

Annual Report 2015/16



CONSUMER GOODS
& SERVICES OMBUD

Fairplay between consumer & supplier

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An interactive copy of the 2015/16 annual report
is available on our downloads page at
www.cgso.org.za

The CGSO Annual Report 2015/16 is submitted in
compliance with the provisions of clause 9.2.11 of
the Consumer Goods and Services Industry Code.



Report of the Chairperson

The 2015/16 financial year started on a high note with the prescription by the Minister of Trade and Industry, Minister Rob Davies, of the Consumer Goods and Services Industry Code and the accreditation of the Consumer Goods and Services Ombud (CGSO) Non-Profit Company (NPC) as the recognised industry dispute resolution body.

The official launch of the Code on 29 May 2015 at an event jointly hosted by the National Consumer Commission (NCC) and CGSO marked the beginning of a cooperative arrangement to ensure that consumers receive access to quick and cost-effective redress.

In terms of this arrangement, CGSO will by no means usurp the role of the NCC: it will merely become an alternative dispute resolution (ADR) agent and a key role-player in providing access to redress in terms of the dispute resolution framework established under the Consumer Protection Act (CPA).

CGSO has the function of resolving or adjudicating disputes when resolution through the internal structures of the supplier has failed. Disputes are resolved through mediation or conciliation and our key objective is to provide an accessible, free and speedy service.

The NCC retains the regulatory role of monitoring consumer disputes per industry and sector dealt with by ADR schemes such as CGSO to identify endemic, harmful business practices as well as emerging harmful trends for further investigation and prosecution where warranted.

In the words of National Commissioner Ebrahim Mohamed, ADR schemes such as CGSO play a key role, as the vast majority of consumers, in lodging complaints, are seeking quick and cost-effective redress of their disputes. This frees up the NCC to perform its regulatory role of conducting inspections and investigations, imposing compliance notices and prosecuting cases before the National Consumer Tribunal.

While consumers with unresolved complaints are encouraged to seek the assistance of CGSO before approaching the NCC, they nevertheless retain the right to approach the NCC and ultimately the Tribunal if they are not satisfied with the outcome of their complaint through the CGSO process. This covers situations where CGSO

does not make a finding in their favour, no settlement can be reached or the supplier fails to cooperate with the process. Uncooperative suppliers run the risk of their conduct being held against them as an aggravating factor by the Tribunal and of being found guilty of contravening the CPA.

CGSO can and does report to the NCC those matters in which there appears to be a serious contravention of the CPA, abuse of consumers or concerns about consumer safety, for the NCC to bring to bear its significant statutory powers.

Maintaining our independence as an impartial and trusted third party dispute resolution agent is one of our key objectives. CGSO is able to achieve this balancing act, in part thanks to the structural provisions of the Code that deal with the governance, appointment, tenure and dismissal of the Ombudsman and his staff members, and in part by the adherence of CGSO to the traditions of ombud practices internationally.

These include independence, accessibility, fairness, public accountability, effectiveness and impartiality.

The requirements of the Code that CGSO compile an annual report of its operations and effectiveness and make the report available to stakeholders, ensure that CGSO remains transparent and accountable. This annual report is produced in fulfilment of that requirement.

There is the additional requirement that CGSO produce annual reports on the implementation and application of the Code and make them available to all interested parties, including industry participants, consumers, the NCC and the Minister.

Such a report is included at the end of this report. As is required by the Code, the Board of CGSO determined a set of performance indicators against which to gauge progress in implementing the Code.

This being the first period of reporting, it needs to be borne in mind that the Code was in existence for just ten months before the end of the reporting period.

In spite of this, CGSO has made solid progress and has delivered some significant outputs, such as a comprehensive



set of materials to assist participating businesses in complying with their obligations under the Code, and clearing backlogs of cases lodged with us.

Regrettably, owing to the slow inflow of funding, some projects have had to be delayed until the financial outlook improves, as it will with the registration of businesses that have not yet done so.

Our key focus going forward is to increase participation in the scheme as this will ensure that consumers can have the confidence that CGSO will cover a wide range of goods and services. We understand that industry players have many questions or concerns and we are available to engage and iron these out. I urge businesses that have not yet signed up to do so without further delay. Not only will this assist CGSO in operating optimally, but it will also reduce the burden on businesses that joined the scheme at the outset.

I would like to thank the Department of Trade and Industry, the National Consumer Commission as well as the Consumer Goods Council of South Africa (CGCSA) for their support and contribution during the process leading up to the promulgation of the Code as well as all the suppliers that joined early and contributed to the scheme.

A further note of gratitude goes to Ombudsman Neville Melville and his staff for doing an excellent job under difficult circumstances.

Magauta Mphahlele



Report of the Ombudsman

In her foreword, Chairperson Magauta Mphahlele alluded to the importance of CGSO acting independently while remaining accountable. Independence is an important element in engendering trust in the minds of potential users of the system, be they consumers or suppliers. This is all the more so in the case of CGSO, which has no coercive powers or ability to impose determinations on the parties: its processes require consensus.

Many milestones were achieved in the last year in gaining functional independence from the industry. CGSO is now entirely self-reliant from the point of view of the administration of human resources and financial matters, having taken these functions over from the CGCSA.

It now raises its own finances by means of fees levied against participants approved by the Board of CGSO in accordance with the provisions of the Code and the memorandum of incorporation of the CGSO Company.

CGSO successfully underwent its first audit as an independent entity and was granted tax exemption status by the South African Revenue Service.

It has brought in-house the call centre function that was previously carried out by a third party service provider. One of the problems with the previous arrangement was that the outsourced call centre also performed call centre functions for a number of brands that fall within CGSO's jurisdiction.

The independence and integrity of CGSO are not abstract concepts, but considerations that come into play in each and every case dealt with. It is not always as easy doing the right thing as it might appear, as pressures are brought to bear on CGSO from many quarters, including the industry, government, consumer bodies and the media. Perhaps the greatest protection of CGSO's independence comes from the fact that, following the promulgation of the Code, it performs a function regulated by statute and is part of the enforcement framework set up under the CPA.

As a result, were CGSO to be biased in favour of either consumers or suppliers, this would very quickly come to the attention of the Minister of Trade and Industry, who has the power to withdraw our recognition on the recommendation of the NCC. While the promulgation of

the Code has certainly made matters easier for CGSO in that many businesses that were undecided as to whether or not to join CGSO have now done so, a worryingly large number of eligible businesses continue to drag their heels. This has put immense strain on CGSO, whose enlarged mandatory jurisdiction has meant an influx of complaints.

As CGSO simply did not have the resources and expertise to determine which businesses fall within its jurisdiction and to recruit and register them, it outsourced this function. As a result of the combined efforts of CGSO and the outsourced entity, the number of registered participating businesses and groups rose from the 24 founding members who registered before the Code was passed to a total of 189. There may be thousands of other eligible businesses. To give these statistics some perspective, it must be pointed out that those businesses that have registered as participants are mostly large groups and, accordingly, a significantly sized segment of the industry has registered.

