THE REGULATORY DEBATES

EDITION 7: MARCH 2018

For sound and responsive consumer and corporate laws

Editorial

If you would like to initiate a debate, make a suggestion or contribute an article, contact the Department of Trade and Industry (**the dti**) at:

Editor: Evelyn Masotja

Tel: 012 394 5901

Fax: 012 394 6901

emasotja@thedti.gov.za

Authors:

Mr Thomas Harban (General Manager: Attorneys Insurance Indemnity Fund (AIIF)

Ms Magauta Mphahlele (Acting Ombudsman: CGSO)

Prof Jacolien Barnard & Prof Corlia van Heerden (Consumer Protection Law Cluster, Department of Mercantile Law, University of Pretoria)

Ms Evelyn Masotja (Deputy Director-General: **the dti**, CCRD)

Mr Likani Lebani (Director: **the dti**, CCRD)

Ms Zodwa Matiwane (Director, **the dti**, CCRD)

Ms Mafedi Mphahlele (Director, **the dti**, CCRD)

Ms Lekgala Morwamohube (Deputy Director, **the dti**, CCRD)

Disclaimer

The views expressed in this publication are those of the authors and do not necessarily represent the views of **the dti** on policy and legislation. They are solely for the purpose of debate and to highlight trends regarding the implementation of legislation.

Contents

Ponzi and pyramid schemes: Participation is illegal even if promoted by a lawyer

By Thomas Harban
General Manager: ***Attorneys Insurance Indemnity Fund (AIIF)***

The various regulatory authorities continuously educate members of the public about the risks associated with participation in ponzi, pyramid and other unregistered, unregulated investment schemes. Ponzi and pyramid schemes are fraudulent investment schemes that promise high returns to 'investors'. There is no underlying regulated product or market in which the scheme is invested and the money advanced by new participants is used to pay 'dividends' or 'returns' to some of the existing participants; eventually there are not enough funds to pay the investors and the scheme collapses.

In the last decade, a number of claims have been notified to the Attorneys Insurance Indemnity Fund (AIIF) where the underlying circumstances arise out of conduct related to ponzi or pyramid schemes. All practising attorneys in South Africa automatically enjoy a level of professional indemnity cover with the AIIF – the attorney must either be in possession of a valid fidelity fund certificate or obliged to apply for such a certificate. The allegations against the attorney are usually that the practitioner, in some way or another, had been a participant, promoter or even founder or administrator of the scheme. Members of the public may have been induced to participate in the scheme by virtue of the fact the attorney's involvement gives them a misplaced assurance that as there was a person with legal knowledge involved, the scheme was 'safe'. Do not be duped by this.

At the outset it must be stated that participation, in any way whatsoever, in a ponzi or pyramid scheme is illegal and may breach the provisions of a number of pieces of South African legislation, namely section 43 of the Consumer Protection Act 68 of 2008, the Banks Act 94 of 1990, the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and the Attorneys Act 53 of 1979 (where an attorney is involved).

Claims by members of the public against attorneys arising out of the promotion of or participation in ponzi or pyramid schemes would not be covered by the AIIF as the claims:

- do not arise out of the conduct falling within the ambit of the profession of an attorney
- arise out of investment advice
- arise out of dishonest conduct

In the event of a misappropriation of the funds associated with such a scheme, the Attorneys Fidelity Fund will, likewise, not be liable to indemnify the members of the public who have suffered losses arising out of the theft (section 26 of the Attorneys Act 53 of 1979 read with section 47 of that Act).

Section 78 of the Attorneys Act and the rules (particularly rules 36, 37 and 38) governing the conduct of the profession includes provisions relating to the conduct of investment practices. Investments in ponzi and pyramid schemes will not meet the requirements as listed in the rules. Some of the factors emerging from the rules are that:

- pooling of investments (as happens in ponzi and pyramid schemes) is prohibited
- an attorney cannot invest on behalf of a client in shares or debentures of a company not listed on a licensed securities exchange in South Africa, for example, the Johannesburg Stock Exchange (JSE). The attorney must obtain written investment instructions from the client.

