Fund Limited v Mati*, facts briefly facts are that Mati entered into a lease agreement in March 2017 and in May 2017, the respondents failed to make payment of rentals

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<sup>147</sup> Delpont H *Problematic aspects of the Consumer Protection Act of 2008 in relation to property transactions, fixed term contracts and unsigned sale agreements* 68.

<sup>148</sup> Section 14(2)(b) of the CPA.

<sup>149</sup> *Mokone v Tassos properties CC and Another* (2017) ZACC 25 para 17.

<sup>150</sup> Glover G and Kerr J *Law of Sale and Lease* 338.

due.<sup>151</sup> As a result the landlord issued a letter of demand demanding the tenants to make payment but they failed to do so. The landlord later terminated the lease after 20 days from the day of letter of demand was issued due to breach of contract and failure to rectify the breach. It was discovered that Mati never occupied the premises but Onu did. The court held that both Mati and Onu are the consumers as defined by the CPA. A consumer is a person who enters into the contract with the supplier or the beneficiary of the service. As a result, the Respondents were to vacate the premises. Delpont raises a concern that in future the landlords may want to conclude commercial leases with the juristic persons and the CPA may not apply to such transactions.<sup>152</sup> Glover also expressed the same concerns regarding the long term lease agreements which may be for 10 years that the CPA may not apply unless the supplier has demonstrated financial benefit to the consumer and the consumer has agreed.<sup>153</sup>

## **2.6 Conclusion**

The above analysis reveals that common law does not provide adequate protection to juristic persons when entering into fixed term agreements. The Common law upholds the freedom of contract which means that the parties are free to enter into any contracts freely and signature is conclusive evidence that they want to be bound by the terms of the agreement. The consumer is bound by such an agreement even if it contains unfair terms and cannot terminate the contract unless there has been a material breach. The study also revealed that the fixed term agreements automatically terminate at the definite time agreed upon and contracts without a fixed term can be terminated by giving a notice within a reasonable time and there is no time frame set.

The study also explored the protection afforded to juristic persons and it was shown that the CPA extends protection to juristic persons when the criterion set is met.<sup>154</sup> It is provided that the juristic persons will be protected when the annual turnover or

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<sup>151</sup> *Transcend Residential Property Fund Limited v Mati and another* (2008) ZAWCHC 40 para 13.

<sup>152</sup> Delpont H *Problematic aspects of the Consumer Protection Act of 2008 in relation to property transactions, fixed term contracts and unsigned sale agreements* 68.

<sup>153</sup> Glover G and Kerr J *Law of Sale and Lease* 338.

<sup>154</sup> See 2.4 above.

asset value does not exceed R2 million. The CPA however, has a limitation to juristic persons in its application in respect of fixed term agreements in section 14.

Cancellation and renewal of fixed term agreements is provided for in section 14 although protection is limited to individual consumers and not juristic persons albeit that they are regarded as consumers. The CPA does not distinguish which agreements are included but this could include the gym contracts, cell phone contract and the lease agreements.<sup>155</sup> The assumption is that the legislature did not interpret which contracts are fixed term agreements in order to cater for a wide range of fixed term agreements.<sup>156</sup> Therefore, a lessee as a consumer would need protection regardless of the annual turnover or asset value when concluding a fixed term agreement.<sup>157</sup>

The CPA allows consumers to terminate fixed term agreements before expiry date and provides a number of days the notice should be given prior to termination. However, juristic persons cannot enjoy this protection as they are excluded from the ambit of section 14 but can terminate contracts where there has been a material breach.<sup>158</sup>

Juristic persons are not protected in terms of the CPA and cannot rely on the CPA when cancelling or renewing fixed term agreements. Therefore, further investigation into the Australian consumer law would be necessary as it seems to present the possible remedy on protection of juristic persons. The Australian position will be dealt with in chapter 3.

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<sup>155</sup> Steyn C *Does s14 of the CPA create an unreasonable disadvantage to owner 2.*

<sup>156</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements 73.*

<sup>157</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements 73.*

<sup>158</sup> See 2.2 above.

### **3. Consumer protection of juristic persons from an Australian perspective**

#### **3.1 Introduction**

In terms of consumer laws, everyone is considered to be a consumer, including juristic persons but not every juristic person comes within the ambit of consumer protection.<sup>159</sup> Juristic persons are offered protection based on the monetary threshold or type of goods and services purchased and whether these are contracts are fixed term agreements or not.<sup>160</sup> Australia however, seems to have a different approach on protection of juristic persons when cancelling or renewing the fixed term agreements.

The definition of a consumer in terms of Australian law has been described as positively generous in comparison to the interpretation of a consumer in other jurisdictions, particularly South Africa.<sup>161</sup> This conclusion is by and large based on the fact that the Australian definition of consumer allows for the juristic persons to terminate fixed term agreements when it is established that they are consumers.<sup>162</sup> The protection is provided when concluding fixed term agreements whereas other jurisdictions do not provide protection for juristic persons when cancelling and renewing fixed term agreements.<sup>163</sup>

Therefore, it is necessary to examine who is considered a consumer in Australia and to what extent they are protected under the *Competition and Consumer Act* (herein referred to as ACL).<sup>164</sup> The ACL repealed the *Trade Practice Act*, when it came into force on 1 January 2011.<sup>165</sup> This law is incorporated into the law of each state and

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<sup>159</sup> See 3.4 below.

<sup>160</sup> Bartlette and Szemeizi *The Application of the Australian Consumer Law to B2B transactions* 46.

<sup>161</sup> Malbon & Nottage *Consumer law and Policy in Australia and New Zealand* 49.

<sup>162</sup> Section 3(1) of the ACL.

<sup>163</sup> Malbon & Nottage *Consumer law and Policy in Australia and New Zealand* 129.

<sup>164</sup> *Competition and Consumer Act* 2010.

<sup>165</sup> *The Competition and Consumer Act* 2010, *Trade Practice Act* 1974.

territory of Australia harmonising and rationalising the existing consumer laws.<sup>166</sup> The ACL provides for the definition of a consumer and affords consumers protection by ensuring fair trade practices.<sup>167</sup> In November 2015 the *Treasury Legislation Amendment (small business and unfair contract terms) Act* extended this protection to juristic persons under section 23 of the ACL.<sup>168</sup> It was based on the fact that juristic persons, particularly small businesses are still in need of protection as they do not have adequate finances to engage the expert to advice on the contract as they are mostly run by their owners.<sup>169</sup> This chapter will discuss the common law position on termination of fixed term agreements and also provide a detailed discussion on the definition of a consumer and the limitation thereof. Consumer protection afforded to juristic persons when terminating fixed term agreements from an Australian perspective will also be discussed.

## **3.2 Common law**

### *3.2.1 Freedom of contract*

The courts are bound by freedom of contract by enforcing the notion that consumers are free to enter into any contract they want on the terms they deem fit.<sup>170</sup> There is a danger that the courts will continue to enforce contract in favour of traders based on freedom of contract.<sup>171</sup> As a result, it is submitted that the suppliers take advantage of freedom of contract by structuring their contracts in one sided fashion.<sup>172</sup> These contracts can be fixed term agreements.

Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*<sup>173</sup> said that basic principle of common law is that the parties to a contract are free to determine for themselves what primary obligations they will accept. Therefore, this principle is based on the assumption that parties have the same bargaining power and have

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<sup>166</sup> *The Competition and Consumer Act 2010, Trade Practice Act 1974.*

<sup>167</sup> Gregso S, *Proof Committee Hansard* 18.

<sup>168</sup> *Treasury Legislation Amendment (small business and unfair contract terms) Act 2015.*

<sup>169</sup> Billson B *Protecting small businesses against unfair contract terms* 6.

<sup>170</sup> Tembe HC *Problems regarding exemption clauses in consumer contracts* 58.

<sup>171</sup> Sims A *Unfair contract terms: A new dawn in Australia and New Zealand* 752.

<sup>172</sup> Tembe HC *Problems regarding exemption clauses in consumer contracts* 58.

<sup>173</sup> *Photo Production Ltd v Securicor Transport Ltd* (1980) AC 827 para 830.

autonomy to draft a contract on the terms that is in their interest.<sup>174</sup> For instance, if a person contracts with a trader and wants to terminate the contract because it contains terms that are unfavourable to the consumer, the courts will not intervene because of freedom of contract unless there is material breach.<sup>175</sup>

The courts, however, are reluctant to terminate contracts merely on the ground that it contains unfair contractual terms.<sup>176</sup> In *Biotechnology Australia Pty Ltd v Pace*, Kirby P explained that the Law of Contract promotes parties' autonomy by allowing them to make their own choices based on the contract thus upholding the notion of freedom of contract.<sup>177</sup> Refusal by the courts to intervene where the contract contains unfair terms reflects the freedom of contract promoting individual autonomy on contracts.<sup>178</sup>

However, freedom of contract has been mitigated through the introduction of consumer law in Australia, namely the ACL.<sup>179</sup> The ACL provides limitation to freedom of contract by allowing one party to the contract to terminate a contract.<sup>180</sup>

### *3.2.2 Termination of fixed term agreements in common law*

In common law, fixed term agreements terminate at the end of the period set out in the contract.<sup>181</sup> Where there is no period set, contracts can be cancelled where there is fraud, duress or undue influence and if the contract is against public morality.<sup>182</sup> Further fixed term agreements can be cancelled where the party to the contract has committed a material breach or where there is a clause permitting the aggrieved party to cancel such a contract in terms of the principles of law of contract.<sup>183</sup> Where the contract does not have duration or the period for termination is not set

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<sup>174</sup> Aronstarm *Consumer Protection, Freedom of contract and the law* 14.

<sup>175</sup> Trucker P. *Hegemony of the narrow doctrine under the Trade and Practices Act* 11.

<sup>176</sup> Tokely K *Introducing a prohibition on unfair contractual terms into New Zealand law* 425.

<sup>177</sup> *Biotechnology Australia Pty Ltd v Pace* (1998) 15 NSWLR 130 para 132,133.

<sup>178</sup> Howells G *The potential and Limits of Consumer empowerment by information* 349,350.

<sup>179</sup> Sec 3.3 below.

<sup>180</sup> Section 23(1) of the ACL.

<sup>181</sup> *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447 para 449

<sup>182</sup> *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447 para 449

<sup>183</sup> It is a principle called *boni mores* which denotes that the other party is in default, that the party to the contract who has an obligation to perform has failed or neglected to do so and therefore, is in default.

