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**CONTENTS • INHOUD**

No.

Page Gazette  
No. No.

**GENERAL NOTICE**

**Trade and Industry, Department of**

*General Notice*

492	Consumer Protection Act (68/2008): National Consumer Commission: Final enforcement guidelines, relating to the internal enforcement functions of the Commission in order to give effect to the Act .....	3	34484
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## GENERAL NOTICE

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### NOTICE 492 OF 2011 NATIONAL CONSUMER COMMISSION

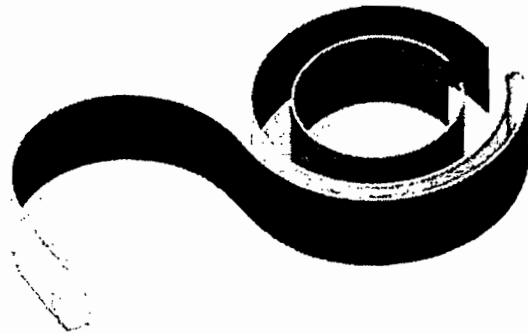
I, Ms Mamodupi Mohlala, the Commissioner of National Consumer Commission, hereby publish final enforcement guidelines, relating to the internal enforcement functions of the Commission in order to give effect to Consumer Protection Act, 2008 (Act No 68 of 2008).

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Ms. M MOHLALA

COMMISSIONER: NATIONAL CONSUMER COMMISSION



NATIONAL CONSUMER COMMISSION

**NATIONAL CONSUMER COMMISSION**

**ENFORCEMENT GUIDELINES**

Final Draft – 20/07/2011

## Definitions

**The Act** means the Consumer Protection Act 68 of 2008.

**The Commission** means the National Consumer Commission established in terms of Section 85 of the Consumer Protection Act 68 of 2000.

**Court** means any court of law with the requisite jurisdiction established in terms of an applicable legislation, but does not include a consumer court.

**Inspector** means a person appointed in terms of Section 88 of the Consumer Protection Act 68 of 2008 to carry out investigative functions of the Act.

**Investigator** means a person appointed in terms of Section 88 of the Consumer Protection Act 68 of 2008 to carry out investigative functions of the Act, and includes any person appointed on a contractual basis.

**Minister** means the Minister of the Department of Trade and Industry, who as a member of the Cabinet is responsible for consumer protection matters.

**Tribunal** means the National Consumer Tribunal established in terms of Section 26 of the National Credit Act 34 of 2005.

## Abbreviations

<b>ADR</b>	<b>Alternative Dispute Resolution</b>
<b>CC</b>	<b>Contact Centre</b>
<b>CHU</b>	<b>Complaints Handling Unit</b>
<b>CPA</b>	<b>Consumer Protection Act</b>
<b>EXCO</b>	<b>Executive Committee</b>
<b>NCC</b>	<b>National Consumer Commission</b>
<b>NCT</b>	<b>National Consumer Tribunal</b>
<b>NGO</b>	<b>Non-Governmental Organisation</b>
<b>NPA</b>	<b>National Prosecuting Authority</b>
<b>PFMA</b>	<b>Public Finance Management Act</b>

## TABLE OF CONTENTS

Item	Description	Page No.
<b>PART A</b>	<b>Introduction</b>	<b>1</b>
	1. Functions of the NCC	1
	1.1 Functions of the Commissioner	3
	1.2 How the NCC will enforce the CPA	4
	2. Consumer Complaints	5
<b>PART B</b>	<b>Complaints Handling and Investigations by the NCC</b>	<b>14</b>
	1. Complaints Handling	14
	2. Investigations by the NCC	26
	3. The Debrief	52
	4. Conclusion	53
	5. Powers In Support of The Investigation	53
<b>PART C</b>	<b>Evidence and Procedural Fairness</b>	<b>63</b>
	1. Evidence Handling	63
	2. Procedural Fairness	69
	3. Assessment of Evidence	70
	4. Investigation Reporting	71
	5. Dealings with the Complainant	72
<b>PART D</b>	<b>Investigation Case File Review and Audit Processes</b>	<b>72</b>
	1. Scope	72
	2. Business Process – Investigation Case File Review and Audit	72
	3. Self / Peer Review	73
	4. Management Review	74
	5. Issues of Management	74
	6. Attachments – Guidelines and Procedures for the Conciliation of Complaints in the National Consumer Commission	

## PART A

### INTRODUCTION

These Guidelines have been developed with the aim of providing an operating framework by which the National Consumer Commission may carry out its mandate in terms of the Consumer Protection Act, 68 of 2008. The Guidelines cover a wide range of issues, from how the NCC will enforce the Act, up to how various essential processes and procedures will be carried out.