Members of the public must request regular written reports and a full accounting from attorneys who invest funds on their behalf. In the nature of the conduct of the profession, an attorney may be required to hold or invest funds on behalf a client. The instruction to invest must be linked to an existing instruction to carry out a legal instruction (for example, the purchase or sale of immovable property). Once the legal instruction has been concluded and all the applicable terms met, the investment should be terminated.

Are industry codes of conduct compulsory?

By Magauta Mphahlele,
Acting Ombudsman: Consumer Goods and Services Ombud

On 29 April 2015, the Minister of Trade and Industry promulgated the Consumer Goods and Services Industry Code of Conduct (CGSI Code) in terms of Section 82(2) of the Consumer Protection Act (CPA), Act 68 of 2008. This promulgation supports one of the purposes of the CPA, which is to provide for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions. The promulgation of the Code gives recognition to the Consumer Goods and Services Ombudsman (CGSO) to fulfill the role of an Alternative Dispute Resolution Agent (ADRA), as outlined in section 70 of the CPA. This means that instead of lodging a complaint with the NCC, a consumer can choose to lodge a complaint with the CGSO, which has handled more than 13 000 complaints since its inception.

While the CGSO is funded by contributions from qualifying suppliers, distributors, manufacturers and retailers as per the requirements of the CGSI Code, the Board of the CGSO is empowered by the CGSI Code to levy a joining fee and an annual levy, which can be calculated using the relative market share of each participant as well as the anticipated number of complaints and the cost of operating the CGSO. In the process of signing up participants and collecting the participation fee, the CGSO has encountered resistance from some industry participants who question whether it is compulsory to become a participant and whether the Minister has the power to include a section in the CGSI Code that empowers the CGSO to levy the participation fees.

With these concerns there is a fairly large portion of qualifying participants who have not joined the CGSO and at the same time do not cooperate with the CGSO when it receives complaints against them. This defeats the purpose of the CPA, which is to provide redress through a system of consensual dispute resolution between consumers and suppliers of goods and services. In a recent ruling, the National Consumer Tribunal (referred to henceforth as the Tribunal) was quite emphatic that "a clear message must be sent that non-compliance with the CPA will not be condoned or tolerated" as per the judgment below: Judgment and reasons NCC v Western Car sales CC NCT/81554/2017173 *SUPPLIER ORDERED TO REFUND CONSUMER R61 450 AND FINED R100 000 TO BE PAID WITHIN 30 BUSINESS DAYS FROM DAY OF JUDGMENT!*

THE FOLLOWING WAS CONSIDERED ONE OF THE AGGRAVATING FACTORS:

The respondent refused to comply with the ruling made by the Motor Industry Ombudsman (MIOSA). It then did not defend the application before the Tribunal. This behaviour is indicative of a dismissive attitude towards the rights of consumers and the dispute resolving process in general. The respondent was granted an ideal opportunity to cooperate and resolve the matter through the MIOSA, but instead chose to ignore the ruling made by the MIOSA and did not attempt to resolve the dispute. This is considered an aggravating factor.

Participating in the Ombud scheme has the benefit of preventing matters from escalating to the Tribunal level, while assisting suppliers and their customers to maintain good relations by resolving disputes in a speedy and consensual manner. It also allows the NCC to focus on investigating more systemic issues as the current Timeshare enquiry. The CGSO has decided to share the contents of a legal opinion that it sought and link it to the above ruling that was issued by the Tribunal which discusses how the Tribunal views the role of Ombudsman in the ADR scheme. While the legal opinion seems to align with the interpretation that once the activities of a participant fall within the jurisdiction of the CPA it is compulsory for them to participate in the CGSO scheme, it still raises the question of whether the CPA and the Code itself provide sufficient certainty to industry about the role of Industry Ombud Schemes. However, it is known that laws are subject to varying interpretations and sometimes the only solution is to seek a court declarator of amend the legislation.

Another challenge is the activities of various sectors are regulated in different laws and enforced by different entities. The telecommunications sector is a clear example where gaps in various pieces of legislation are exploited by some entities to deny consumers effective redress. A large portion of this sector refuses to subscribe to the CGSO while it is very clear that some of the issues relating to cellphone contracts are covered by the CPA. This is one area where a regulatory amendment should be enforced to ensure that this jurisdictional impasse is resolved. In conclusion, it is mandatory for all participants to comply with the provisions of the Code, to register with the CGSO and contribute towards the funding of the CGSO. A failure by a supplier to comply with the Code amounts to a contravention of section 82(8) of the CPA, which would constitute prohibited conduct in the form of "an act or omission in contravention of" the CPA, which may lead to the imposition of an administrative fine. A copy of a summary of the legal opinion can be made available on request.