Kerr *Sale and Lease* 501.

out, such agreement will be terminated by giving the other party a reasonable notice or any other notice the parties have agreed upon in the initial agreement.<sup>184</sup>

However, in Australia the ACL intervened where common law had some discrepancies through the introduction of consumer protection legislation which allows parties to cancel the agreement before its expiry. The ACL allows fixed term agreements which are referred to as standard form contracts although not every fixed term agreement is a standard form contract to be cancelled despite the fact that the parties have attested their signature on the contract.<sup>185</sup>

### **3.3 Application of the ACL**

#### *3.3.1 Consumer contract*

A consumer contract is:

a contract for supply of goods or services or a sale or grant of interest in the land to an individual whose acquisition is wholly or predominately for personal, domestic or household use or consumption.<sup>186</sup>

According to the definition, goods which have been acquired must be used by a natural person and be used for household purposes.<sup>187</sup> In order to determine what the use of the goods and services acquired are, the courts followed the precedent established in *Director of Consumer Affairs Victoria v AAPT Limited*.<sup>188</sup> The precedent stated that the contract or agreement will reflect the intention of parties whether services, and goods purchased are for personal, household or domestic use even if they are not solely for that purpose.<sup>189</sup> It can be inferred that one of the purposes for which the goods and services are acquired can be for personal or household use, and does not preclude them from also being used for business purposes, as long as the goods or services are consumed.<sup>190</sup>

In Australia, the ACL does not specify contracts which are fixed term agreements and the assumption that, it was meant to cover variety of contracts like cell phone

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<sup>184</sup> Cooper WE *Landlord and Tenant* 61-65.

<sup>185</sup> Cancellation of fixed term agreements under the ACL will be discussed later in the chapter.

<sup>186</sup> Section 23(3) of the ACL.

<sup>187</sup> Section 23(3) of the ACL.

<sup>188</sup> *Director of Consumer Affairs Victoria v AAPT Limited* (Civil claims) (2006) VCAT 1493 para 30.

<sup>189</sup> *Director of Consumer Affairs Victoria v AAPT Limited* (Civil claims) (2006) VCAT 1493 para 30.

<sup>190</sup> Section 23(3) of the ACL.

contracts, gym contracts and the lease agreements. This consumer contract can include interest in the land which is defined in section 2 of the ACL as "a right to occupy a land or erect a building by virtue of a contract or purchase of shares in the company that owns the land".<sup>191</sup> It is evident that the provision applies to lease agreements.<sup>192</sup> Such agreements might be valid for a fixed term, thus for a specific period, and automatically expire at the time set, or can be renewed. The provisions restrict the protection to individual persons who are recipients of the goods or services, and do not extend to juristic persons, even when the criteria have been met.<sup>193</sup> However, in 2015 the protection was extended to juristic persons when terminating and renewing the contracts.<sup>194</sup>

### *3.3.2 Standard form contracts*

Kahn defines standard form contracts as contracts drafted by an economically superior party.<sup>195</sup> The ACL states that the presumption is that a contract is a standard form contract.<sup>196</sup> However not every fixed term agreement is a standard form contract although most of them are the standard form contracts as they are drafted by the supplier.<sup>197</sup> Factors are taken into consideration to determine whether the standard form is a fixed term agreement and this includes the looking into the contract as a whole and the upfront payable price.<sup>198</sup> For instance, the ACCC instituted a claim against Cardtronics which had unfair contract term in the standard form contract and provided that for automatic renewal of the contract for 6 years without consumer's consent.<sup>199</sup> It was held that the consumer may give a 60 days' notice if they wish to terminate the contract and it will be automatically be renewed if the notice is not served with the intention to terminate the contract.<sup>200</sup> The burden of proof lies with the supplier to demonstrate that the contract is not a standard

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<sup>191</sup> Section 2 of the ACL.

<sup>192</sup> Section 20 *Retain and Commercial Leases*.

<sup>193</sup> Section 23(3) of the ACL.

<sup>194</sup> Billson B *Protecting small businesses against unfair contract terms* 3.

<sup>195</sup> Kahn E *Contract and Mechantile law through cases* 76

<sup>196</sup> Section 27(1) of the ACL.

<sup>197</sup> Tembe HC *Problems regarding exemptions clauses in consumer contracts* 5.

<sup>198</sup> Section 23(3) of the ACL.

<sup>199</sup> *Australian Consumer and Competition Commission v Cardtronics Australasia Pty Ltd (2017) FCA 1204* para 13.

<sup>200</sup> *Australian Consumer and Competition Commission v Cardtronics Australasia Pty Ltd (2017) FCA 1204* para 13.

form contract.<sup>201</sup> There are certain factors courts may consider to determine whether a contract is open to negotiation (or not) by the consumer at the time of sale.<sup>202</sup> Such factors include whether the consumer was given a chance to negotiate or review the contract and by which party the contract was prepared.<sup>203</sup> It is a common cause that consumers lack bargaining power and contracts are prepared by businesses while consumers have to accept the terms in the contract by affixing their signature.<sup>204</sup>

The clauses in the contract favour the party by whom it was drafted, especially concerning exemption from liability and as such is detrimental to the weaker party, usually the consumer.<sup>205</sup> A contract is usually drafted by the supplier and is not wrong *per se* but, the contract will be void when a term in the contract is used indiscriminately.<sup>206</sup> The assumption is that parties have the same bargaining power to negotiate equally.<sup>207</sup>

### *3.3.4 Termination of fixed term agreements*

In Australia, fixed term agreements are for a duration of twelve months and the price payable upfront should not exceed AUD300 000.<sup>208</sup> Also there are contracts that have duration of over twelve months although the ACL does not define when they terminate but the assumption is that the legislature left it open in order for parties to decide about their duration.<sup>209</sup> Fixed term agreements and other contracts can be terminated when it has been established that there is a term that is unfair and can cause detriment loss to another party.<sup>210</sup>

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<sup>201</sup> Section 27(1) of the ACL.

<sup>202</sup> Section 27(2) of the ACL.

<sup>203</sup> Bender P, *Australian consumer law: unfair contract terms and other litigation* 3.

<sup>204</sup> Aronstam *Consumer Protection, Freedom of contract and the law* 14.

<sup>205</sup> Kahn E (ed) *Contract and Mercantile law through cases* 34.

<sup>206</sup> Section 27(2)(b) of the ACL.

<sup>207</sup> Tokely K *Introducing a prohibition on unfair contractual terms into New Zealand law: Justifications and suggestions for reform* 421-422; Atiya P.S *Unfair Contracts Introduction to the Law of Contract* 300, unconscionable bargain is "situations in which it is believed that, although no duress or fraud took place on contracting party took advantage of or exploited the other".

<sup>208</sup> Section 23(4) of the ACL; See 3.5 below.

<sup>209</sup> Section 23(4) of the ACL.

<sup>210</sup> Section 24(1) of the ACL.

Unfair contract terms are provided for in section 24(1) of the ACL which can be defined as:<sup>211</sup>

A term that causes another party to the contract to be at a disadvantage while the term is not reasonably necessary for the protection of the interests of the other party.

In other words, unfair contract terms can be defined as a contract drafted by the supplier for all the consumers prior to transaction taking place based on a take it or leave it basis.<sup>212</sup> The consumer usually does not have the power to negotiate the terms of the contract.<sup>213</sup> In Australia, the consumer is permitted to terminate the contract if it contains a term which would cause significant imbalance of rights, obligations and would cause detriment to another party and it is reasonably necessary to terminate the contract.<sup>214</sup> In *Australian Competition and Consumer Commission v Ashley and Martin*<sup>215</sup> the court held that when the contract is terminated, the penalty imposed must be reasonable and not cause detriment to the other party. In this case the consumer was permitted to terminate the contract before the date set for termination but it required the penalty to be paid to be 100% of the agreed fee to be paid.

The ACL does not specify how much the cancellation fee should be but the penalty charged must be fair and reasonable and the notice to be given before cancellation must be within a reasonable time.<sup>216</sup> In *Sunshine Records (pty) Ltd v Frohling and Others*<sup>217</sup> the pop music group was entitled to terminate the contract which contained terms that were unfair and the court held that the notice must be given within a reasonable time stating the intention to terminate the contract.

The ACL include a list of terms as examples of unfair contract terms which may lead to termination of a contract.<sup>218</sup> These include a term that permit one party to

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<sup>211</sup> Sims A *Unfair Contract Terms: A new dawn in Australia and New Zealand* 739.

<sup>212</sup> *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd* [2008] VCAT 482 (17 March 2008) 67.

<sup>213</sup> Section 27(2)(b) of the ACL.

<sup>214</sup> Sims A *Unfair Contract Terms: A new dawn in Australia and New Zealand* 739.

<sup>215</sup> *Australian Competition and Consumer Commission v Ashley and Martin* (2019) FCA 1436 para 6.

<sup>216</sup> *Australian Competition and Consumer Commission v Ashley and Martin* (2019) FCA 1436 para 9.

<sup>217</sup> *Sunshine Records (pty) Ltd v Frohling and Others* 9383/84/av [1986] ZASCA 153 para 17.

<sup>218</sup> Section 25(1) of the ACL.

terminate or renew the contract, permitting one party to vary the terms of the contract and the term that one party to determine the whether the contract has been breached.<sup>219</sup> For instance, in *Victoria v AAPT Limited*<sup>220</sup> the mobile phone agreement allowed the supplier to vary the terms without giving notice to the consumer and the court held that the consumer is entitled to terminate such contract.

### **3.4 Definition of a consumer in Australia**

Prior to the enactment of the ACL, Australia already had laws governing consumer protection in terms of the *Trade Practice Act* which however, had flaws being that juristic persons were excluded from the protection afforded to consumers.<sup>221</sup> In order to render optimum protection to consumers the ACL defines a consumer as:<sup>222</sup>

When acquiring goods as a consumer

- (1) a person is taken to have acquired particular goods as a consumer if and only if:
  - (a) The amount paid or payable for the goods as worked out under subsections (4) to (9) did not exceed:
    - (i) \$40 000; or
    - (ii) If a greater amount prescribed for the purposes of this paragraph that greater amount; or
  - (b) The goods were of a kind ordinarily acquired for personal, domestic, or household use or consumption; or
  - (c) The goods consisted of a vehicle or trailer acquired for use principally in the transport of goods for public goods.
- (2) However subsection (1) does not apply if the person acquired the goods, or hold himself or herself out as acquiring the goods:
  - (a) For the purpose of resupply; or
  - (b) For the purpose of using them up or transforming them. In trade or commerce:
    - (i) In the course of a process of production or manufacture; or
    - (ii) In the course of repairing or treating other goods or fixtures on land

In light of the above definition, it can be derived that the definition of a consumer is not limited to individual consumers but is extended to juristic persons when the amount payable does not exceed AUD40, 000.<sup>223</sup> Juristic persons can also enjoy the same protection as long as the amount of goods and services purchased does not

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<sup>219</sup> Section 25(1) of the ACL.