Whether or not a business that falls within CGSO's jurisdiction has registered and paid its dues, CGSO must deal with any complaints received against that business. The disproportionate increase in work received compared to funds received put CGSO under extreme pressure in the review year and led to a backlog of cases. This crisis will hopefully be alleviated in the new financial year, as all registered participants are expected to pay a full year's fees, as opposed to the pro-rated ten months' fees paid by participants who registered after the Code was passed, two months into the financial year. This will enable CGSO to take on desperately needed additional staff members.

In spite of the difficult operating conditions in which CGSO has had to operate, it has managed to assist a significant number of consumers in resolving their disputes.

For the year under review, the complaints of 2 192 consumers were finalised. Of the 1 715 cases within CGSO jurisdiction and in which there was an outcome, 69% were resolved by the consumer receiving all or part of what was claimed or some other assistance. In many instances, the suppliers in question acted in the spirit of good customer relations by providing refunds or other relief even though they were not obliged to do so under the strict application of the law.



This year, the format of the first part of the report follows the requirements of paragraph 9.2.11 of the Code, with the exception that the financial statements and audit reports will be separately provided later in the year, once the audit has been completed and the financials signed off by the Board.

For convenience sake, the required report on the implementation and application of the Code is included in this report. It would be premature for CGSO to make recommendations to the Board for any necessary amendments to the Code for the consideration of the NCC, to enable it to act in terms of section 82(5)(c) of the CPA, as the Code has been in effect for only ten months. Aspects that will require careful monitoring, however, are how the cases dismissed because of a lack of cooperation from the supplier are ultimately dealt with, and the NCC referral process.

At present, CGSO merely informs the consumer of his right to approach the NCC, as it is required to do by section 70(2) of the CPA when a supplier fails to cooperate. It is not known what becomes of these cases. Regarding cases referred to CGSO by NCC, the process is not optimal. This is expanded on later in the report.

Advocate Neville Melville



Case Statistics

Total cases opened, with main enquiries coming from call centres

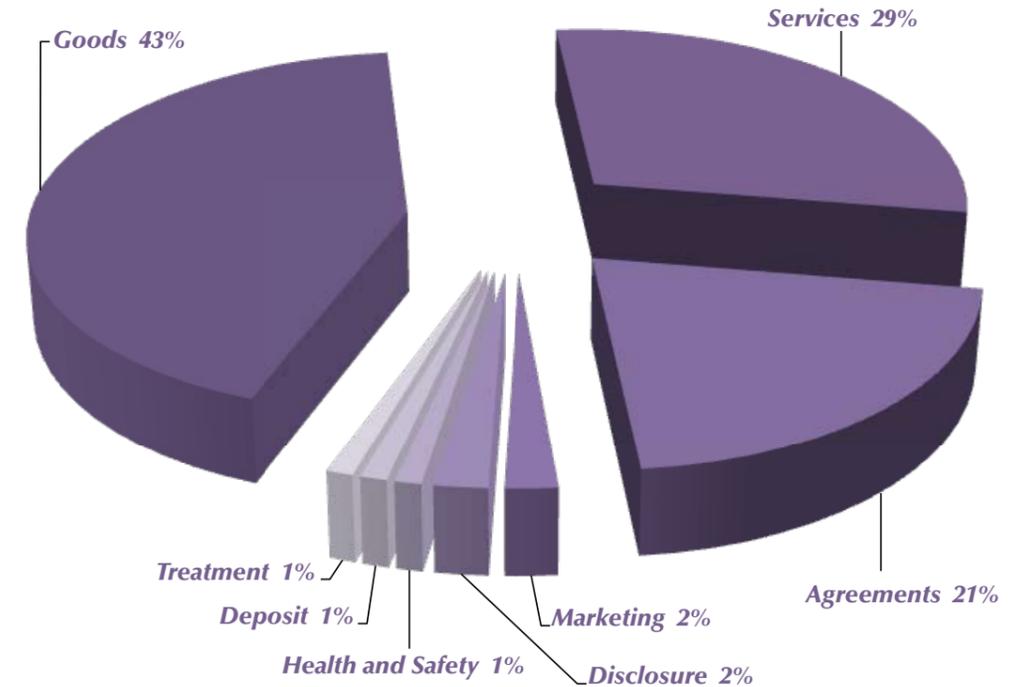
Calls received by outsourced call centre March 2015	698
Calls received by internal call centre April 2015 – February 2016	13 901
Total call centre calls received	14 599
Total cases opened for the financial year March 2015 – February 2016	3 495

(While the call centre was the main point of contact, cases also came via email and the CGSO website)

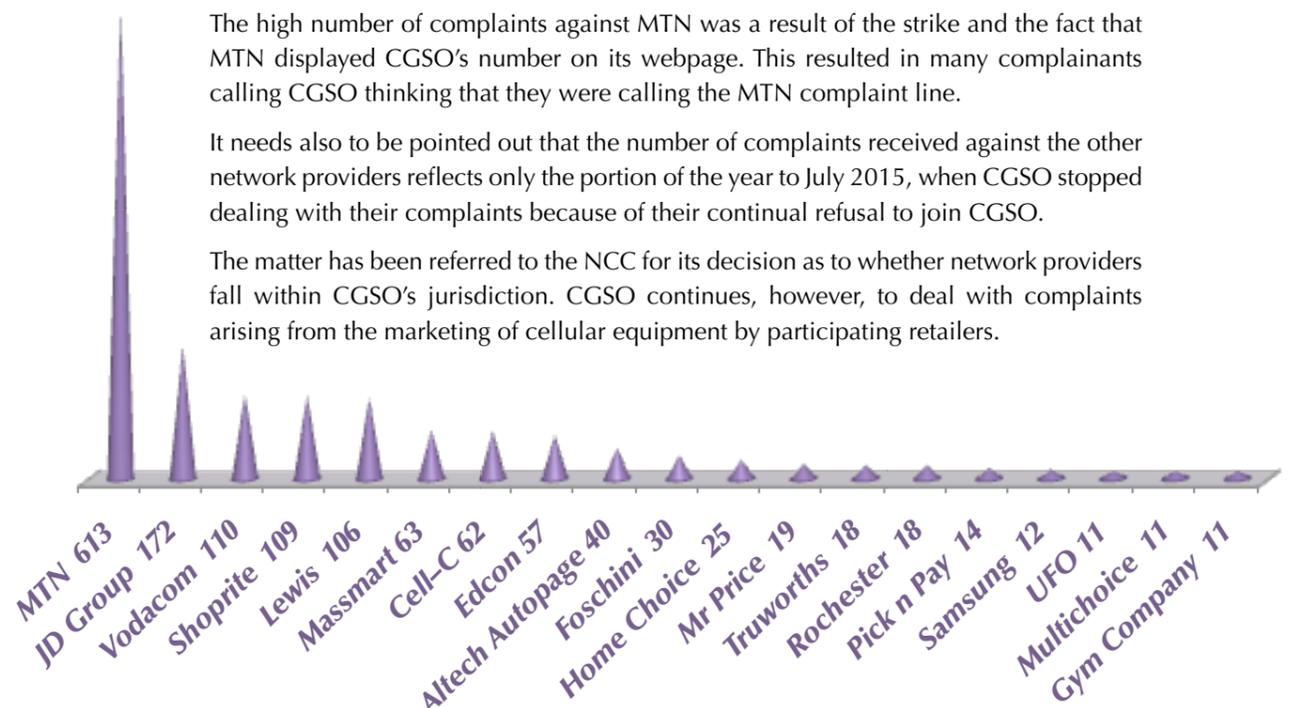
Type and frequency of complaint

Product	Total	Product	Total
Cellphones	951	General merchandise	27
Services	795	Virtual goods	22
Furniture	523	Footwear apparel	21
Electrical appliances	343	Medical equipment	21
Computer and accessories	140	Cosmetics	15
Clothing	123	Linen and bedding	12
Other	113	Homecare products	9
Building material	110	Toys	8
Hardware supplies	54	Stationery	7
Food and beverage	39	Tools	6
Jewellery	38	Sports goods	5
Home decor	34	Chemicals	3
		Petfood and pet products	2