Effective practices and the important role players in product safety monitoring and recall of defective motor vehicles

By Prof. Jacolien Barnard
Consumer Protection Law Cluster, Department of Mercantile Law, University of Pretoria

Prof. Corlia van Heerden
Consumer Protection Law Cluster, Department of Mercantile Law, University of Pretoria

The damage caused by defective motor vehicles (or their components) and the subsequent recall thereof has been at the centre of news events both nationally and globally in recent months (see for example "Defective airbags: Bakkies, cars to be recalled in South Africa" www.wheels24.co.za/News/toyota-hilux-bakkies-recalled-in-sa-due-to-defective airbags-20180115; "Toyota, Honda add 1-million vehicles to Takata airbag recalls" www.wheels24.co.za/News/Industry_News/toyota-honda-add-1-million-vehicles-to-takata-airbag-recalls-20180111). Such headlines necessitate an overview of the following:

- what safety monitoring and product recall entail?
- what the most effective practices for successful monitoring and product recall are?
- how do role players influence effective practices in this regard?

These questions will be answered taking into account not only the South African position, but also other jurisdictions such as the United States (US), the European Union (EU), Australia and Brazil. It should be noted that suppliers in the supply chain refer to all suppliers who directly or indirectly contribute to the ultimate supply of goods and services to a consumer, whether as a producer/manufacturer, importer, distributor or service provider (section 1 definition of 'supply chain' Consumer Protection Act 68 of 2008).

In general terms, product recall refers to a company's (supplier's) removal or correction of a marketed product that is in violation of state law, and against which a government agency or regulatory body could initiate legal action. A product recall can be voluntary where it is done through the company's own initiative or at the request of a government agency (as is the case in South Africa with the NCC). Apart from a continuous system and process of safety monitoring, suppliers should have a Corrective Action Plan (CAP), which is a plan to deal with product recalls should it occur, is usually governed by legislation and should be provided to the regulatory authority. In South Africa, safety monitoring and product recall is primarily governed by section 60 of the CPA read together with the NCC guidelines on product safety recall (GN 490, GG 35434 13/06/12). The minimum information that should be included in the CAP is:

- identification of the product

- scope and depth of the recall
- disposition of the recalled product
- plan for replacement or reimbursement
- plan for public notification
- effectiveness checks and status reports

The plan for public notification is of particular importance and could have a direct effect on the success of the recall. In South Africa and abroad, insufficient or incorrect methods of public notification can cause reputational damage to the supplier and its product brand and even a decrease in market shares.

Methods for public notification could include a joint news release from the regulatory body and supplier (see for example the joint media briefing by the NCC and Ford Kuga www.enca.com/media/video/livestream-joint-media-briefing-by-national-consumer-commission-and-ford-kuger-sa?playlist=107). It could also include a direct notification to the affected consumers, notifications on the supplier's website, the use of social media or even recall posters at the relevant dealerships. The particular type of consumer market will determine which method of public notification will be most successful and must take into account vulnerable consumers affected.

The regulatory authority has a duty to monitor whether the CAP is followed by the supplier and may impose penalties in the case of non-compliance and prohibited conduct. This could also be the case where the supplier delayed the notification process. The role players that form part of product safety monitoring and recall include suppliers in the supply chain, regulatory authorities (such as the NCC), industry bodies (such as the Motor Industry Ombud of South Africa), the media and consumers. Each of these role players have an impact on the success of product recall. In the case of South Africa (as was seen from the Ford Kuga recall), other crucial role players when it comes to the recall of motor vehicles are insurers and banking institutions where vehicles where financed ("Will SA banks finance a Ford Kuga?"). See the following link, www.heraldlive.co.za/news/2017/01/26/will-sa-banks-finance-ford-kuga/).

The following effective practices regarding safety monitoring and product recall are highlighted:

- a sufficient CAP with minimum information to be updated regularly;
- notification of the CAP to the regulatory authority;
- monitoring of the CAP by the regulatory authority and the institution of penalties and fines where it is not complied with; and
- relevant and appropriate public communication and notification taking into account the type of consumers affected.