<sup>220</sup> *Victoria v AAPT Limited* (2006) VCAT 1943 para 54.

<sup>221</sup> Tokely K *Introducing a prohibition on unfair contractual terms into New Zealand law* 425.

<sup>222</sup> Section 3 of the ACL.

<sup>223</sup> Section 23(1) of the ACL.

exceed AUD40 000 or the prescribed amount.<sup>224</sup> Unlike the South African position, the criteria used to determine whether a juristic person is a consumer is based on the price of the product and not based on the annual turnover or asset value.<sup>225</sup> Freilich and Griggs argue that defining a consumer by relying on the amount payable for the product creates an enormous problem for ordinary consumers who purchase goods exceeding the limit by precluding them from the protection of the ACL.<sup>226</sup>

### 3.4.1 Threshold amount

For the purpose of defining a consumer under the ACL, any person acquiring goods or services not exceeding AUD40 000 is considered to be a consumer.<sup>227</sup> According to the threshold test, the use or purpose which the goods or services are ordinarily used for is irrelevant as long as the consumer does not exceed the monetary threshold.<sup>228</sup> This is evident in *Seely International (Pty) Ltd v Newtronic (Pty) Ltd*, where the company had purchased goods less than AUD40 000.<sup>229</sup> The company was considered to be a consumer based on the threshold test as the goods purchased were less than AUD40 000, despite the fact that the goods purchased were not for domestic use or purposes.<sup>230</sup> When it has been determined that a juristic person purchases goods and services less than AUD40 000, it can rely on the provisions of the ACL to terminate or renew the contract because that contract is considered a consumer contract.<sup>231</sup>

The determination for a monetary threshold is made based on the number of factors including the price of goods and services at the time they are purchased, the lowest price the goods could have been acquired from another supplier and the value of goods or services at the time of acquisition.<sup>232</sup> However in the event the purchase price is over AUD40 000, consideration will be given to whether the goods were

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<sup>224</sup> Modiba M T *The influence of the Consumer Protection Act 68 of 2008* 46.

<sup>225</sup> Section 3(1) of the ACL.

<sup>226</sup> Freilich A & Griggs L *Just who is a consumer? Policy and rationales and proposal for change in* Malbon J & Nottage L (eds) *Law and policy in Australia and New Zealand* 47.

<sup>227</sup> Section 3(1) of the ACL.

<sup>228</sup> Section 3(1)(b) of the ACL.

<sup>229</sup> *Seely International (Pty) Ltd v Newtronic (Pty) Ltd* (2002) Aust Contract R 90-142 para 179.

<sup>230</sup> *Seely International (Pty) Ltd v Newtronic (Pty) Ltd* (2002) Aust Contract R 90-142 para 202.

<sup>231</sup> Section 23(1) of the ACL.

<sup>232</sup> Freikich A and Webb E *Small Business: Forgotten and in need of protection from unfairness?* 136.

acquired for personal, domestic or household use in order to determine whether the consumer should be protected under the ACL.<sup>233</sup>

In essence, when a juristic persons purchases goods or services less than AUD40 000, such a person should be treated as a consumer and is afforded protection under the ACL.<sup>234</sup> However, according to the threshold test, if an individual person purchases goods or services slightly over AUD40 000 such a person will not be considered a consumer and cannot be afforded any protection under the ACL unless goods or services are for personal use or household use.<sup>235</sup> Peterson is of the view the threshold test used to determine whether a juristic person may be afforded protection for an unfair term in consumer contract is not accurate.<sup>236</sup>

### 3.4.2 Commercial limitation

The person acquiring goods or services exceeding the threshold is still a consumer if the goods are for domestic or household use.<sup>237</sup> This is applicable to juristic persons to a large extent.<sup>238</sup> That is, the nature of the goods is the determining factor irrespective of the price.<sup>239</sup> The test looks at what the goods are ordinarily used for rather than looking at the intention of the consumer.<sup>240</sup> The Australian courts have given this requirement a wide interpretation to include transactions between companies involving goods or services commonly acquired by households.<sup>241</sup> This may be seen in the case of *Carpet Call (Pty) Ltd v Chan*<sup>242</sup> where it was held that a carpet to a nightclub fell within a definition of a consumer transaction. This was based on the fact that the carpet is ordinarily used for household or domestic use.<sup>243</sup> The use of the carpet cannot be changed on the grounds that it is purchased by the

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<sup>233</sup> Freikich A and Webb E *Small Business: Forgotten and in need of protection from unfairness?* 136.

<sup>234</sup> Section 3(1)(a) of the ACL.

<sup>235</sup> Malbon J & Nottage L (eds) *Law and policy in Australia and New Zealand* 47.

<sup>236</sup> Peterson J *The Australian unfair contract terms law: The rise of substantive unfairness as a ground for review of standard form consumer contracts* 31.

<sup>237</sup> Section 3(1)(b) of the ACL.

<sup>238</sup> Section 3(1) of the ACL.

<sup>239</sup> Section 3(1)(b) of the ACL.

<sup>240</sup> Sims A *Unfair Contract Terms: A new dawn in Australia and New Zealand* 747.

<sup>241</sup> Bartlette and Szemeizi *The Application of the Australian Consumer Law to B2B transactions* 2.

<sup>242</sup> *Carpet Call (pty) Ltd v Chan* ASC 55-553; (11987) ATPR (Digest) 42-025 para 25.

<sup>243</sup> *Carpet Call (pty) Ltd v Chan* ASC 55-553; (11987) ATPR (Digest) 42-025 para 25.

juristic person. Further in *Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd*<sup>244</sup> the court concluded that a photocopier which was purchased by a natural person was a product which is ordinarily acquired for business purposes and not for household use. It was held therefore that the photocopier was acquired for business purposes although it was purchased by a natural person.<sup>245</sup> The distinction between the two cases is that in *Carpet Call (Pty) Ltd v Chan*<sup>246</sup> the product was purchased by the juristic person and it was considered a consumer transaction as the carpet is used for household purposes, whereas in *Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd*<sup>247</sup> the photocopy machine was purchased by the natural person but that was considered not to be a consumer contract as the photocopy machine is usually used for business purposes.

The ACL requires that goods and services purchased must be intended for household or personal use or consumption.<sup>248</sup> It means that the product purchased must be for consumer use and not for resale, thereby limiting juristic persons who may acquire goods and services for resale.<sup>249</sup> Problems may arise when the goods acquired are used for commercial purposes because juristic persons will be left unprotected albeit they are consumers as well.<sup>250</sup> This limitation is based on the purpose for which the goods are acquired.<sup>251</sup>

### ***3.5 Extension of protection to juristic persons***

Prior to the amendment of the ACL, the ACL limited the right to terminate the contract only to consumer contracts, that is, it does not apply to juristic persons.<sup>252</sup> However in 2015 the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* herein referred to as the UCT, was introduced. This amended the ACL and *Australia Securities and Investment Commission Act* (ASIC

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<sup>244</sup> *Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd* (1981) AT PR 40-2321 para 19.

<sup>245</sup> *Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd* (1981) AT PR 40-2321 para 19.

<sup>246</sup> *Carpet Call (pty) Ltd v Chan* ASC 55-553: (11987) ATPR (Digest) 42-025 para 25.

<sup>247</sup> *Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd* (1981) AT PR 40-2321 para 19.

<sup>248</sup> Section 3(1)(b) ACL.

<sup>249</sup> Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 83.

<sup>250</sup> See 3.4.2 above.

<sup>251</sup> Section(3)(1)(b) of the ACL.

<sup>252</sup> Section 23(3) of the ACL.

Act), protection to juristic persons as consumers was extended when cancelling and renewing contracts.<sup>253</sup> The application of the UCT affects only contracts that were varied or entered into on or after 12 November 2016 and one of the parties to the contract ought to be a juristic person.<sup>254</sup>

The amended provision of section 23(1) reads as follows<sup>255</sup>:

The contract is for a supply of goods or services, or a sale or grant of an interest in land;

(a) at the time of contracting, at least one party to the contract is a business that employs fewer than twenty (20) persons; and

(b) either:

The upfront price payable under the contract does not exceed \$300 000; or

(i) The contract has duration of more than 12 months and the upfront price payable under the contract does not exceed 1 Million dollars.

The above mentioned section sets out the prescribed criteria for protection that will apply to juristic persons to determine whether they have a right to terminate the contract under the ACL. It is necessary to discuss the requirements being the employees fewer than twenty and the upfront price payable.

### *3.5.1 Determining the upfront price*

The definition for the business contract provides that the upfront price payable under the contract should not exceed AUD300 000 if the contract is for 12 months or less; and that the contract price does not exceed 1 Million dollars if the contract is valid for longer than 12 months.<sup>256</sup> It can be understood that this type of contract is a fixed term agreement between the juristic persons and they can rely on the ACL for protection when the criteria is met.<sup>257</sup> The consumer contract, on the other hand, only affords protection to individual consumers by stating that the goods acquired have to be for personal use thereby leaving the juristic persons unprotected in respect of fixed term agreements when acquiring goods for business purposes.<sup>258</sup>

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<sup>253</sup> Section 23(1) of the ACL.

<sup>254</sup> *Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.*

<sup>255</sup> Section 23(4) as amended by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.*

<sup>256</sup> Section 23 of the ACL.

<sup>257</sup> See 3.5 above.

<sup>258</sup> Section 3(1)(b) of the ACL.

It is also imperative to define the upfront price payable in the consumer contract which will assist in determining whether the set threshold is met. The upfront price payable is defined as the consideration for the supply of goods and services to be provided and should be disclosed before entering into a contract.<sup>259</sup> The UCT is unclear on whether the consideration can only be in the monetary form or can also be non-monetary.<sup>260</sup> The Explanatory Memorandum, however, makes it clear that consideration can be any amount or item provided<sup>261</sup> consequently juristic persons can now rely on the business contracts when considering the upfront price payable, and also the number of employees in its service.<sup>262</sup>

The courts are further given the discretion to declare a term unfair in its application even in the case where a juristic person is part of the fixed term agreement.<sup>263</sup> For instance, on 6 September 2017, the proceedings were instituted against JJ Richards & Sons (Pty) Ltd in Australia and the federal court stated that the terms of a fixed term agreements with a juristic person were unfair.<sup>264</sup> This is because the contract stated that the consumer is bound by the contract if not cancelled within the first 30 days of the initial term. Under the contract, the consumer was further precluded from terminating the contract and in the event the consumer terminates the contract, such a person was to pay the amount outstanding for the whole contract despite the fact that the services were no longer rendered. Therefore, Justice Moshinsky declared that the contract is void.<sup>265</sup>

### *3.5.2 Determining "employees fewer than twenty persons"*

The question whether the juristic person employs fewer than twenty persons refers to only permanent employees and not independent contractors or casual employees

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<sup>259</sup> Section 26(2) of the ACL.