Nature of complaint



Suppliers who received more than 10 complaints



The high number of complaints against MTN was a result of the strike and the fact that MTN displayed CGSO's number on its webpage. This resulted in many complainants calling CGSO thinking that they were calling the MTN complaint line.

It needs also to be pointed out that the number of complaints received against the other network providers reflects only the portion of the year to July 2015, when CGSO stopped dealing with their complaints because of their continual refusal to join CGSO.

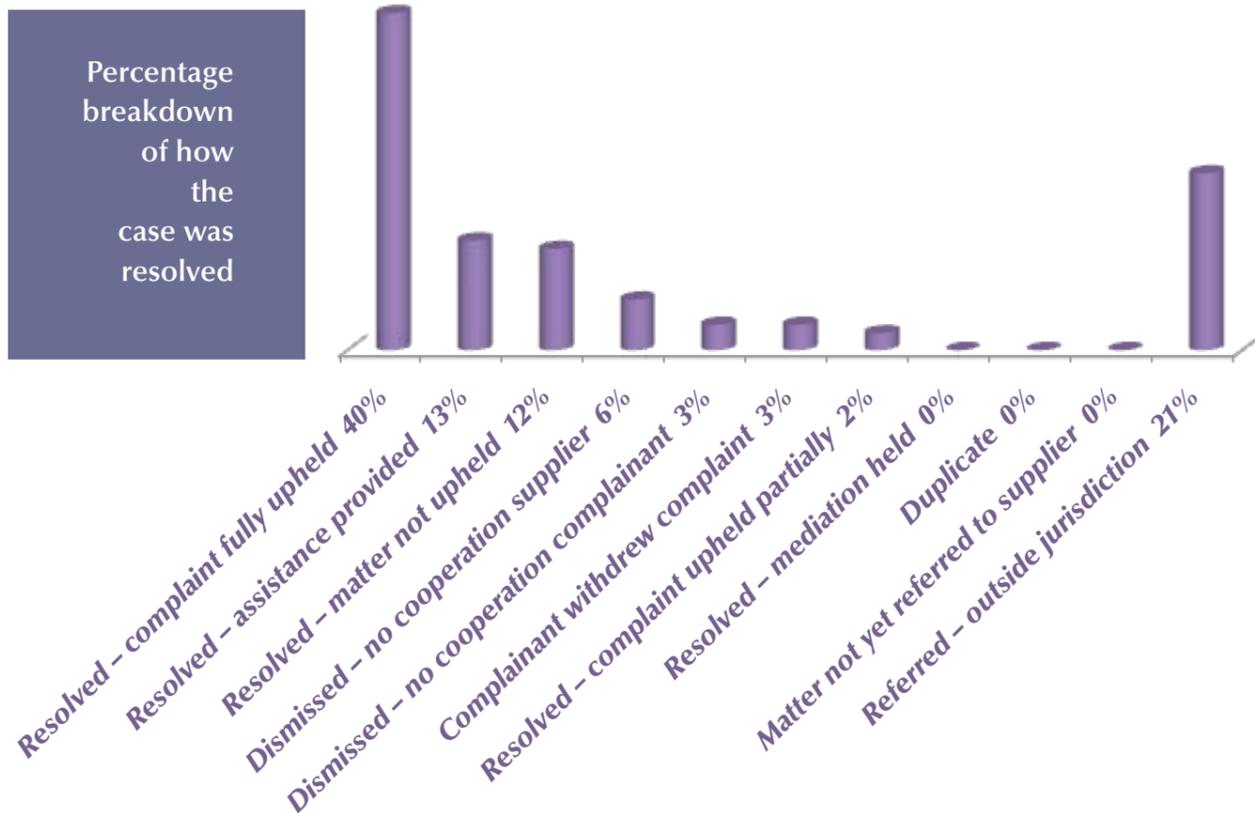
The matter has been referred to the NCC for its decision as to whether network providers fall within CGSO's jurisdiction. CGSO continues, however, to deal with complaints arising from the marketing of cellular equipment by participating retailers.

Case status

Closed	2 192	Open	1 303
		Total	3 495

How the matter was resolved

Resolved – complaint upheld fully	869	Dismissed – no cooperation from complainant	74
Referred – outside jurisdiction	464	Complainant withdrew complaint	58
Resolved – assistance provided	273	Resolved – complaint upheld partially	52
Resolved – matter not upheld	258	Duplicate	8
Dismissed – no cooperation from supplier	130	Matter not yet referred to supplier	5
		Resolved – mediation held	1



Age of cases

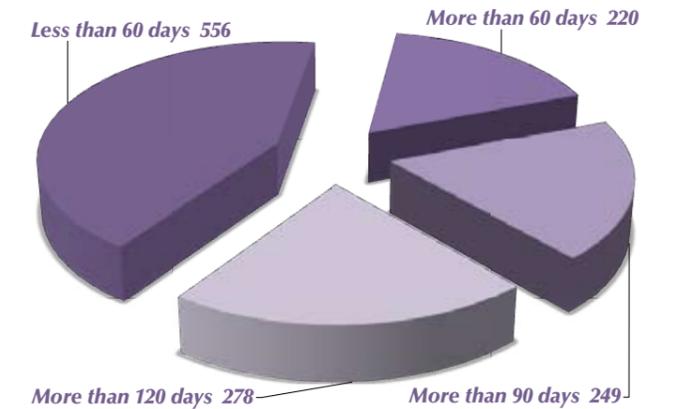
This information on case aging refers to cases received during the period from July 2015 to February 2016 as it was not possible to transfer all the information that was recorded on the old case management system onto the system that replaced it in July 2015.

Average days to close a file: 57 days

The number of open cases older than 90 days shows that CGSO is under severe stress, the reasons being its inadequate resources to deal with the caseload and the difficulties experienced in getting some suppliers to cooperate with the process.

This situation will improve in the next financial year, as all participants will be paying fees for the full year. That was not the case this year as the fees of new participants were pro-rated as the Code came into effect in May 2015, two months into the financial year.

Another contributing factor to the backlog is the initial teething problems relating to the manner in which the NCC refers complaints to CGSO.