Internet cafes and online gambling

By Evelyn Masotja
DDG: Consumer and Corporate Regulations Division, **the dti**

There was a time when going to the internet café was all about access to the World Wide Web. The internet is a tool that provides access to information and makes things easy and convenient. It creates convenience and bridges the gap between people across distances and information. Nowadays, internet cafes are masquerading as casinos where people gamble.[1] The form of gambling they currently participate in is online gambling, which is prohibited in South Africa. The National Gambling Act 7 of 2004 prohibits online gambling and the policy position government has taken is to continue not to allow online gambling. The internet cafes are unlicensed, use software stolen from other nations and work severely in cash for as long as they can get away with it.[2]

This is a serious concern because there are many internet cafes in cities as well as towns, including townships and is accessible to all including minors. Journalists tested internet cafes in Limpopo and pretended to be regular customers. They claim they paid a minimum of R50 to bet. This may not be the norm across the internet cafes in South Africa that offer gambling activities, but the journalists explained that the internet cafes they visited use touch-screen computers that do not access Google, while credible internet cafes have keyboards. They offer different gambling slots on every touch-screen computer to choose the game.[3]

What about vulnerability to gambling addiction? Although data on online gambling is hard to find, there are indications that it is easy to be addicted to gambling online because of the privacy of gambling in your own private space for those gambling at home or offices. Of course others argue that with online gambling sites, the activity can be monitored as the provider can know the gambling patterns of gamblers and limits can be set on gambling amounts.

Law enforcement in this area has proven to be a challenge. With serious crimes that the law enforcement agencies are faced with, prioritising illegal gambling is a gap. It has been expressed that proving that there is online gambling in an internet cafe can

1 https://steelburgernews.co.za/186174/illegal-gambling-establishments-are-exposed/
2 https://www.iol.co.za/personal-finance/is-online-gambling-legal-9011553
3 https://steelburgernews.co.za/186174/illegal-gambling-establishments-are-exposed/

be difficult given the complexity of servers used by internet cafe operators. Another challenge raised is that there are no specialised cyber-related investigators who can address these specific cases.

With a growing number of internet cafes and these unlawful gambling activities, much more needs to be done by various stakeholders to address this plight. There is a need for serious coordination among regulators and law enforcement agencies to ensure that this challenge is curbed and those who contravene the law are brought to account. There are regulators in Limpopo and North West who have started to take action on illegal internet cafes. It is important for the customer to refrain from participation if he or she realises that the internet cafe offers online gambling. Consumers must be careful not to become gamblers by default, by virtue of having visited an internet cafe that turned out to be an online casino.

The National Credit Act and mortgage agreements: Lack of innovation for potential new home owners from historically disadvantaged backgrounds?

By Likani Lebani
Director: Market Research and Trends Analysis, **the dti**

Innovative legislative advancements present enormous opportunities to improve access to housing without necessarily creating a conflict with the current credit regulatory framework that has inter alia the objective to promote a fair and non-discriminatory marketplace for access to consumers, the promotion of responsible credit granting and prohibition of reckless credit lending.

For many to be home owners, affordability is an important element in the bond approval process and to a great extent the main but not only reason behind many mortgage declines.

According to the June 2016 South African Reserve Bank Quarterly Bulletin, the value of new residential mortgage loans granted decreased by 14,57% year-on-year for the 1st quarter of 2016. Anecdotal evidence also suggests that close to half of home loans are rejected and a handful of potential home owners qualify for 100% home loans as banks increasingly want deposits of at least 10%.

This is a major constraint for first-time home buyers as their affordability is unlikely to improve due to rising prices and other unavoidable commitments, especially for the previously disadvantaged that not only have to look after their extended families, but also do not qualify for housing subsidies – the missing middle. Consequently, such people have limited options of ever owning a home in their primary area of domicile.

Under the National Credit Act (NCA), affordability is measured by net disposable income, which is calculated using the applicant's gross income, net income and fixed monthly expenses. In the case where the applicant's monthly repayments exceed one-third of his or her net income, the NCA regulations require that the application be declined on the basis of affordability.