<sup>260</sup> Section 26(2)(b) of the ACL.

<sup>261</sup> *Explanatory Memorandum, Trade Practices Amendments (Australia Consumer Law) Bill No1 (2010)*.

<sup>262</sup> *The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*.

<sup>263</sup> Section 15AB (1)(b)(i) *Acts Interpretation Act 2005*.

<sup>264</sup> *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224*.

<sup>265</sup> *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224*.

in the case where a business has less than twenty employees is unclear. The UCT does not define which employees are included.<sup>266</sup> The court in *Federal Commission of Taxation v Consolidated Media Holding Ltd* stated that when interpreting the statute, the intention of the legislature must be construed as well as the historical consideration.<sup>267</sup> Section 23 has shed some light on how to count employees in order to determine if they are fewer than twenty in order for juristic persons to be protected.<sup>268</sup>

Section 23 provides that casual employees and independent contractors are not regarded as employees unless they are employed on regular basis and systematic basis.<sup>269</sup> It can be difficult for a person concluding a fixed term agreement with a business to know whether such business employs persons fewer than twenty at the time of contracting in order to determine whether it falls within the ambit of the UCT.

The UCT is further unclear whether the juristic person will be protected in future if it employs more than twenty people during the course of the contract. The explanatory memorandum does not shed any light on this issue.<sup>270</sup> Yet, at the time the contract was concluded the requirement of less than twenty persons was met. Given the ambiguity in the UCT in respect of number of employees, it can be argued that the requirement to have fewer than twenty employees have to be met only when entering into the contract.

It is worth noting that juristic persons are now protected provided that the number of employees does not exceed twenty.<sup>271</sup> Prior to the UCT, juristic persons were only protected if they did not exceed the monetary threshold set for consumer contracts.<sup>272</sup> This leaves room for all juristic persons to rely on provisions of the ACL

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<sup>266</sup> Sise P *The extension of unfair contract terms to small business contracts: A lack of clarity* 217.

<sup>267</sup> *Federal Commission of Taxation v Consolidated Media Holding Ltd* (2012)250 CLR 503 para 39 as cited in *Thiess v Collector of Customs* (2014) 250 CLR 664 para 22.

<sup>268</sup> Section 23(5) of the ACL.

<sup>269</sup> Section 23(5) of the ACL.

<sup>270</sup> *Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill* (2015).

<sup>271</sup> See 3.5.2 above.

<sup>272</sup> Section 1 of the ACL.

when concluding fixed term agreements provided that the number of employees does not exceed twenty.<sup>273</sup> Thus, juristic persons can hire casual employees and independent contractors as long as permanent employees do not exceed twenty.

The change to extend protection to juristic persons is brought about in order to protect juristic persons who are also consumers when concluding fixed term agreements as the ACL defines a consumer to include a juristic person.<sup>274</sup> This is evident from the explanatory memorandum which states:<sup>275</sup>

Small businesses, like consumers, are vulnerable to unfair terms in standard form contracts, as they are often offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate contract terms. There is a potential for small business detriment where these unfair contract terms are enforced.

The extension of the unfair contract terms protection to cover small business contracts will address this vulnerability by allowing unfair contract terms to be declared void, providing a remedy for small businesses.

From the memorandum it is clear that the protection is intended for small businesses which are consumer and not all the juristic persons unlike the CPA which totally does not apply to juristic persons when terminating their contracts regardless of their annual turnover or asset value.<sup>276</sup> The ACL states the factors to be considered to determine whether a consumer can be offered protection and these factors include considering the number of employees the juristic person employs.<sup>277</sup> In the case a juristic person employs fewer than twenty people it will still be considered a consumer and be protected by the ACL.<sup>278</sup>

### **3.6 Conclusion**

The ACL has been one of the important and relevant pieces of legislation in Australia which provided protection for juristic persons because under common law they are bound by agreement once they sign it even if it contains unfair terms.<sup>279</sup> Freedom of contract permitted courts to enforce contracts containing unfair contract terms.<sup>280</sup>

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<sup>273</sup> See 3.5.2 above.

<sup>274</sup> Section 3 of the ACL.

<sup>275</sup> *Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill (2015)*.

<sup>276</sup> See 2.3 above.

<sup>277</sup> Section 23(4) of the ACL.

<sup>278</sup> See 3.5.2 above.

<sup>279</sup> See 3.2 above.

<sup>280</sup> See 3.2.1 above.

The ACL is also significant as it allows protection to be extended to juristic persons.<sup>281</sup> In the light of the above, the term consumer should be understood to include anyone who enters into a contract for supply of goods and services, including juristic persons.<sup>282</sup> Since the introduction of the ACL, fixed term agreements including unfair terms can be declared void and unenforceable.<sup>283</sup> The case of *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* was the first to declare the terms of a contract as unfair and unenforceable.<sup>284</sup>

The enactment of the UCT introduced protection for juristic persons when concluding fixed agreements.<sup>285</sup> The UCT allowed juristic persons to rely on the ACL in the case where a business employs fewer than twenty people, and the price payable upfront does not exceed AUD1 million for contracts over 12 months and AUD300 000 for 12 months contracts.<sup>286</sup> This protection is afforded to juristic persons when concluding business contracts because they are also vulnerable.<sup>287</sup> The ACL afforded protection to juristic persons when terminating fixed term agreements and does not only offer protection to natural persons.<sup>288</sup> The protection is given without differentiating between natural consumers and juristic persons.<sup>289</sup>

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<sup>281</sup> Section 23 (4) of the ACL.

<sup>282</sup> See 3.5 above.

<sup>283</sup> Section 23 of the ACL.

<sup>284</sup> See 3.5.1 above.

<sup>285</sup> See 3.5 above.

<sup>286</sup> See 3.4 above.

<sup>287</sup> See 3.3 above.

<sup>288</sup> See 3.5 above.

<sup>289</sup> See 3.3 above.

## **4. A comparison of the South African and Australian legal positions of consumer protection of juristic persons in respect of fixed term agreements**

### ***4.1 Introduction***

Different jurisdictions have different definitions of who is considered a consumer in order to determine which transactions can be classified as consumer contracts or business contracts within the consumer law. Circumstances differ from one jurisdiction to another of when a juristic person is considered to be a consumer. Like other countries, Australia and South Africa have taken a step in ensuring that all consumers, including juristic persons, are protected, although there are some limitations when protection is afforded to juristic persons.

In relation to the termination and renewal of fixed term agreement, the South African consumer law will be compared with the Australian consumer law to determine what extent section 14 of CPA should provide protection to juristic persons. The comparison is critical in assisting further development of the South African law, particularly in the area of consumer protection in respect of fixed term agreements concluded by juristic persons. Barnard accordingly states that section 2(2) of the CPA deals with the significance of comparative investigation that the courts or tribunals may consider the foreign law.<sup>290</sup>

The South African Consumer Protection Act became the first comprehensive legislation protecting consumers when terminating and renewing contracts and was established to provide protection to the weaker party who lacks bargaining power.<sup>291</sup> However, the protection was extended to juristic persons when the threshold criteria set have been met.<sup>292</sup> Equally, the Australian Consumer Law came into effect on 1 January 2011 and is contained in schedule 2 of *the Competition and Consumer Act* ending the long prolonged need for suitable consumer protection.<sup>293</sup>

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<sup>290</sup> Barnard J *The influence of Consumer Protection Act 68 of 2008 on the common law of sale* 482: Section 39(1)(b) *Constitution of the Republic of South Africa* 1996.

<sup>291</sup> *Consumer Protection Act* 68 of 2008.

<sup>292</sup> Section 5(1) CPA.

<sup>293</sup> Malbon & Nottage *Consumer law and Policy in Australia and New Zealand* 312.

In the light of the above it is crucial to note that codification of consumer protection is fairly new and similar in both South Africa and Australia. The similarities and differences between the CPA and the ACL will be highlighted and this will assist in dealing with the ambiguities the CPA presents in respect of the fixed term agreements.

#### **4.2 The conflict between the freedom of contract and consumer protection**

The notion of freedom of contract is one of the important basic principles in both Australia and South African common law of contract based on the principle of *pacta sunt servanda*.<sup>294</sup> According to this principle, every person can conclude a contract freely and on any terms they deem fit without arbitrary or unreasonable legal restrictions.<sup>295</sup> Ngcobo J endorsed Cameron JA's view that the parties have to honour their contractual obligations that were freely entered into and undertaken.<sup>296</sup>

The courts have given the parties the freedom to negotiate their contracts without any interference and the provisions thereof were given their full and legal effect.<sup>297</sup>

The court in *Wells v South African Alumentite Company* held as follows:<sup>298</sup>

If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by the courts of justice.

In the light of the above it should be noted that once the parties affix their signature on the contract they are bound by the terms thereof.<sup>299</sup> Thus, the courts are bound by freedom of contract by enforcing the notion that consumers can act rationally.<sup>300</sup> As a result, the traders take advantage of freedom of contract by structuring their

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<sup>294</sup> Barnard AJ *A critical legal argument for contractual justice in South African law of contract* LLD 213.

<sup>295</sup> Van Der Merwe, Van Huysteen, Reinecke and Lubbe *Contract General Principles* 10.

<sup>296</sup> *Brisley v Drotzky 2002 (4) SA* para 12.

<sup>297</sup> Pillay MM *The impact of pacta servanda in the law of contract* 2.

<sup>298</sup> *Wells v South African Alumentite Company* 1927 AD 69 para 73.

<sup>299</sup> G.C. Cheshire, C.H.S. Fifoot and M.P. Furmston *The Law of Contract* 36; Van der Merwe and Van Huysteen *Contract General Principles* 23.