The process of receiving scanned copies of complaints in batches led to costly inefficiencies and delays in resolving the complaints.

Both CGSO and NCC are cooperating to find more cost-effective and efficient means to receive and refer complaints between the two institutions.

Type of sanction(s) imposed

The Code does not empower CGSO to make binding rulings or impose sanctions. Whenever we pick up on a trend that points to a practice that is inconsistent with the purposes of the CPA (the words used in section 95(1)(a)) or we believe we cannot adequately deal with a matter, we refer it to the NCC for investigation and action. During 2015, we made several such referrals.

We referred the unilateral price increase of cellphone contracts to the NCC.

Where the complaint was not upheld or no cooperation was received, we gave the complainant the NCC's contact details. In some of these cases, the complainants reported some challenges with having their cases dealt with by the NCC, and both entities are working on ways to ensure consumers access to proper and effective redress. According to media reports, the NCC initiated an industry-wide investigation into labelling and trade descriptions following a complainant being referred to it by CGSO.

The activities of the following businesses were brought to the attention of the NCC:

Speculative software (various suppliers)	The supplier falsely promises software packages that will enable consumers to trade on stock exchanges
Orthopedic Pillow & Mattress	Failed to assist, cooperate and resolve complaints as per the Code
Loan Tracker SA	The supplier advertises that it assists consumers in obtaining loans, whereas it subscribes consumers for all sorts of different things for a monthly fee

CGSO Directors ensure fairplay for all

Supplier cleans up its act

The statistics conceal the gamut of emotions that consumers experience when they have a problem with a service they have paid for or something they have purchased, or the frustration of trying to get the matter resolved.

This letter received from a satisfied complainant gives some insight into a typical consumer experience:

'I have been fighting with [the store] and [the manufacturer] for five months, ever since I purchased my washing machine and no-one would listen. My washing machine did not clean my clothes; [they] basically came out wet and dirty. Two technicians came to my house and they had a look at the machine and saw the clothes dirty after the wash and reported "no fault found", but agreed that that was not the way the machine was supposed to wash...'

[The consumer then unsuccessfully approached an online complaints portal for assistance.]

'I then called Consumer Goods and Services Ombud and was assisted by a very friendly lady whose name I cannot remember now as I was so angry at the time with [the manufacturer]. She very professionally listened to me, logged my complaint and explained the timeframe of the query. The very next day I was contacted by a senior manager from [the store] who fully refunded me and collected the washing machine. I was so impressed with your company and wonder why didn't I just come to you guys in the first place. It would have saved me so much time and energy and my stress levels would not have been so badly affected.

'My email is just to say a HUGE THANK YOU to CGSO and the lovely lady who helped me. Because of you, I have a washing machine that performs its function.'

The directors of CGSO include:

Financial and audit reports

These are available only annually, after the audited financial statements are signed off by CGSO's board. A decision was taken not to delay the report on CGSO's activities, to ensure that the information in it is current when it is released.

During the year, a copy of the audited 2014/15 financials was published and made available on the CGSO website <http://www.cgso.org.za/wp-content/uploads/2015/12/CGSO-Signed-2015-AFS.pdf>.

We wish to draw attention to two matters. Firstly, it was an unqualified audit. Secondly, the auditors commented on 'going concern', as the company had a negative net asset value at the end of 2014.

The company, however, remained liquid. CGSO appointed a third party business to manage participant registration and fee collection, but many businesses are still dragging their heels.



Zyda Rylands
Woolworths

Richard Chauke
JD Group



Grattan Kirk
Tiger Brands



Magauta Mphahlele
Chairperson



Gwarega Mangozhe
Consumer Goods Council SA



Russell Behrens
Tiger Brands



Clif Johnston
SA National Consumer Union



Ravi Pillay
Nestlé



Thandiwe Zulu
The Black Sash Trust



Nozuko Mxunyelwa
Company Secretary



Sally Gnodde
Cosmetic Toiletry and Fragrance Association SA



Eddie Moyce
MTN SA

Case Summaries

According to section 2(2) of the CPA, a person (which includes both a supplier and a consumer), court or Tribunal or the Commission may consider any decision of an ombud for guidance as to the interpretation or application of the CPA. To facilitate access to its decisions, CGSO has available a Compendium of Cases under downloads on its website www.cgso.org.za, and it entered into an agreement with the Southern African Legal Information Institute (SAFLII), the online repository of open access legal information, for it to publish CGSO decisions on its website (see <http://saflii.org/za/cases/ZACGSO/>).

In so doing, CGSO complies with the Code objectives of offering guidance to participants in the industry as to implementation of, and compliance with, the CPA, and of educating consumers as to their rights.

A tale of two prices

The case summaries that follow illustrate that the rules regarding advertised price differ depending on whether the price is displayed in a store or on a website. The reason for the difference is that online transactions are governed by a separate piece of legislation to face-to-face transactions, which fall within the CPA.

Case 1: Lowest display price binding

After the complainant had paid the displayed price of R2 199.99 for a sleeper couch and given the invoice to the stock manager, the manager refused to hand over the couch, saying that the wrong price had been placed on it. The complainant was asked to pay an additional R800 to get the couch.

In its response to CGSO, the supplier claimed that it was not bound by an obvious error in the price. It suggested that an unauthorised person had tampered with the price in some way, but provided no evidence to support this.

CGSO started its analysis of the relevant law with a consideration of the common law position. In a long-standing judgment it was held that an advertisement did not constitute a binding offer that a customer could accept, but was merely an announcement of the shopkeeper's intention to sell at the advertised price (this is known as an invitation to treat [do business]). This position has been altered by section 29 of the CPA, which states that a supplier must not require a consumer to pay a price for any goods or services higher than the price displayed, unless the displayed price contains an inadvertent and obvious error. In that case, the supplier is not bound by it after the error and taking reasonable steps to inform consumers of the error and the correct price.

CGSO considered it necessary to determine the point in the dealing between the parties up to which the supplier can take these steps and after which the supplier is bound regardless. After a review of decisions from other jurisdictions, CGSO concluded that the most logical and workable conclusion is that that point is reached when the consumer takes the selected goods out of the trolley or basket and places them on the counter to pay for them.

Section 23 does not apply in instances where the circumstances are such that the error is not obvious. On the facts, the display price of R2 199.99 was not that much lower than R2 999.99 that it gave rise to an inference that it was an obvious error. Further, the agreement had already been concluded before the stock manager detected the error. Accordingly, the supplier was bound by the incorrect price.

Case 2: Online price not binding

The complainant found one of the supplier's websites advertising goods on special. Over a period of four days, he bought various items and paid a total of R10 530. The actual value of the goods ordered was R415 500.

The supplier, however, refused to deliver the goods on the grounds that the consumer had bought the goods from a testing site that was not supposed to be visible to the public. The advertised specials were for illustrative purposes only. The supplier further argued that the prices were significantly lower than the normal selling prices and a reasonable person would have noticed that there was a pricing error.