A rent-to-own installment option is one way to improve affordability for first-time home buyers, but also drive the stagnant property market, especially in instances where residential properties stay on the sale market for a very long time. However, the sale of property through an installment sale agreement requires one to register with the National

Credit Regulator (NCR) as a credit provider and then apply all the prescripts of the NCA in order to avoid being classified as reckless lender.

Arguably, this is one area of the NCA that stifles residential market growth and home ownership by black people as a substantial number of new home owners from this population segment are declined mortgages on the basis of affordability, yet they can afford to pay monthly rentals for similarly priced properties on sale. With a revised crafting of the NCA, the rental payments under an installment sale agreement could be incorporated into a mortgage agreement that over an agreed period contributes to the deposit.

Once the deposit has accumulated to the requisite levels, this can then be used towards conversion to the usual mortgage of 20 to 30 years – now of a lower amount but also to a buyer with a better affordability index. This said, the assumption is that the new home owner does not incur increased debt when the deposit is being built up towards ownership. Notwithstanding this risk, the heart of the matter is that potential black home owners are declined mortgages because of mainly affordability issues yet the NCA can be twigged to avoid banks defaulting to affordability as the reason for decline.

Through the protection of an amended NCA, committed and reputable home lending institutions, a rent-to-own option can be better structured and secured to benefit both the buyer and seller. While the Alienation of Land Act, No. 68 of 1981, still presents an opportunity for sellers and buyers to enter into installment sale agreements without the use of bank finance, this is not a widely used option as most potential buyers choose the commercial banks route. Furthermore, private agreements that do not involve liquid lending institutions present potential risk to both buyers and sellers in cases of default or failure to comply with the agreement obligations by either party. Consequently, this has led to a default position where residential property sellers prefer bond-approved buyers, which to a significant degree excludes a large number of the previously disadvantaged.

All said and done, the issue of human settlements is a national priority that requires innovative regulatory as well as practical solutions from both the public and private sectors. It should therefore be expected that the latter will develop innovative ways to overcome the requirements of the NCA if they have already not done so or rather that the NCA be made more dynamic in order to evolve with the current socio-economic realities in the country.

Who has the responsibility in a company to address environmental issues?

By Zodwa Matiwane,
Director: Legislative Drafting, **the dti**

The social and the ethics function is the responsibility of the Social and Ethics Committee (SEC) for addressing environmental issues in organisations. Most companies focus on profit-making and fail in the area of ethics. If the SEC is functional and provides proper advice within a company, this will have a positive impact on the brand of that company, which will in turn extend to profits, job creation and further sustainable growth of the company and subsequently the economy. Before companies can implement good corporate governance, a better understanding of the company's purpose is imperative. For years, businesses conducted their operations with little concern about environmental consequences. The requirement to appoint a SEC originates from Section 72 (4) of the Companies Act 71 of 2008 (the Companies Act), which reads as follows: "The Minister, by regulation, may prescribe - (a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to - (i) annual turnover;(ii) workforce size; or (iii) the nature and extent of the activities of such companies; (b) the functions to be performed by social and ethics committees required by this subsection; and (c) rules governing the composition and conduct of social ethics. Ultimately, all humans are responsible to ensure that environmental ethics are being met. While applying environmental ethics, all humans need to expand the concept of the natural environment beyond living things, to the entire ecosystem from which all life and business firms obtain resources and to which all bears responsibility for the impacts that all firms have on it. The business organisation can apply the ethics of care, by which all firms should follow a practice of caring for the natural environment and maintaining environmental sustainability.

The common and fundamental environmental issues facing businesses today are the following:

- climate change
- energy
- water
- biodiversity and land use

- chemicals
- toxics and heavy metals
- air pollution
- waste management
- ozone layer depletion
- oceans and fisheries
- deforestation

There are many environmental issues now relevant to the operations of businesses or companies that need to be addressed through environmental ethics. Some of the challenging environmental issues include:

- ecological damage
- traditional business attitudes towards the environment
- problems involving environmental abuse
- environmental protection
- methods to pay for environmental protection