<sup>300</sup> See 2.2 and 3.2 above.

contracts in one sided and the consumer cannot insert any new terms to the contract.<sup>301</sup>

Therefore, freedom of contract is almost unrestricted and subject consumers to oppressive terms in the trade as the seller has a stronger bargaining power.<sup>302</sup>

Therefore, the unequal economic situations of consumers have influence on the bargaining power.<sup>303</sup> Baulig and Nagtegaal argue that freedom of contract is not free as the vulnerable disadvantaged consumer may never attain the economic status which will enable them to have a stronger bargaining power in the market transaction.<sup>304</sup> As a result consumers are left vulnerable to accept the terms in the contract.

Freedom of contract in both South Africa and Australia is subjected to limitations through the introduction of consumer law which has its origins in the nineteenth century. Thus, consumer law has been developed in order to protect consumers in respect of cancellation and renewal of fixed term agreements.

#### *4.2.1 Balancing freedom of contract and consumer protection*

Both Australia and South Africa use the consumer law to balance the freedom of contract which is incorporated into the common law in order to protect consumers when entering into agreements.<sup>305</sup> As a result, consumer protection is used to balance the notion of freedom of contract by imposing limitations to this freedom without totally disregarding it in order to prevent abuse when cancelling and renewing fixed term agreements.<sup>306</sup> In order to protect consumers, the CPA provides the provisions that limit freedom of contract. These include, but are not limited to, cancelling a fixed term agreement by giving a twenty days' notice before its expiry date.<sup>307</sup>

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<sup>301</sup> Tembe *HC Problems regarding exemption clauses in consumer contracts* 58.

<sup>302</sup> Aaronstram P *Consumer protection, freedom of contract and the Law* 1.

<sup>303</sup> Bram J.H *Policing standard form contracts in Germany and South Africa: A comparison* 53.

<sup>304</sup> Baulig A and Nagtegaal A *Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008* 156.

<sup>305</sup> Freilich A & Griggs L *Just who is a consumer? Policy and rationales and proposal for change* 40.

<sup>306</sup> Bhana *The role of judicial method in the relinquishing of constitutional rights through contract* 303.

<sup>307</sup> Section 14(2) of the CPA.

South Africa and Australia, in an attempt to protect the rights of consumers, including a juristic person, have produced comparable consumer laws to protect consumers when terminating and renewing fixed term agreements that contain unfair contract terms.<sup>308</sup> However, it is submitted that the Australian law provides more protection to consumers, particularly to juristic persons in respect of termination and renewal of fixed term agreements whereas the CPA excludes juristic persons albeit they are consumers.<sup>309</sup>

It is important to note that section 14 has its limitations in its application as juristic persons are excluded although they are considered to be consumers as per section 1.<sup>310</sup> In terms of the CPA, the consumer is a person who enters into the transaction with the seller in the normal course of business, unless such a transaction is prohibited as per section 5(2) and section 5(3) of the CPA.<sup>311</sup> In addition, a consumer also includes a juristic person, as per section 1, and is defined as "a body corporate or partnership and/or an association". However, the Act does not apply to juristic persons if their annual turnover or assets are beyond the monetary threshold set by the Minister of Trade and Development. The threshold is currently set at an annual turnover or assets to a value not exceeding R2 million.<sup>312</sup> It therefore seems like all juristic persons, regardless of size, are protected, while section 14 excludes them from the protection and they can only rely on the common law for termination and renewal of their contracts.

On the other hand, Australian consumer law protects juristic persons regarded as consumers when the products purchased do not exceed AUD 40 000 and the goods acquired are for household purposes.<sup>313</sup> This is unlike the South African law where juristic persons are left unprotected when terminating fixed term agreement.<sup>314</sup> The justification for this is that individual consumers lack bargaining power, and it can be

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<sup>308</sup> Braun J.H *Policing standard form contracts in Germany and South Africa* 45.

<sup>309</sup> Section 14(1) of the CPA.

<sup>310</sup> Section 1 of the CPA.

<sup>311</sup> Section 1 of the CPA

<sup>312</sup> *Government Notice No 293* of 1 April 2011.

<sup>313</sup> Section 3(1)(b) of the CPA.

<sup>314</sup> Section 14(1) of the CPA.

noted that the CPA as it favours natural consumers over juristic consumers albeit that juristic person are defined as consumers. The provisions of the ACL are similar to those of South African legislation in that, both jurisdictions the definition of the consumer covers juristic persons.<sup>315</sup>

### ***4.3 Termination of fixed term agreements***

In South Africa fixed term agreements have a maximum duration of twenty four months and they automatically terminate upon their expiry date or giving a notice of twenty business days.<sup>316</sup> The CPA does not limit fixed term agreements to certain contracts thus it covers a wide range of fixed term agreements including gym contracts, lease agreements and cell phone agreements, as long as they are consumer contracts.<sup>317</sup> In Australia, fixed term agreements are for a maximum duration of 12 months with the upfront price of AUD300 000 and there are also contracts with over twelve month but the ACL does not stipulate their maximum duration.<sup>318</sup> Australia also covers a wide range of fixed term agreements which include gym contracts, lease agreements and cell phone agreements and they can be either consumer contracts or business contracts.<sup>319</sup> Unlike South Africa which states the number of days the notice has to be served, in Australia fixed term agreements can be terminated by giving another party a reasonable notice stating the intention to terminate the contract.<sup>320</sup>

Further, in South Africa, when terminating the fixed term agreement, the supplier may charge the consumer the cancellation penalty although the charge should be reasonable and not be a punishment or amount to compensation for breach of contract.<sup>321</sup> In the manner, in Australia when the contract is terminated, the reasonable penalty may be charged and should not cause a detriment to the other party.<sup>322</sup> The ACL further states that the contract can be terminated if it contains

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<sup>315</sup> *Part 3-2 Division 1* ACL.

<sup>316</sup> See 2.5 above.

<sup>317</sup> See 2.5 above.

<sup>318</sup> See 3.5 above.

<sup>319</sup> See 3.5 above.

<sup>320</sup> See 3.3.4 above.

<sup>321</sup> See 2.5.1 above.

<sup>322</sup> See 3.3.4 above.

unfair terms which are unreasonable necessary to protect interest of another party.<sup>323</sup>

However, in South Africa protection in section 14 is only limited to natural persons when terminating and renewing fixed term agreements and does not extend to juristic persons regardless of their annual turnover and the CPA or the Explanatory memorandum do not provide justification for this exemption.<sup>324</sup> It means the juristic person who is considered to be a consumer is also excluded from relying on the provisions of section 14 when terminating or renewing fixed term agreements.<sup>325</sup> On the hand, Australia had a similar approach as South Africa but that has been changed.

Prior to amendment of the ACL, protection afforded to consumers under section 23 of the ACL had restrictions towards juristic persons, because they could not rely on provisions of the ACL to terminate a term contained in the contract as unfair on the basis that it is not a consumer contract. It is evident that juristic persons need protection, specifically small business as they are regard consumers under the consumer laws.<sup>326</sup> The Explanatory Memorandum states that small businesses need protection as they are as vulnerable as individual consumers, because they are also offered contracts on take it or leave it basis.<sup>327</sup> As a result the need arose to extend the protection to business contracts concluded by juristic persons as consumers. In November 2015 the ACL was amended to include business contracts.<sup>328</sup> Australia protects juristic persons considered to be consumers when terminating fixed term agreements and the monetary threshold is increased to AUD 300 000.<sup>329</sup>

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<sup>323</sup> See 3.3.4 above.

<sup>324</sup> See 2.5 above.

<sup>325</sup> See 2.3.1 above.

<sup>326</sup> See 3.5.2 above.

<sup>327</sup> *Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015.*

<sup>328</sup> The contract is for a supply of goods or services, or a sale or grant of an interest in land;  
(a) at the time of contracting, at least one party to the contract is a business that employs fewer than twenty (20) persons; and  
(b) either:  
(i) the upfront price payable under the contract does not exceed \$300,000.00; or  
(ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

<sup>329</sup> See 3.5.1 above.

#### **4.4 Interpretation of consumer protection**

The CPA has been criticised by scholars in respect of ambiguities arising in its application or interpretation. According to Lern and Van den Bergh, the CPA regulates the relationship of the supplier and the consumer; however, it is regarded as one of the worst pieces of legislation as far as drafting is concerned.<sup>330</sup> The wording is unclear, ambiguous and absurd while at times it becomes meaningless due to sentence construction.<sup>331</sup> However, the CPA has its own interpretation clause which provides that it should be interpreted in a way that promote and advance the social and economic welfare of consumers.<sup>332</sup> Where there is an inconsistency when interpreting the CPA and any provisions of other legislation, both legislations have to be applied concurrently to the extent it is applicable, and the consumer protection must be upheld.<sup>333</sup> The CPA further explicitly states that protection should be given to the most vulnerable consumer in the socio-economic community.<sup>334</sup>

Australia on the other hand does not differ from South Africa's position in that vulnerable consumers in the economic society must be protected.<sup>335</sup> The Explanatory Memorandum states the purpose of regulating unfair contract terms is to ensure there is a fair trading practice in the market place.<sup>336</sup>

It therefore becomes necessary to define the phrase 'in the ordinary course of business' although the definition section does not define it and in order to define it, the case law will be referred to. Although the cases do not deal with the CPA they assist in the interpretation. The supreme court of appeal in *Gazit Properties v Botha* laid the objective test that considers the circumstances and obligations of the parties under contract in order to determine whether the contract was concluded in the ordinary course of business.<sup>337</sup> The court in *Amalgamated Banks of SA v De Goed* held that a person does not need to conduct the business on a daily basis or

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<sup>330</sup> Le Roux *Correct and Incorrect Methods* 4.

<sup>331</sup> Le Roux *Correct and Incorrect Methods* 4.

<sup>332</sup> Section 3(1) the CPA.

<sup>333</sup> Section 2(9) the CPA.

<sup>334</sup> Section 4(2)(b)(i) of the CPA.

<sup>335</sup> Rittenberg *RL Building Understanding of the Domain of Consumer Vulnerability* 2.

<sup>336</sup> *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth)*.