CGSO concluded that section 23 of the CPA, which deals with disclosure of price of goods or services, does not apply to a transaction if section 43 of the Electronic Communications and Transactions Act (ECT Act), which relates to online transactions, applies. CGSO considered the ECT Act and concluded that it did not exclude the common law relating to the advertisement of a price. The general rule is that an advertisement does not constitute a binding offer that a customer has a right to accept, but is merely an announcement of the shopkeeper's intention to sell at the advertised price.

It was nevertheless necessary to decide at what point a transaction would become binding. While there was some authority for the view that an Internet contract is concluded when the order is received and accepted, the more widely held view internationally is that by clicking on the 'I accept' button, the transaction becomes binding. Consequently, unless a supplier's terms say otherwise, a supplier is bound by a consumer's acceptance of the offer and the advertised price.

However, there is still the possibility of the supplier relying on 'snatching a bargain' as a defence where there was an error in the price. This means, in the words of a Singaporean judge: 'If the price of a product is so absurdly low in relation to its known market value, it stands to reason that a reasonable man would harbour a real suspicion that the price may not be correct or that there may be some troubling underlying basis for such a pricing.'

CGSO concluded that, because the discrepancy between the actual price or the price that a reasonable consumer might expect the price to be and the advertised price was so large that a reasonable consumer would have realised there was an error and not have been misled, the supplier was not bound to provide the complainant with the ordered goods at the incorrectly advertised price.

If the shoe fits

The complainant purchased two pairs of leather shoes – one in red and one in black. The red pair fitted perfectly but both of the black shoes were uncomfortable in the toe area. The complainant returned the black shoes to the supplier, who advised her that there was not a manufacturer's defect and that in terms of the store's policy; she would have to accept a credit note.

When the complainant refused to accept the credit note, the store sent the shoes to the factory for testing. The feedback received after the testing was that the shoes were not defective: the black shoes differed from the red shoes because different leather was used. The complainant insisted that the black shoes did not perform to the specifications of the red pair and, therefore, were not fit the purpose for which they were purchased.

The most widely misunderstood aspect of the CPA is the right to return goods or cancel an agreement. Many people mistakenly believe that they have the absolute right to change their minds after buying something and to return it for a refund. The correct position is that there is a cooling off period only if direct marketing took place. The only other time a consumer can cancel a transaction after the goods are delivered is if the goods prove defective within six months of purchase. This right applies whether or not the consumer could have detected the defect before taking delivery of the goods.

This does not mean that the consumer should not try on or inspect the goods in the store. On the contrary, the CPA gives the consumer the right to choose or examine goods and to select or reject any particular item from displayed stock before completing the transaction (section 18). If the consumer has had the opportunity to examine the goods before they are delivered, he loses the right under section 20(2) to return them and receive a full refund after delivery.

It is essential that the consumer inspects the goods before delivery because, unless the shop has a refund policy permitting discretionary returns, it is not obliged to take back goods that:

- the consumer regrets buying;
- the consumer's partner does not like;
- do not match the consumer's other clothes/furniture;
- do not fit (unless the goods were in a sealed package);
- are uncomfortable to wear;
- are uncomfortable to sit/sleep on;
- the consumer realises he cannot afford.

In this instance, the complainant had had the opportunity to inspect and to try on the shoes before buying them. That the shoes do not fit as comfortably or were not exactly the same as the red pair was not sufficient to instruct the store to refund the complainant.

CGSO considered the offer of a credit note fair and reasonable.

Falling head over heels

The complainant fell and hurt her knee and toe while walking and attributed her fall to the sandals she had purchased from the supplier: she felt they were not safe to wear on the road. The matter was referred by her to the supplier's insurer, which rejected the claim without providing the complainant with a copy of its investigation. The supplier denied liability, claiming there was not an issue regarding the quality of the sandals. It claimed that the sandals showed a fair amount of wear and tear and attributed the fall to this fact.

In terms of section 61 of the CPA, consumers may obtain redress from the producer, importer, distributor or retailer if they have been injured because of a safety defect in a product. The supplier will be liable irrespective of whether negligence can be established. Consumers, therefore, no longer have the onerous burden of proving fault. A consumer must, however, still prove that the product had some sort of flaw that made it unsafe or otherwise defective in terms of the definitions of the CPA and the damage was caused wholly or partly by this defect.

CGSO arranged for the sandals to be returned to the supplier to be inspected to see whether there was any manufacturer's defect that could have caused the complainant to fall. The supplier provided CGSO with an inspection report that indicated that the necessary quality checks were done on the batch of sandals before they were sent to the various stores and that the sandals passed the checks and tests.

The supplier also confirmed that it had had no other returns of the sandals in any of its stores. The supplier's quality control department stated that there had been a considerable amount of wear and tear on the sandals, especially the back of the heel tip and the front of the sole bottom. On both areas, the moulded grip lines and grip pattern had worn away, resulting in the sandals being less able to grip on wet, smooth surfaces.

CGSO was not able to conclude that the complainant's fall was caused by a defect in the sandals.

Slip through the cracks

The complainant received a cot mobile as a gift from a friend. She tried to return it to the supplier for a replacement when it stopped working: the supplier still had the product on its shelves and insisted on a till slip that she did not have. She also did not keep boxes for longer than three months.

In the supplier's response to CGSO, it stated that there was no proof that the item was actually bought at any of its stores as it was available at other retailers.

As neither party was prepared to budge from its stance, CGSO considered the law. Section 55 of the CPA provides consumers with the right to safe and good-quality goods and section 56 imposes a built-in or automatic warranty that all goods sold comply with the requirements of section 55.

If the goods are not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in section 55, the consumer is entitled to return them within six months of delivery, at the supplier's risk and expense and without penalty, and:

- (a) have the item(s) repaired;
- (b) have the item(s) replaced, or
- (c) receive a full refund.

As section 56 makes no specific reference to whether till slips need to be produced to return goods, CGSO considered whether it was reasonable for the supplier to request a till slip.

Each case must be determined on its own merits. The item was available at other retailers. Furthermore, the till slip or proof of purchase is crucial for a supplier/Ombud/Commissioner or Tribunal to determine if the goods were returned within the prescribed period of six months. One also needs to take note of the high levels of crime in the country.

Even though suppliers should also keep proper records of transactions, with no information on when exactly or how (cash or with a debit/credit card) the purchase was made, the supplier would not have been able to confirm if the goods had been bought from its store.

CGSO was consequently not able to instruct the supplier to replace the item.

Written Recommendations

These written recommendations not followed by a supplier are published in terms of paragraph 11.7.4 of the Consumer Goods and Services Industry Code.

S&S Cartage

Details of complaint

In spite of the complainant having provided the supplier with a list of the furniture items she wanted moved, it sent a moving van that was too small. The supplier had not advised her in advance of the need to take out insurance on her goods.

When the van reached its destination, the furniture was offloaded in a reckless manner. The moving crew was careless and threw things on the floor and refused to assemble the beds.

Several items were damaged.

The supplier refused to accept responsibility as the complainant had not taken out insurance and she had signed a form after the delivery had taken place thanking it for the 'best service'.

*Service:
goods damaged in transit*

Decision and recommendation

The carriage of goods clearly falls within section 65(2)(b). In light of section 51, the clause in the supplier's document that the complainant was not covered for accidents or damage during the removal has no legal effect.