Environmental issues caused by human activities are potentially exposing harm or danger to all lives and the ecosystem. At the same time, these problems reduce the quality of human life. Companies that were once infamous for the damages they made to the environment are now paying attention to the initiatives for environmental protection as environmentalism is now profitable. Environmentalists had one approach available for getting most businesses to treat the environment with greater respect: “mandate, regulate, and litigate”. Businesses would stop damaging the environment only when it became illegal and/or unprofitable to do so. Under Regulation 43(iii) of the Companies Act, a social and ethics committee has to monitor the company’s activities, having regard to any relevant legislation, other requirements or prevailing codes of best practice with regard to matters relating to the environment, health and public safety, including the impact of the company’s activities and of its products and services. Factors that have arisen in the social environment have created an atmosphere in which business criticism has taken place and flourished. Though some resistance to change has been apparent on business’s part, the more positive responses on the part of business have been an increased awareness and concern for the social environment as well as a changed social contract (relationship) between business and society. Over the decades, many factors in the social environment have created a climate in which criticism of business has taken place and flourished. Some of these factors occur relatively independently of one another, but some are interrelated; that is, they occur and grow hand in hand. Many questions can be asked while trying to find the ways of applying ethics in a response to environmental issues.

The company may develop a better idea of what environmental ethics is and how it can be practised as a response to environmental issues using the ethical model and principles approach to ethics such as the Kohlberg's model of moral development, moral principle of utilitarianism, the golden rule and virtue ethics. Kohlberg's model of moral development accurately depicts the stages of moral development according to a general sequence of three levels (each with two stages) through which individual advance in learning to think or develop morally. The three levels of moral development of Kohlberg's model of moral development are:

1. pre-conventional
2. conventional
3. post-conventional, autonomous or principled

Kohlberg's model of moral development can be used to identify attitudes and behaviours towards environment related issues or problems at developmental level. At the pre-conventional level of moral development in environmental ethics, humans and their organisations or firms can be perceived as being concerned only with self or with their own species and habitats. In conventional level of moral development, humans and their firms or organisations will appreciate nature, but only when and where such appreciation is common or in accordance with the latest fashion or trends. At the post-conventional, autonomous, principled level of moral development, which Kohlberg argues few humans reach, the focus of environmental ethic might include more mature attitudes and behaviours that are more universal, including considerations of all species and habitats.

Twin Peaks model of financial regulation: What are the implications for the NCR?

By Mafedi Mphahlele,
Director: Knowledge Management,
the dti

The Financial Sector Regulation Act No. 9 of 2017 was published in Government Gazette No. 41060 on 22 August 2017. Different sections of the Act will come into effect on different dates, to coincide with the establishment of the two regulators - the Financial Sector Conduct Authority (FSCA) and Prudential Authority (PA). It is anticipated that the authorities will be established in early 2018.[1] The Act introduces the Twin Peaks model of financial sector regulation in South Africa which places equal focus on prudential and market conduct supervision by creating dedicated authorities responsible for each of these objectives as follows:

1. South African Reserve Bank (SARB), the 'prudential regulator', being responsible for regulating all financial institutions, namely; banks, insurance houses and asset management sector (solvency); and
2. financial conduct being regulated by a new entity called Financial Sector Conduct Authority (FSCA), the market conduct regulator which replaces the Financial Services Board (FSB) (market conduct).

The Twin Peaks model also provides for cooperation and collaboration among the NCR, the SARB and the Financial Intelligence Centre (FIC).[2]

This approach is introduced with understanding that the current legislative framework is fragmented, inconsistent, incomplete across the financial sector and too institutionally focused as opposed to functionally focused, which in turn compromises the effective supervision of market conduct by the regulators.[3] Ultimately, the Act establishes the Financial System Council of Regulators (FSCR) as a forum for the senior representatives of the financial sector regulators and other institutions represented on the FSCR (such as **the dti**, in particular the NCR). It is within this framework that the NCR is expected to participate as a stakeholder for market conduct supervision within the twin peaks landscape. Members of the FSCR has to co-operate and collaborate, and where

1 http://www.treasury.gov.za/twinpeaks/Implementation%20of%20the%20Financial%20Sector%20Regulation%20Act.pdf 20171107
2 http://www.fin24.com/Companies/Financial-Services/zuma-signs-twin-peaks-bill-into-law-20170821
3 KPMG 2016. Market Conduct: Regulatory change is upon us and it cannot be avoided https://assets.kpmg.com/content/dam/kpmg/za/pdf/2017/01/za-regulatory-change-is-upon-us.pdf

appropriate decide on the consistency of action between the financial sector regulators for a holistic and co-ordinated market conduct regulatory framework that applies consistently across the financial sector.[4]