<sup>337</sup> *Gazit Properties v Botha* 2012 (2) SA 306 para 8.

constantly to determine whether the transaction was concluded in ordinary course of business.<sup>338</sup> The question is whether the transaction was performed with the ordinary terms that people would ordinarily enter into. Australia similarly does not differ with South Africa in this regard. It can therefore be concluded that it is the legislature's intention that the protection be extended to juristic persons.<sup>339</sup>

#### *4.4.1 Consumer contracts and business contracts*

In South Africa, the CPA does not provide for business contracts when cancelling and renewing fixed term agreements but the CPA provides for consumer contracts.<sup>340</sup> In Australia however, the first noticeable difference with the UCT which amended section 23 of the ACL is the distinction between consumer contracts and business contracts.<sup>341</sup> Prior to the enactment of the UCT, the ACL only required that the contract be a consumer contract.<sup>342</sup> A consumer contract is defined as a supply of goods or services or interest in the land for personal or household use or consumption.<sup>343</sup> The definition of consumer contract was limited prior to the amendment of section 23 as it precluded consumers, particularly juristic persons, from protection when acquiring goods and services for purposes other than personal or household use albeit that the monetary threshold has been met.<sup>344</sup> For instance, in *Seely International (Pty) Ltd v Newtronic*<sup>345</sup>, Seely purchased electronic components to be installed at the price of \$25 000. However, the court held that according to the consumer contract, the transaction fell outside the consumer contract as the goods purchased were for neither personal or household use, nor consumption, despite that the contract price of \$25,000.<sup>346</sup> In the light of the above, the juristic person as a consumer is afforded protection to terminate a fixed term agreement which contains unfair term.<sup>347</sup> For instance, a lease agreement for twenty

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<sup>338</sup> *Amalgamated Banks of SA v De Goed* 1997 SA(4) 538 para 8.

<sup>339</sup> Van Eeden A guide to the Consumer Protection Act (2009) paragraph 3.2 Memorandum on the objects of the consumer Protection Bill(B19-2008) AT 80 which provided that the threshold will mean that the protection of the Bill will be extended to small businesses and other businesses.

<sup>340</sup> See 2.4 above.

<sup>341</sup> *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act* 2015.

<sup>342</sup> Section 23(3) of the ACL.

<sup>343</sup> Section 23(3) of the ACL.

<sup>344</sup> Section 39(1)(a)(b) of the ACL.

<sup>345</sup> *Seely International (Pty) Ltd v Newtronic (Pty) Ltd* (2002) Aust Contract R 90-142 para 11.

<sup>346</sup> *Seely International (Pty) Ltd v Newtronic (Pty) Ltd* (2002) Aust Contract R 90-142 para 12.

<sup>347</sup> See 3.5 above.

four months can be terminated prior to its expiry date if it only permits the lessor to terminate the contract and not the lessee.

A contract is a business contract if the business employs less than twenty persons and the upfront price payable does not exceed \$300 000 and given the term of the contract is less than 24 months; and \$1 million if the contract's term is for longer than 12 months.<sup>348</sup> The ACL requires that a business be a legal person with less than twenty employees supplying the goods and services.<sup>349</sup> However, it must be noted that the ACL excludes casual employees or independent contractors when calculating the number of employees of a business.<sup>350</sup> In the light of the above, it is submitted that any juristic person can rely on the provisions of the ACL whenever it employs fewer than twenty people. This can be achieved by employing casual employees or independent contractors who will not be considered to be employees.<sup>351</sup>

The ACL differentiates between the consumer contract and business contract while the CPA does not include this differentiation. According to the CPA, the transaction must be concluded between the supplier and a consumer and does not specify whether it is a business contract or consumer contract. Interestingly, section 14 excludes all juristic persons from protection, although they are still considered to be consumers.<sup>352</sup> As a result, juristic persons cannot terminate a contract even though it contains unfair contract terms, because in common law, they are bound by the contract once they affix their signature to it, thus the legislation leaves them vulnerable.<sup>353</sup>

Like Australia, the South African law also considers the number of employees to determine whether a business qualify as a small business. However, in South Africa there is no uniform definition for a small business as the definition differs from one industry to another.<sup>354</sup> The size in terms of number of employees may differ as well, however, it is generally accepted that the small business employs less than fifty

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<sup>348</sup> Section 23 of the ACL as amended.

<sup>349</sup> Section 250; section 2(1) of the ACL.

<sup>350</sup> Section 25(5) of the ACL.

<sup>351</sup> Sise P *The extension of unfair contract terms to small business contracts: A lack of clarity* 217.

<sup>352</sup> Section 14(1) of the CPA.

<sup>353</sup> Melville *The Consumer Protection Act* 22.

<sup>354</sup> Charmes, J. *A Critical Review of Concepts, Definitions, and Studies in the Informal Sector*.

people.<sup>355</sup> A juristic person in South Africa is considered vulnerable and worthy of protection if it has less than fifty employees in its workforce. This differs from Australia where this definition holds that to be considered a small business; the number of employees should not exceed twenty. South Africa's definition is broad and fails to indicate whether casual employees and independent contractors are included when calculating the number of employees. Despite the similarities between the two jurisdictions, South Africa still fails to extend protection to juristic persons when concluding fixed term agreements, and therefore leaves juristic persons unprotected.

#### 4.4.2 Commercial limitation

The ACL requires that goods and services purchased must be done so for household or personal use or consumption.<sup>356</sup> It means that the product purchased must be for the consumer's consumption, and not for resale, thereby limiting juristic persons who may acquire goods and services for resale.<sup>357</sup> The test to determine whether the goods acquired are for home consumption looks at what the goods are standardly used for rather than considering what the purchaser purchased goods for or what the goods are actually used for.<sup>358</sup> Problems may arise when the goods acquired are used for both commercial and personal or domestic use. In *Bunnings (Pty) Ltd v Laminex Group Limited*<sup>359</sup> the retailer in the construction sector had bought insulation to use in the construction of a warehouse. The court held that the goods were indeed ordinarily acquired for personal or domestic use, despite the fact that the retailer used the goods for business purposes.<sup>360</sup> The CPA on the other hand, the limitation applicable is that the monetary threshold should not be exceeded or the transaction should not be exempt in order for a juristic person to be.<sup>361</sup>

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<sup>355</sup> Section 1 *National Small Business Act* of 1996 as amended by the *National Small Business Amendment Acts* of 2003 and 2004.

<sup>356</sup> Section 3(1)(b) of the ACL.

<sup>357</sup> De Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* 83.

<sup>358</sup> Erbacher S and Clarke PH *Australian Consumer Law: Commentary and Materials* 446.

<sup>359</sup> *Bunnings (Pty) Ltd v Laminex Group Limited* (3006) 153 para 19.

<sup>360</sup> *Bunnings (Pty) Ltd v Laminex Group Limited* (3006) 153 para 27.

<sup>361</sup> Regulation 5 (2) of the CPA.

#### ***4.5 Conclusion***

The aim of this chapter was to compare the CPA with the ACL to determine what lessons can be derived from the ACL in respect of protection offered to juristic persons when cancelling or renewing the fixed term agreements. It has been seen that the ACL provides wider protection to juristic persons than the CPA which leaves juristic persons vulnerable and unprotected under the provisions of the CPA when cancelling or renewing the fixed term agreements. The CPA only provides protection to consumer contracts and not to business contracts while the ACL provides protection to consumer contracts and business contracts.

It is submitted that the CPA's definition of a consumer should be amended to include juristic persons when entering into fixed term agreements, as the exclusion of vulnerable juristic persons from protection seems problematic. In this regard, it is also submitted that the CPA should make provision for business contracts as is done in Australia to ensure that all consumers are protected. In Australia on the other hand, the definition of a consumer should be amended to be anyone who purchase goods and services regardless of the purpose which goods will be used for. It should be recognized that all people are consumers and in need of protection. Australia provides more protection under the ACL to consumers entering into fixed term agreements without affording different treatment to consumers as in the case of the CPA. It is concluded that the CPA does not provide any protection to juristic persons under section 14 and therefore it is necessary to provide recommendation in that regard because juristic persons are regarded as consumers.

## **5 Conclusion and Recommendations**

### **5.1 Conclusion**

The main aim of this study, as stated at the outset, was to ascertain to what extent does the CPA provides protection to juristic persons when renewing or cancelling fixed term agreements under section 14.<sup>362</sup> The context and scope of the study was set in the first chapter whereby the research question and problem statement were presented.<sup>363</sup> The chapter presents the summary of findings of the research together with the writer's recommendations.

The second chapter discussed the common law principles in South Africa when concluding fixed term agreements.<sup>364</sup> It has been revealed that, although the principle of freedom of contract created problems for consumers, the courts had to enforce such contracts even when it contained unfair terms. Common law did not permit parties to cancel the contract on the basis that it contained unfair contract terms.<sup>365</sup> It is clear that consumers needed protection particularly when cancelling fixed term agreements which are the focus of this study.

It has been argued that juristic persons should be considered to be consumers and be protected within the consumer law, because it is evident that they needed protection when cancelling or renewing fixed term agreements.<sup>366</sup> This was achieved through the introduction of the CPA and the ACL.

The CPA was investigated and principles that related to its application and interpretation were discussed.<sup>367</sup> It was discovered that the CPA protects the vulnerable, disadvantaged consumers including juristic persons when the criteria have been met in order for them to be considered as consumers.<sup>368</sup> However the conclusion was drawn that interpretation of it creates ambiguities in its application, particularly under section 14 which deals with renewal and cancellation of fixed term agreements. This conclusion was based on the fact that section 14 affords different

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<sup>362</sup> See 1.5 above.

<sup>363</sup> See 1.6 above.

<sup>364</sup> See 2.2 above

<sup>365</sup> Laubscher G *Consumer Protection Act on fixed term lease agreements* 71.

<sup>366</sup> See 2.5 above.

<sup>367</sup> See 2.3 above.

<sup>368</sup> See 2.5 above.

treatment between individual consumers and juristic persons. This differentiation is done by excluding juristic persons from its protection of section 14 regardless of their annual turnover although the CPA regards juristic persons to be consumers.<sup>369</sup>

Based on the research, juristic persons, particularly small businesses, need protection when concluding fixed term agreements. The contract may contain unfair terms, and due to such terms, the party may wish to terminate the contract. Therefore, the exclusion of juristic persons from the ambit of section 14 means that juristic persons can only rely on common law which states that the parties are bound by the contract and it can be terminated by agreement between parties or expire automatically if it is a fixed term agreement. Juristic persons continue to be bound by contracts that contain unfair terms despite that they are regarded as consumers under the CPA.

It was also learned that fixed term agreements can be cancelled by giving another party twenty business days' notice which can be in writing and upon cancellation, penalty may be imposed but has to be reasonable.<sup>370</sup> The consumer will be liable to pay any outstanding balances due for goods and services rendered. Also before the contract expire, the supplier may write to the not less than forty days to notify the consumer that the contract will terminate and if there is interest to renew the contract, any changes may be incorporated.<sup>371</sup>

In this regard, a reflection on how Australia deals with consumer protection in respect of fixed term agreements was explored by virtue of section 2 of the CPA.<sup>372</sup> . Section 2 states that foreign law may be considered when applying or interpreting the CPA.