The supplier was liable to the complainant for any loss resulting from a failure to take proper care of her property while moving it.

Pets Galore and Grooming Parlour

Details of complaint

The consumer bought a parrot from a pet shop. When, two weeks later, the bird began losing its feathers, the consumer took it to a veterinarian, to find that it had a very contagious disease and needed to be put down.

Tests on her other parrot showed that it did not have the disease. The complainant believed the breeder was responsible.

According to the pet shop, when the bird was sold, it was in a good healthy condition and it showed none of the symptoms associated with the disease. The pet shop's displayed signage excluded it from responsibility once livestock left the shop.

Tests on some of the breeder's other birds were negative.

*Goods:
diseased bird*

Decision and recommendation

While it was not possible on the information available to pinpoint when the bird contacted the disease and in whose possession it was at the time, it was possible to infer from the evidence and information available on the Internet that the bird already had the disease when it was sold by the pet shop. As suggested by the complainant, the incubation period of the disease is fairly lengthy.

In terms of section 51, a supplier cannot by means of a contract or notice exclude its liability under the CPA, so the pet shop's notice of no responsibility was of no effect.

As was mentioned previously, where the complaint was not upheld or no cooperation was received from a supplier at an earlier stage of the process, CGSO gave the complainant the NCC's contact details. Where there was more than one instance of non-cooperation involving the same supplier, this fact was reported to the NCC.

Issues faced by CGSO

Here we highlight the main issues that came up during the year under review.

Failure of certain businesses to cooperate with CGSO or follow its recommendations

While the statistics provided earlier in this report show that over half the consumers who approached CGSO for assistance not only had their complaint dealt with but also received assistance or had their complaint resolved partially or fully in their favour, there is a concern that in approximately 6% of cases, the supplier failed to cooperate with the process. In other matters, the suppliers refused, as they are entitled to do under the Code, to accept the CGSO recommendation.

The consumers who brought these complaints had the option of pursuing the matters through the NCC, which has the option of investigating the matter and then referring it to the National Consumer Tribunal for prosecution where warranted.

However, neither the Commission nor the Tribunal may order that a complainant be compensated for loss or damage suffered as a result of prohibited conduct or dereliction of required conduct. A consumer whose complaint was not resolved at the ombud scheme stage would need to institute a claim in a civil court in terms of section 115(2). This emphasises how important it is that a complaint is informally resolved by an ombud scheme.

CGSO intends to monitor this situation closely to decide whether it ought to recommend that the law be changed to ensure compliance by all suppliers.

In the meantime, in the hope that the threat of publicity acts as an inducement for businesses to accept and implement all of CGSO's recommendations, the recommendations that were not followed and the details of the recalcitrant suppliers have been included in this report.

Reasonable penalty upon cancellation of an agreement

CGSO receives a significant number of complaints relating to the cancellation or termination of agreements and the cancellation of advance bookings or orders. Disputes arise particularly in the area of the fairness of suppliers

refusing to refund deposits taken for event bookings and advance product orders and in seeking to hold consumers liable for future payments, fees or instalments.

In terms of common contract law, the principle of *pacta sunt servanda* ('agreements must be kept') is central. If one party to a contract seeks to cancel or be released from the contract without valid legal reason, the other party is entitled to sue the defaulting party either for the fulfilment of the contract or for cancellation and damages arising from the breach.

The Conventional Penalties Act 15 of 1962 permits contracting parties to agree in advance on the amount of damages that will be payable by the one to the other in the event of a breach of contract by means of a penalty stipulation, so long as the penalty is not out of proportion to the harm suffered by the innocent party.

This provides a useful yardstick in applying the CPA.

Where a breach of contract has occurred, the innocent party must take reasonable positive steps to mitigate or prevent the occurrence of losses, failing which his or her claim may be reduced or eliminated.

Consumers no longer sign documents or enter into agreements at their peril as the CPA provides them with the right to cancel an agreement in a number of circumstances (listed at <http://www.cgso.org.za/wp-content/uploads/2015/12/CGSO-Advisory-Note-12-Cancellations-Revision1.pdf>).

The calculation of permissible charges for damages presents a challenge in practice because of the generality of the provisions of section 14(3)(b)(1) read with regulations 5(2) and (3)21 (cancellation of fixed-term contract) and section 17(4) (cancellation of advanced order).

After considering international precedent, CGSO came to the following conclusions:

Cancellation of advance events and wedding venues (section 17):

- The cancellation policy must be appropriate to the type of service offered, taking into account the likelihood of being able to, with diligence, rebook the venue/service;

- Any deposit taken should be fair, reasonable and proportionate to the actual loss that a supplier is likely to suffer if the event/service is cancelled, including loss of profits if the venue is not rebooked;
- Provision should be made for a graduated scale of forfeiture of a percentage of the deposit in proportion to the length of notice.

The graduated forfeiture is subject to the proviso that, in the event of the venue/service being rebooked, the consumer will be charged only an administrative fee based on actual costs.

In the spirit of the CPA and in the interests of good customer relations and reputation, the cancellation terms and the provisions of section 17 of CPA should be brought to the attention of the consumer before the booking is made.

Cancellation of fixed-term agreement (section 14):

Some guidance as to how to calculate the 'reasonable cancellation penalty' is provided in Regulations 5(2): it implies that a supplier may not merely predetermine a set penalty, say a percentage of the outstanding value of the contract, but must treat each case in terms of the variables set out in the regulation.

This does not prevent it from agreeing a sliding scale of permitted penalty charges that relates to the period of the contract and the point at which it is cancelled, as long as, in accordance with the Conventional Penalties Act, the penalty is not out of proportion to the harm suffered by the supplier.

To further protect itself, the supplier could indicate in the contract that stipulated goods and services are provided free in anticipation that the contract will run the full term agreed upon, but that a specified amount will be charged if the contract is cancelled without justification within a stated period of time.

Where goods have been provided, such as a cellphone or a kit bag, the supplier must calculate the penalty based on:

- The value of the transaction up to cancellation;
- The value of the goods that will remain in the possession of the consumer after cancellation;
- The value of the goods that are returned to the supplier; and
- The duration of the consumer agreement initially agreed.

(This is a calculation that is readily capable of being reduced to an online application [app] of the sort available in the USA. In Canada, section 16 of Bill 60, Wireless Services Agreements Act 2013 very helpfully provides a formula that must be applied. Something similar could be considered in South Africa.)

Once the penalty is calculated, it must be deducted from any amount paid in advance by the consumer and the balance paid over to the consumer in terms of section 14(3)(b)(ii). Regulation 5(3) prevents the supplier from charging a fee that would negate the consumer's CPA right to cancel the agreement.

Even where the CPA permits a penalty to be charged, this is subject to the supplier being under an obligation to mitigate its losses, for example by seeking replacement business.

Lack of clarity on future losses

Regulation 5(2) appears to refer to a penalty based on future losses and the mitigation of these losses. If this is the case, it is beyond the scope of section 14(3)(b)(i), which refers only to the imposition of a reasonable cancellation penalty for any goods supplied, services provided or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term.