The Act aims to achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the republic, by establishing a regulatory and supervisory framework that promotes:

- financial stability
- the safety and soundness of financial institutions
- the fair treatment and protection of financial customers
- the efficiency and integrity of the financial system
- the prevention of financial crime
- financial inclusion
- transformation of the financial sector
- confidence in the financial system[5]

In practice, the FSR Act does not take away from the NCR and the NCA, but consider them as a separate focus for financial stability. In view of the above, the NCR remains the sole regulator of the credit market itself and the features around the credit products. The NCR therefore regulates credit providers as provided for within the NCA. The NCR will still be responsible for regulating the market conduct of credit agreements issued by banks and non-banks, e.g. furniture retailers whilst the FSCA will be responsible for regulating the market conduct of these players for other financial services that they may provide. For example, credit that falls outside the scope of the NCA will be regulated by the FSCA.[6] According to Reddy, the Director at Norton Rose Fulbright, the current ambit of financial services legislation will remain in force.[7] All financial institutions will still be regulated by their current governing legislation and new licence applications will be subject to the current licensing procedures provided for in the relevant legislation.[8] According to National Treasury, Twin Peaks implies the following in the context of the NCR:

4 ibid
5 https://www.iol.co.za/news/zuma-signs-financial-sector-regulation-act-into-law-10883725
6 https://www.moonstone.co.za/national-credit-regulator-and-cms-under-twin-peaks/
7 https://www.iol.co.za/personal-finance/twin-peaks-act-will-give-you-more-protection-10300428
8 https://www.bbrief.co.za/2017/08/15/financial-services-industry-adopts-twin-peaks-regulation/

Entities regulated under the	Licensing authority	Subordinate legislation	Supervision and enforcement
National Credit Act	National Credit Regulator	Standards issued by the PA and FSCA will apply to entities licensed by the NCR. Standards will be issued in consultation.	The NCR remains responsible for supervising and enforcing the NCA PA and FSCA supervise and enforce requirements of standards, subordinate legislation they issue.

In view of the above, credit providers take a particular interest in the Act as credit products and services are implicated within the ambit of this new law, which begs the question on how cumbersome the compliance with the National Credit Act and the new financial legislation. This Act does not take away the powers of the NCR in terms of the NCA to regulate and will be enforce compliance. This remains an area for discussion by regulators and legislators.

Valuation and pricing of musical works in the digital space: A challenge for copyright

By Lekgala Morwamohube,
Deputy Director: Market Research and Trend Analysis, **the dti**

In recent years, the internet has brought technological developments wherein internet intermediaries such as Apple, Spotify, Pandora and Google have created platforms for delivering digital content such as movies, music, books and other forms of entertainment. This allows digital content to be delivered to any part of the world.

In the music industry, downloading of music is no longer a big concern as compared to the streaming of music, which is understood as having access to the music on a playlist without owning it. This simply means, viewing, listening or playing content directly from the internet without downloading a copy. This differs from downloading of music in a sense that the latter refers to transferring of a copy of the file to an electronic device. For example, downloading a music track to a computer through iTunes or Amazon.

Today, streaming services fulfil the same function as CD sales in that both deliver recorded music to consumers. However, while these internet intermediaries rely heavily on advertising, hundreds of millions of users upload and watch or listen to content freely which create a significant gap between usage and payment. In this regard, record labels have lost their gatekeeper role as they are not responsible for deciding the music that consumers would listen to. The distribution of musical content is now available to everyone, allowing the consumers to make the decision as to the works they want to listen to. These technological developments raise new risks of copyright erosion and inadequate or unfair compensation of creators mainly the valuation and pricing of musical works.