The Australian position on termination of fixed term agreements was discussed in chapter 3. Considering the position of consumer law in Australia, it has been established that the ACL also extends protection to juristic persons as consumers. Prior to the introduction of the UCT which amended section 23 of the ACL, the ACL

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<sup>369</sup> Section 14(1) of the CPA.

<sup>370</sup> See 2.5.1 above.

<sup>371</sup> See 2.5 above.

<sup>372</sup> Section 2(2)(a) of the CPA.

excluded business contracts and only limited the protection to consumer contracts.<sup>373</sup> The ACL further excluded goods and services which were acquired for commercial purposes by virtue of the definition of a consumer which indicated that goods should be acquired for personal or household use or consumption. After the introduction of the UCT in 2015, protection was also afforded to business contracts, thus juristic persons could terminate contracts containing unfair terms. Similar to South Africa, the ACL is relatively new, but in Australia, consumers are afforded a wider protection by protecting juristic persons against unfair contract terms. This is unlike in South Africa where juristic persons are left unprotected.

It was also discovered that in Australia, contracts may be terminated by giving another party a reasonable notice and the penalty charged for cancellation should be fair.<sup>374</sup> Once the contract has expired it can be renewed by the party and vary the terms if they wish to.

Both the CPA and the ACL aims to protect all consumers including juristic persons within their ambit. However, the ACL affords extensive protection to consumers by allowing the courts to declare or cancel unfair contract terms whether they are contained in consumer contracts or business contracts.<sup>375</sup> On the other hand, the CPA only allows individual consumers to terminate fixed term agreements and not juristic persons. It is evident that the CPA does not provide any protection to juristic persons at all under section 14 when terminating and renewing fixed term agreements. The CPA only provides protection to the extent juristic persons meet the criteria set to be considered consumers and when the contract is not a fixed term agreement.

## ***5.2 Recommendations***

In South Africa, fixed term agreements are those that have a definite period when they lapse and according to the CPA and have a maximum duration of 24 months.<sup>376</sup> These can be lease agreements, cell phone contracts or gym contracts to name but

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<sup>373</sup> See 3.5 above.

<sup>374</sup> See 3.3.4 above.

<sup>375</sup> See 3.4 above.

<sup>376</sup> Regulation 5(1)(a) Government Notice No 293 of 1 April 2011.

a few. Section 14 includes a limitation in this regard as to who is protected within its ambit.<sup>377</sup> Juristic persons are excluded from the protection regardless of their annual turnover or asset value.<sup>378</sup>

It is submitted that South Africa should extend protection to juristic persons who are considered to be consumers in terms of section 1 of the CPA. South Africa should follow in the footsteps of Australia, as the consumer laws are comparable in both countries, although Australia does not differentiate between the natural persons and juristic persons consumers. Australia protects both individual consumers and juristic persons as long as they can establish whether the contract is a business or consumer contract and meets the requirements thereof. By doing so, the CPA will solve ambiguities and uncertainties as well as unintended consequences created when applying section 14 with regard to who is protected. The inclusion of juristic persons within section 14 will not be contrary to the purpose of the CPA, but will rather help to achieve the aim which is to promote and advance the social and economic welfare of consumers.<sup>379</sup>

In comparing the two jurisdictions, the CPA should follow the Australian approach of consumer protection, as South Africa mostly relies on principles of common law which are sometimes unclear. The courts have by and large relied on the principle of freedom of contract in case of unfair contract terms in order to ensure that all consumers are protected. The CPA should provide clear guidelines to protect juristic persons when terminating the fixed term agreements particularly those that are considered to be consumers by the CPA.

In South Africa the application of the CPA to juristic persons is determined by the annual turnover or asset value at the time of the transaction. If the transaction value exceeds the threshold set, such a juristic person will not be considered to be a consumer. It has been discussed that this approach presents difficulties in determining the threshold at the time of the conclusion of each transaction.

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<sup>377</sup> See paragraph 2.1 above.

<sup>378</sup> See paragraph 2.1 above.

<sup>379</sup> De Stander E *Consumer Law unlocked* 3.

Turnover is not an accurate indication of vulnerability and it is difficult to access the financial statements of another party. It is suggested that the number of employees in a business' workforce should be considered - like Australia - to determine whether a transaction is a business contract between two juristic persons or the individual. By considering the turnover or asset value of a business limits juristic persons from relying on the provisions of consumer protection, whereas relying on the number of employees may assist to determine whether a transaction is a business transaction, although the number of employees differs from industry to industry. It is suggested that - similar to the ACL - the CPA provide a uniform definition of the number of employees employed by a juristic person in order to be protected within the CPA. The ACL states that in order to be considered a small business, such person must have twenty or less employees in its workforce. In so doing, all consumers, including juristic persons, will be protected by the CPA, as currently the CPA does not provide any protection to juristic persons when cancelling and renewing fixed term agreements.

## ***Bibliography***

### **Literature**

Alexandra S *Unfair contract terms*

Alexandra S *Unfair contract terms: A new dawn in Australia and New Zealand*  
(Monash University Law Review 2013 volume 39 No. 3)

Aronstarm PJ *Consumer Protection*

Aronstarm PJ *Consumer Protection, Freedom of contract and the law* (Juta  
1979)

Atiya P.S *Unfair Contracts*

Atiya P.S *Unfair Contracts; Introduction to the Law of Contract* (6<sup>th</sup>, Clarendon  
Press Oxford 2009)

Bartlette D and Szemeizi V *The Application of the Australian Consumer Law*

Bartlette D and Szemeizi N *The Application of the Australian Consumer Law to  
B2B transactions* Competition and Consumer Law News March 2012 Volume  
27 No 7

Barnard J *For Whom the Bell Tolls*

Barnard J *For Whom the Bell Tolls: The Application of Section 14 of the  
Consumer Protection Act 68 of 2008 to Residential Lease Agreements -  
Transcend Residential Property Fund Limited v. Mati* 82 THRHR 164 (2019)

Barnard J *A critical legal argument*

Barnard J *A critical legal argument for contractual justice in South African law  
of contract* (LLD-dissertation University of Pretoria 2002)

Barnard J *The influence of the Consumer Protection Act 68 of 2008 on common law  
of sale*

Barnard J *The influence of the Consumer Protection Act 68 of 2008 on common law of sale* (LLD-dissertation University of Pretoria 2013)

Baulig A and Nagtegaal A 2015 *Bread as dignity*

Baulig A and Nagtegaal A *Bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008* (2015 De Jure)

Bhana D 2008 SAJHR

Bhana D *The role of judicial method in the relinquishing of constitutional rights through contract* (2008 24 SAJHR 300)

Bram J.H *Policicing standard form contracts*

Bram J.H *Policicing standard form contracts in Germany and South Africa: A comparison* (LLM-dissertation University of Cape Town 2005)

Bender P *Australian consumer law*

Bender P *Australian consumer law: unfair contract terms and other litigation*.  
2015 LISTA Barristers

Bernitz U *Consumer Protection*

Bernitz U *Consumer Protection in Sweden* 2<sup>nd</sup> edition (Stockholm University 1986)

Bruce B *Protecting small businesses*

Bruce B *Protecting small businesses against unfair contract terms* (Australia 20 March 2015)

Charmes J *Critical Review of Concepts*

Charmes J *A Critical Review of Concepts, Definitions, and Studies in the Informal Sector* in D. Turnham, B. Salomé, and A. Schwarz (eds.) *The Informal Sector Revisited* (Paris 1990)

Cheshire, Fifoot and Furmston *The Law of Contract*

Cheshire GC, C.H.S. Fifoot and M.P. Furmston *The Law of Contract* (London, Butterworths 1972)

Delport H *Problematic aspects of the Consumer Protection Act of 2008*

Delport H *Problematic aspects of the Consumer Protection Act of 2008 in relation to property transactions, fixed term contracts and unsigned sale agreements* (Obiter 2014)

De Stadler E *The scope of application of the CPA*

Stadler E *The scope of application of the CPA in the context of the sale of defective goods in comparative perspective* (LLM-dissertation University of Cape Town 2016)

De Stadler E *Consumer Law unlocked*

De Stadler E *Consumer Law unlocked* (Siber Ink CC Cape Town 2013)

Du Plessis L *Theoretical (dis-) position strategic leitmotivs*

Du Plessis L *Theoretical (dis-) position strategic leitmotivs in constitutional interpretation in South Africa* (2015 PER Vol 18 No 5)

Erbacher S and Clarke PH *Australian Consumer Law*

Erbacher S and Clarke PH *Australian Consumer Law: Commentary and Materials* (6<sup>th</sup> edition, Thomson Reuters Australia, Limited 2018)

Freilich A and Griggs L *Just who is a consumer?*

Freilich A and Griggs L *Just who is a consumer? Policy and rationales and proposal for change* in Malbon J & Nottage L (eds) *Law and policy in Australia and New Zealand* (The federation Press 2013)

Gates K *Unfair contract terms in small business contracts*

Gates K *Unfair contract terms in small business contracts: ACCC takes its first court action against JJ Richards*, (14 September 2017 Australia)

Glover G and Kerr J *Law of Sale and Lease*

Glover G and Kerr J *Law of Sale and Lease* (LexisNexis 2014)

Hale R *Consumer transactions*

Hale R *Consumer transactions: equitable models for individuals with decision making Impairments* (The University of Melbourne 2017)

Howells G *The potential and Limits of Consumer empowerment*

Howells G *The potential and Limits of Consumer empowerment by information* 32 *Journal of Law and Society* 2005

Hutchison D and Pretorius C *The Law of Contracts in South Africa*

Hutchison D and Pretorius C *The Law of Contracts in South Africa* (Oxford University Press 2009)

Kahn E *Contract and Mechantile law*

Kahn E *Contract and Mechantile law through cases* 1<sup>st</sup> edition (Juta 1971)

Kerr AJ *The Law of Sale and Lease*

Kerr AJ *The Law of Sale and Lease* 3<sup>rd</sup> edition (LexisNexis Durban 2004)

Laubscher G *Consumer Protection Act*

Laubscher G *Consumer Protection Act on fixed term lease agreements* (LLM-dissertation North West University 2016)

Louw M *The plain language movement and legal reform*

Louw M *The plain language movement and legal reform in the South African law of contract* (LLM University of Johannesburg 2010)

Malbon and Nottage *Consumer law and Policy*

Malbon J and Nottage L *Consumer law and Policy in Australia and New Zealand* (Federal Press 2013)