Accordingly, a court might rule that Regulation 5(2) is *ultra vires* (ie it exceeds the scope of the primary legislation and is invalid).

Reaching out to consumers

How consumers learnt about CGSO

How did you hear about CGSO?	Total	How did you hear about CGSO?	Total
NCC	911	Radio	78
Internet	583	Supplier	77
TV	253	Consumer Goods Council SA	61
Friend	155	Newspaper	56
Legal adviser	82	Office of the Consumer Protector	49

It is disappointing to note that only 77 complainants said they were referred to CGSO or informed of its existence by the supplier against which they had complaints. It is not surprising then that such a high percentage of dissatisfied consumers first approached the NCC before they were referred to CGSO, thus protracting the process.

Now that the Code is law, CGSO will need to ensure that suppliers inform consumers about the Code and of their right to approach CGSO, as well as provide the contact details of CGSO.

TV and radio appearances

Regular media slots with CGSO's Ouma Ramaru

Station	Day	Time	Term
North-West FM	Monday	20:00	5 months
Speak Out, SABC 2	Thursday	21:30	9 months

The Ombudsman appeared on

Sunrise TV	eNCA
Newsday SABC	CNBC Africa
	ITV

The Ombudsman spoke on

SAFM	Voice of the Cape
702	Power FM

Other CGSO staff engaged on

Phalaphala FM	Channel Islam
Munghana Lonene	Radio Sonder Grense
SAFM Current Affairs	

Interface with the industry

An industry liaison committee was formed at the Code launch function in Midrand and, subsequently, committee meetings were held in Bryanston and Cape Town. The Ombudsman spoke at a function of the Compliance Institute, at the AGM of the Vacation Ownership Association of Southern Africa and at a business breakfast in Johannesburg.

There is a large amount of information available to industry participants on CGSO's website, including advisory notes on the interpretation and application of the CPA, a collection of the CGSO's decisions and, for paid-up participants password-protected e-learning modules on the CPA and the Code.

Providing consumer journalists with information

An important observation is that, in spite of extensive media coverage of CGSO, a comparatively small number of complaints reach CGSO as a result of this exposure. A far greater number can be attributed to the Internet. It was partly for this reason that CGSO placed less emphasis on media releases during the year.

It was found to be more effective to cultivate ongoing relationships with leading journalists. We would like to pay tribute, in particular, to the following stalwarts of consumer rights for their assistance in promoting CGSO and in informing consumers and businesses alike of their rights and obligations:

Leading lights in consumer journalism

Megan Power	Consumer columnist: Sunday Times
Wendy Knowler	Consumer writer: Times Media
Lyse Comins	Journalist, editor and media consultant
Thuli Zungu	Consumer editor: Sowetan
Jessica Anne Wood	Journalist: Just Money
Angelique Arde	Journalist: Saturday Star – Personal Finance
Kailene Pillay	Journalist: The Witness
Neesa Moodley	Freelance financial journalist: City Press
Elaine Swanepoel	Journalist: Rapport

Roadshows

CGSO was not able to conduct roadshows to the extent that it had hoped, given the slow inflow of funds from businesses. It had to allocate its resources to personnel and money to its primary function of resolving disputes.

However, it is expected that there will be sufficient funds for this activity in 2016.

A cost-benefit analysis of this type of intervention compared to community radio and the Internet will be undertaken.

CGSO delegations participated in the 'Winter safety consumer awareness campaign' in Kya Sands, Gauteng, with the NCC and the National Regulator for Compulsory Specifications, and in campaigns on 'Rights to fair value' in

Rustenburg and 'Defective furniture and delivery of goods' in Mafikeng.

The last two mentioned were organised by the Office of the Consumer Protector, North West Province.

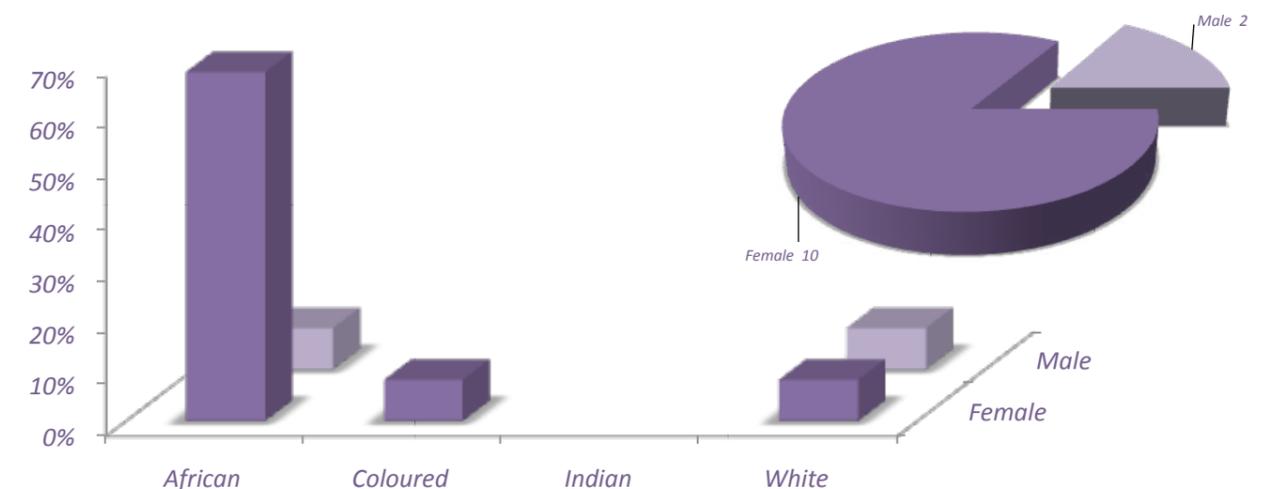
The Ombudsman addressed a gathering of provincial consumer protectors in Johannesburg.

Meet the CGSO staff



The CGSO team. Back: Advocate Neville Melville – Ombudsman. Back row from left: Bongwiwe Myeni – administrator, Bonita Hughes – complaints manager, Mantombi Rikhotso – call centre agent, Sicelo Gwala – complaints assessor, Cindy Jojo – accountant, Gladys Manyobe – cleaner, switchboard. Front row from left: Nadima Hartley – administrator, Queen Munyai – GM: corporate services, Ouma Ramaru – office and complaints administrator, Penelope Kwape – call centre agent, Mpho Neluheni – administrator.

Staff statistics: by population group and female-to-male ratio



Implementing the Code

Following the Code coming into effect on 29 April 2015, CGSO became obliged in terms of clauses 5.3 and 9.2.13 to produce annual reports on the operations and effectiveness of the Code, to be made available to all interested parties, including participants, consumers, the NCC and the Minister.

Reporting areas

CGSO must operate in accordance with the procedures and values of the Code. Although the efficiency of CGSO can, to some extent, be recorded in the annual report, the level of its compliance with the procedures set out in the Code would need to be verified by a five-yearly review of the type envisaged in section 82(5) of the CPA or a review conducted by a suitably experienced and qualified individual or organisation, as is the international practice (see for instance <https://www.fos.org.au/about-us/independent-reviews>).