In view of the above, creators of music works and recording companies are calling for proper regulation of these companies so that there is a fair compensation of the royalties to the copyright owners. However, the pricing of copyrighted works in a way that creators are fairly compensated while users benefit from copyrighted works has always been a difficult task in a brick and mortar environment and doing it in the digital era is even more challenging. One of the challenges identified is the classification of these internet intermediaries within the music industry value chain. The question is: can they be classified as users or rights holders in order to be held liable for commercial gain generated out of copyrighted material? At the moment these companies do not want to be identified in either way which makes it difficult to be held accountable. The main concern with the creators of music works is that the royalties paid back to them for services such as streaming or dissemination are minimal. By so doing, the digital technologies are found to be reducing the marginal cost of dissemination or distribution of works to almost zero thereby favouring the emergence of markets and the internet intermediaries. This is seen as the "value gap" in the music industry which is now a worldwide issue for creators of music works and the recording companies.[1]

Academic experts in the music industry research emphasise the need to strike a balance in determining the proper royalty level and the efficient rate base which require that the competitive market value of such copyright in musical works and sound recordings be ascertained. Hence the importance of copyright law to take into consideration the paradigm-changing potential that comes from large scale digitisation. Another critical consideration to make is a clear distinction between many forms of music copyright because the exclusive right of authors, composers and music publishers as well as the reproduction, adaptation, performance, broadcast and communication of their works and sound recordings come in different forms, depending on the industry considered and the technology used. These forms come with financial deals, which blur the lines between different business models in the music delivery industry and it is not clear how they will impact on the copyright royalties.[2]

Globally, there is a worldwide push to address this value gap so that more of the royalties go to the copyright owners. For example, On 14 September 2016, the European Commission published a proposal on copyright in the Digital Single Market to address the 'value gap i.e. the misalignment between the volume of creative content accessed globally by users through the services of the targeted providers and the revenue that this access generates for the holders of copyright in that content.[3] Among other things, this obliges companies such as YouTube to work with copyright holders (labels, publishers, individuals). In the US, there is recently a court case between the streaming services companies and the creators of the music works on issues of royalty payments.

1 Boyer M (2017) The competitive market value of copyright in music: a digital gordian knot"

2 ibid

3 Angelopoulos C (2017) On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market (January 2017). Available at SSRN: https://ssrn.com/abstract=2947800

Important contact details of CCRD agencies

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD/ CALL CENTRE	COMPLAINTS/ COMPLIANCE LINE OR EMIAL ADDRESS	
National Credit Act (Act No. 34 of 2005)	National Credit Regulator (NCR)	011 554 2700	086 062 7627	complaints@ncr.org.za For complaints regarding debt counselling: dccomplaints@ ncr.org.za .
Consumer Protection Act (Act No. 68 of 2008)	National Consumer Commission(NCC)	012 428 7726	012 428 7000	complaints@thencc.org.za
	Consumer Goods and Services Ombudsman (CGSO)	011 781 2607	086 000 0272	complaints@cgso.org.za/ info@cgso.org.za
	Consumer Goods Council of South Africa(CGCSA)	086 124 2000		info@cgcsa.co.za
	National Consumer Tribunal (NCT)	012 683 8140		registry@thenct.org.za
	National Regulator for Compulsory Specifications (NRCS)	012 482 8700		

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD/ CALL CENTRE	COMPLAINTS/ COMPLIANCE LINE OR EMIAL ADDRESS	
Companies Act (Act No. 71 of 2008)	Companies and Intellectual Property Commission (CIPC)	086 100 2471		
	Companies Tribunal (CT)	012 394 3071/ 5553		registry@companiestribunal.org.za
	Takeover Regulation Panel (TRP)	011 784 0035		admin@trpanel.co.za
Liquor Act (Act No. 59 of 2003)	**the dti**: National Liquor Authority (NLA)	012 394 1683		
Lotteries Act (Act No. 57 of 1997)	National Lotteries Commission (NLC)	012 432 1300/ 1399	012 432 1434 08600 65 383	
	National Lotteries Distribution Trust Fund (NLDTF)	086 006 5383		nldtf@nlcsa.org.za
National Gambling Act (Act No. 7 of 2004)	National Gambling Board (NGB)	086 722 7713	010 003 3475	info@ngb.org.za

the dti Campus
77 Meintjies Street
Sunnyside
Pretoria
0002

the dti
Private Bag X84
Pretoria
0001

the dti Customer Contact Centre: 0861 843 384

Website: www.thedti.gov.za