Mahembe E *Literature Review on Small Medium Enterprises*

Mahembe E *Literature Review on Small Medium Enterprises' Access to Credit and Support in South Africa* (December 2011 Pretoria)

Melville NJ *The Consumer Protection Act*

Melville NJ *The Consumer Protection Act made easy* (Book of Life Publications Modiba M T *The influence of the Consumer Protection Act* Pretoria 2011)

Modiba MT *The influence of the Consumer Protection Act*

Modiba M T *The influence of the Consumer Protection Act 68 of 2008 on the concept of plain language in standard form contracts* (LLM-dissertation University of Pretoria 2015)

Mudzviti M *Termination of Contracts with an indefinite term*

Mudzviti M *Termination of Contracts with an indefinite term: South African courts' approach* De Rebus Johannesburg 01 August 2018

Mupangavanhu Y *Fairness a slippery concept*

Mupangavanhu Y *Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008* (De Jure 2015)

Nahan and Webb *Unfair contract terms in consumer contracts*

Nahan N and Webb E *Unfair contract terms in consumer contracts* in Malbon & Nottage *Consumer law and Policy in Australia and New Zealand* Federal Press 2013

Naude T and Eiselen S *Commentary on the Consumer Protection Act*

Naude T and Eiselen S *Commentary on the Consumer Protection Act* (Juta Limited 2015)

Nottage, Luke R *Suppliers' Duties to Report Product-Related Accidents*

Nottage, Luke R *Suppliers' Duties to Report Product-Related Accidents under the New Australian Consumer Law: A Comparative Critique* (Commercial Law Quarterly, Vol. 25, No. 2, pp. 3-14, 2011) (Sydney Law School Research Paper No. 10/41.)

Parish R *Consumer Protection*

Parish R *Consumer Protection and Ideology of Consumer Protectionist in Duggan AJ and Darvall LW Consumer Protection Law Theory* (The Book Company Ltd Sydney 1980)

Parliamentary Research Committee *synopsis of submission*

Parliamentary Research Committee *Parliamentary Research Unit synopsis of submission* issued to Economic and foreign Affairs (23 June 2008)

Peterson J *The Australian unfair contract terms law*

Peterson J *The Australian unfair contract terms law: The rise of substantive unfairness as a ground for review of standard form consumer contracts* 31 December 2009

Pillay MM *The impact of pacta servanda in the law of contract*

Pillay MM *The impact of pacta servanda in the law of contract* (LLM Dissertation University of Pretoria 2015)

Productivity Commission *Review of Australia's Consumer Policy*

Productivity Commission Australian Government *Review of Australia's Consumer Policy Framework* Productivity Commission Inquiry Report No.45 30 (April 2008)

Rittenberg RL *Building Understanding of the Domain of Consumer Vulnerability*

Rittenberg RL *Building Understanding of the Domain of Consumer Vulnerability* (Journal of Macro marketing 1 (2005) 25(2))

Sharrock RD *Business transactions law*

Sharrock RD *Business transactions law* (Juta Cape Town 2011)

Sharrock 2010 SA Merc LJ

Sharrock RD *Judicial Control of Unfair Contract terms: The implication of Consumer Protection Act* (2010 SA Merc LJ 296-325)

Sims A *Unfair Contract Terms*

Sims A *Unfair Contract Terms: A new dawn in Australia and New Zealand*  
Monash University Law Review 2013 (Volume 39 no 3)

Sise P *The extension of unfair contract terms*

Sise P *The extension of unfair contract terms to small business contracts: A lack of clarity* (Competition and Consumer Law Journal 2016)

Stoop PN *The consumer Protection Act 68 of 2008 and procedural fairness*

Stoop PN *The consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts* (PER/PELJ 2015 Volume 18 No 4)

Tembe HC *Problems regarding exemption clauses*

Tembe HC *Problems regarding exemption clauses in consumer contracts: The search for equitable jurisprudence in the South African Constitutional realm* (LLD-dissertation University of Pretoria 2017)

Tokely *Introducing a prohibition on unfair contractual terms*

Tokely K *Introducing a prohibition on unfair contractual terms into New Zealand law: Justifications and suggestions for reform* (2009) 23 *New Zealand Universities Law Review* 419

Trucker P *Hegemony of the narrow doctrine*

Trucker P *Hegemony of the narrow doctrine under the Trade and Practices Act 1974* (Trade practices 2003 *Journal* 78)

UNCTAD *Manual on Consumer Protection*

UNCTAD *Manual on Consumer Protection* United Nations Publication  
UNCTAD/Web/Ditc/Clp/2016/1

Van der Merwe and Van Huyssteen *Contract General Principles*

Van der Merwe D and Van Huyssteen LF *Contract General Principles* 2<sup>nd</sup> Edition (Juta Cape Town 2012)

Van der Berg M *Formalities in the law of contract and their impact on visually impaired consumers*

*Van der Berg M Formalities in the law of contract and their impact on visually impaired consumers* (LLM Dissertation University of Pretoria 2015)

Van Eeden *The Consumer Protection Law in South Africa*

Van Eeden E and Barnard J *The Consumer Protection Law in South Africa* 2<sup>nd</sup> edition (LexisNexis 2017)

Zimmerman and Daniel *Civil Law and Common Law*

Zimmerman R and Daniel V *Civil Law and Common Law in South Africa* (Juta & Co, Ltd Cape Town 1996)

### **Case Law**

*Afrox Health Care Bpk v Strydom* 2002 (6) 21 SCA

*African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours and others* 2011 (3) SA 511 (SCA)

*Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA)

*Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224

*Australian Competition and Consumer Commission v Ashley and Martin* (2019) FCA 1436

*Barkhuizen v Napier* 2007 1 SA 323 (CC)

*Biotechnology Australia Pty Ltd v Pace* (1998) 15 NSWLR 130

*Botha v Rich* 2014 (4) SA 124

*Brisley v Drotsky* 2002 (4) SA 1

*Bredenkamp and Others v Standard Bank of South Africa Ltd* 2009(5) SA 304

*Bunnings (Pty) Ltd v Laminex Group Limited* (3006) 153

*Carpet Call (pty) Ltd v Chan ASC 55-553: (11987) ATPR (Digest) 42-025*

*Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447

*Custom Credit Corporation (pty) Ltd v Shembe* (1972) 3 ALL SA 489

*Director of Consumer Affairs Victoria v Craig Langley (Pty) Ltd & Yoga (Pty) Ltd* (2008) VCAT 482

*Director of Consumer Affairs Victoria v AAPT Limited (Civil claims)*(2006) VCAT 1493

*Eskom Holding Limited v Halsteak-Cleak* 2017(1) SA 333 (SCA)

*Federal Commission of Taxation v Consolidated Media Holding Ltd* (2012)250 CLR 503

*Four Wheel Drive Accessory Distribution CC v Leshni Rattan N.O* 6916/13

*Four Square (Qld) Ltd v ABE Copiers (Pty) Ltd* (1981) AT PR 40-2321

*Gazit properties (Pty) Ltd v Deon Marius Botha N.O and Others* (873/10) [2011] SASCA 199

*Goldbatt v Fremantle* 1920 (A) 123

*Khan v Naidoo* (1989)

*Morr No v Hentry Shield Chiat* 2001 (1) SA 404

*Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176

*Mokone v Tassos properties CC and Another* (2017) ZACC 25

*Murcia Lands cc v Erinvale Country Estate Home Owners Association* (2004) 4 ALL SA 656

*Photo Production Ltd v Securicor Transport Ltd* (1980) AC 827

*Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA)

*Plumbago Fincancial Services (pty) Ltd T/A Toshiba Rentals v Janap Joseph T/Project Finance* 2008(3) SA 47

*Seely International (Pty) Ltd v Newtronic (Pty) Ltd* (2002) Aust Contract R 90-142

*Smit v Pretorius and others* (33801/2001) [2014] ZAGPPHC 632

*Standard Bank Sa Ltd v Nomzingsi Princess Mnyipiza* 468/2014

*Sunshine Records (pty) Ltd v Frohling and Others* 9383/84/av) [1986] ZASCA 153

*Rose and Frank Co v JR Crompton and Bros Ltd*, [1925] AC 445

*Transcend Residential Property Fund Limited v Mati and another* (2008) ZAWCHC 40

*Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W)

*Trioparizi v Bulawayo Municipality* 2016 HC 3080-13

*Thiess v Collector of Customs* (2014) 250 CLR 664

*Union Government v Vianni Ferro-Concrete Pipes* 1941 AD 43

*Wells v South African Alumentite Company* 1927 AD 69

*Wireless Rentals (pty) Ltd v Stander* 1965(4) SA 753

*Van Zyl & others NNO v Turner & another NNO* 1998 (2) SA 236

*Victoria Falls and Transvaal Co & Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1

*Victoria v AAPT Limited* (2006) VCAT 1943

## **Legislation**

*Acts Interpretation Act 2005*

*Australia Securities and Investment Commission Act 2001*

*Companies Act 71 of 2008*

*Consumer Protection Act 68 of 2008*

*Competition and Consumer Act 2010*

*Constitution of Republic of South Africa 1996*

*Determination of threshold in terms of the Consumer Protection Act 68 of 2008*

*Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*

*Explanatory Memorandum, Trade Practices Amendments (Australia Consumer Law) Bill No1 (2010)*

*Explanatory Memorandum, Trade Practices Amendment (Australia Consumer Law) Bill No 2 2010*

*Government Notice No 293 of 1 April 2011*

*Memorandum on the objects of the consumer protection Bill, Consumer Protection Bill (B19-2008)*

*National Business Act 102 of 1996*

*National Credit Act 34 of 2005*

*National Small Business Amendment Act 26 of 2003*

*Regulation 5(1)(a) Government Notice No 293 of 1 April 2011*

*Sectional Titles Property Act 95 of 1986*

*Trade Practice Act 1974*

*Treasury Legislation Amendment (small business and unfair contract terms) Act 2015*

*Trust Property Control Act 11 of 2018*

## **Internet Sources**

Holding Redlich 'The application of the Australian Consumer Law to B2B transactions'  
<http://www.holdingredlich.com.au/assets/docs/The%20application%20of%20the%20australian%2028%20march.2.pdf>, accessed on 05 March 2019

<https://debitoor.com/dictionary/sales-turnover> accessed 14 May 2018 Anonymous and date unknown

The Australian Consumer Law: An introduction (2010) at 1. Available at  
[http://www.consumerlaw.gov.au/content/the\\_acl/downloads/ACL\\_an\\_introduction\\_november\\_2010.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_november_2010.pdf), accessed 08 November 2019