As to CGSO's other obligations, the Board has, as required by clause 5.4, developed performance indicators to measure the Code's effectiveness. Being a small organisation with limited resources, CGSO had to prioritise its activities to ensure it remained financially viable and continued to render an acceptable service. Pending an improvement in resources, activities such as monitoring of participant compliance and public outreach had to be delayed or minimised.

This document lists, in order of priority, the different areas of the Code that can be monitored, with performance indicators, outputs and measures.

Compliance and qualitative aspects for review by an expert

As mentioned in the previous section, there are requirements of the Code that would have to be investigated and reviewed by an expert.

These are:

- 7.2.3 ensure that complaints are dealt with timeously (currently measured), consistently and effectively.
- 8.3 The Ombudsman shall act independently and objectively in resolving disputes.
- 8.5 CGSO shall:
 - 8.5.1 act honestly, independently and objectively;
 - 8.5.2 practice fairness, justice, equity and the provisions of the CPA and the Code;
 - 8.5.3 balance the rights of consumers on the one hand and the rights of participants and industry on the other hand;
 - 8.5.4 avoid discriminating against anyone on the grounds contemplated in section 9 (3) of the Constitution of the Republic of South Africa 1996 (Act No 108 of 1996) and section 8 of the CPA; and
 - 8.5.5 take reasonable steps to accommodate the needs of persons with disabilities and to eliminate obstacles that may unfairly limit or restrict persons with disabilities from using the services of CGSO.
- 8.6 Criteria to be used in resolving disputes include:
 - 8.6.1 the law, especially the CPA and the Code (in all cases where there is conflict between the interpretation of the CPA and the Code, the CPA shall prevail);

- 8.6.2 applicable industry codes and guidelines, and
- 8.6.3 fairness in all circumstances.

- 9.2.14 Address each complaint in an equitable, objective and unbiased manner through the complaints handling process.
- 12.1 Subject to any other law, personally identifiable information shall be kept confidential by CGSO and be protected, except to the extent that it is necessary to provide it to a party for the sole purpose of resolving a dispute, or unless disclosure is required by law, or consent for disclosure is obtained from the party concerned.

Report on compliance with the Code

The following is the report on implementation and compliance measured in terms of the key performance indicators determined by the CGSO Board under clause 5.4 of the Code.

KPI – Provision of efficient dispute resolution service

Report on in annual report for 2015/16

Performance reported on in the body of the report to which this report is annexed

KPI – Registration of participants

Appoint agency to identify participants and sign them up

Trifecta Capital appointed. Number of participants signed up: 189

Collect fees in line with budget (additional R2 million in 2016/17)

Summarised budget 2015 – 2016

	Full-year Budget	Actual 29 Feb 2016	Variance	
Revenue	R10 407 500	R9 504 354**	R903 146	** An additional R787 500 revenue was raised in February 2016 but accounted for in 2016/17
Total expenditure	(R10 635 422)	(R7 925 821)	(R2 709 601)	
Expenditure***	(R9 221 881)	(R7 600 000)	(R1 621 881)	
Discretionary expenditure	(R1 413 541)	(R325 821)	(R1 087 720)	*** Estimated NB: These figures have not yet been audited.
Surplus/(deficit)	(R227 922)	R1 578 533	(R1 806 455)	

Publish fee structure on CGSO website

<http://www.cgso.org.za/fees/>

KPI – Consumer education

Consumer section on website

<http://www.cgso.org.za/complaints/>

Media statements, feed consumer information to journalists, TV and radio appearances

Subject to funding: roadshows, including with NCC

See 'Outreach' in the body of the report for details

Determine strategy for awareness of the Code: guidance on compliance aimed particularly at smaller participants

See immediately below

5.2.1 information brochures, guidelines

<http://www.cgso.org.za/wp-content/uploads/2014/10/CODE-PARTICIPANTS.docx>

5.2.2 display the Code on the CGSO website and social networking sites

<http://www.cgso.org.za/wp-content/uploads/2015/05/CODE-2015.pdf>

5.2.3 publication of relevant matters on the CGSO website

<http://www.cgso.org.za/your-rights-explained/>

5.2.4 the facilitation of induction workshops for new employees in the industry, on the other principles and procedures contained in the Code

CGSO commissioned an e-learning module on the principles and procedures of the Code for induction of new employees in the industry:

http://www.cgso.org.za/members/introduction_to_the_code_of_conduct.htm

5.2.5 partnering with the provincial consumer protection authorities and other relevant bodies on awareness campaigns

The Ombudsman addressed a meeting in Johannesburg of consumer affairs officials from around the country and CGSO participated in three consumer awareness campaigns.

See 'Outreach' in the body of the report.

KPI – Assist participants to comply with the Code

Workshops/ liaison groups

Invited guest speaker on Code to Code launch function. Code explained by Ombud at industry liaison meetings in Cape Town and Johannesburg, at meeting of Compliance Institute, at AGM of Vacation Ownership Association of Southern Africa and at breakfast hosted by Trifecta Capital in Johannesburg. Online training at:

http://www.cgso.org.za/members/introduction_to_the_code_of_conduct.htm

Create advisory notes

<http://www.cgso.org.za/downloads/>

Compendium of cases

http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf

Publish cases on Saffii.Org

<http://saffii.org/za/cases/ZACGSO/>

KPI – Assist participants to comply with the Code

Provide concept complaints-handling process

Access to members page provided to new participants on registration

<http://www.cgso.org.za/members/>

Provide decals/enable participants to print/files for websites

Free decals provided to new participants on registration plus digital files to enable them to print and put on websites

Provide participants with copies of Code booklet printed by Lexis Nexis/access thereto/electronic summary of consumer rights of the Code

Hard copies of Code provided on registration:

<http://www.lexisnexis.co.za/store/za/catalog/booktemplate/productdetail.jsp?pag-Name=relatedProducts&prodId=ZAProd9780409118797>

Summary:

<http://www.cgso.org.za/wp-content/uploads/2014/10/CODE-PARTICIPANTS.docx>

Create e-learning material

http://www.cgso.org.za/members/introduction_to_the_code_of_conduct.htm

http://cgso.org.za/members/insufficient_stock/insufficient_stock.html

Facilitate creation of complaint management software for sale or per case usage

CGSO commissioned the customisation of the Respond system to comply with this need.

KPI – Reporting

Develop complaint management system with self-service status checker for complainants and report monthly to participants

<https://remote.cgso.org.za/RespondSelfServe/C09B956B-0154-468B-B96C-A997994BE1B9/case/lookup>

Produce annual reports containing this information

See the report to which this is annexed

KPI – The Code

Produce annual reports on these KPIs

This is the report

Propose amendments if necessary

None at this stage

KPI – The Ombud staff and training (budget permitting)

Create staff structure, recruit qualified staff, provide training, budget permitting

Organogram approved by Board

11 members of staff recruited

Internal training provided on CPA, Code, mediation, report writing and Respond case management system. In negotiations with service provider for provision of accredited mediation training for 2016/17.



**CONSUMER GOODS
& SERVICES OMBUD**

Fairplay between consumer & supplier