#### 1. Functions of the NCC

The National Consumer Commission (NCC) is a juristic body established in terms of the Consumer Protection Act. It is headed by a Commissioner who is appointed by the Minister of Trade and Industry. It is obliged to carry out the functions and exercise the powers assigned to it by the CPA.

**In carrying out its functions, the NCC may:**

- **Take into consideration** international developments in the field of consumer protection;
- **Consult** any person, organisation or institution with regard to any matter relating to consumer protection;
- **Develop**, and promote the voluntary use of Codes of Practice with regard to the following:
  - Use of plain language in documents;
  - Standardised or uniform means of presenting and

- communicating the right to disclosure of information;
- Alternative dispute resolution<sup>1</sup>;
  - **Identify** national or provincial legislation, or regulations that affect the welfare of consumers, in relation to laws that govern matters affecting consumers; and consistent with the purposes of the CPA develop proposals with the purpose of reforming current legislation.
  - **Consult** with provincial consumer protection authorities; organs of state, consumer protection groups, alternative dispute resolution agents and suppliers,
  - **Promote** consumer protection within organs of state<sup>2</sup>, in order to better achieve the purposes of the CPA in relation to goods and services supplied to consumers
  - **Consult** with relevant provincial consumer protection authorities, organs of state within the national sphere of government, regulatory authorities, consumer protection groups, and ombudsman with respect to the delivery of any such goods or services, with the object of:
    - identifying any practice that is inconsistent with the purposes and policies of the CPA; and
    - developing proposals for reform of any such practices; and
    - reporting from time to time to the Minister with recommendations for achieving the progressive transformation and reform of practices contemplated in this section.

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<sup>1</sup> in terms of section 70

<sup>2</sup> S95 of CPA



## 1.1 Functions of the Commissioner

The Commissioner is responsible for all matters pertaining to the proper functioning of the NCC and is also the accounting authority for the NCC. As such, the Commissioner is responsible for the following —

- all income and expenditure of the NCC;
- all revenue collected by the NCC;
- all assets, and the discharge of all liabilities of the NCC; and
- the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the NCC.

**The Commissioner may in addition—**

- assign management or other duties to employees with appropriate skills to assist the NCC in the management, or control over the functioning of the NCC; and
- delegate, any of the powers or functions of the Commissioner to any suitably qualified employee of the NCC.

## 1.2 How the NCC Will Enforce the CPA

In terms of Chapter 6 of the CPA the NCC will enforce the Act in the following ways:

- **promote** informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, **but is not responsible** to intervene in or directly adjudicate any such dispute;
- **receive** complaints concerning alleged prohibited conduct or offences, and deal with those complaints in accordance with Part B of Chapter 3;
- **monitor** the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted;
- **monitor** the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;
- **investigate and evaluate** alleged prohibited conduct and offences;
- **issue and enforce** compliance notices;
- **negotiate and conclude** undertakings and consent orders contemplated in section 74;
- **refer** to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act No. 89 of 1998);
- **refer** matters to the Tribunal, and **appear** before the Tribunal; and
- **refer** alleged offences in terms of this Act to the National Prosecuting Authority.

## **2 CONSUMER COMPLAINTS**

This section of the document highlights the manner in which the NCC will deal with complaints received. As indicated in the Act, the NCC will be required to investigate and evaluate alleged prohibited conduct. Such conduct is spelt out in the CPA and will emanate from complaints lodged by consumers.

The investigation component is critical to the enforcement function of the NCC. Before an investigator is able to understand the investigation process that the NCC will follow in conducting investigations, they must ensure they are well conversant with all aspects of the Act.

### **2.1 What is a Complaint?**

A complaint will comprise of an allegation that a consumer's rights in terms of the CPA have been infringed, impaired or threatened; or that prohibited conduct has occurred or is occurring. Such a complaint must be lodged in the prescribed form.

### **2.2 Who Can Lodge a Complaint?**

In terms of the CPA, any person to whom goods or services are marketed in the ordinary course of a supplier's business; or any person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, can lodge a complaint with the NCC. Consumers include franchisees and businesses that fall within the ambit of the threshold stipulated in the regulations.

The NCC itself may directly initiate a complaint or an investigation concerning any alleged prohibited conduct. It may also do so when directed by the Minister in terms of section 86 (b); or at the request of -

- a provincial consumer protection authority;
- another regulatory authority; or
- an accredited consumer protection group

The following categories of people can lodge complaints with the NCC:

- persons acting on their own behalf;
- an authorised person acting on behalf of another person who cannot act in their own name;
- a person acting as a member of, or in the interest of, a group or class of affected persons;
- a person acting in the public interest (in this instance such person can only lodge the complaint with leave of the Tribunal or Court, as the case may be); and
- an association acting in the interest of its members.

A person who lodges a complaint is referred to as the **complainant**, whereas the person against whom the complaint is lodged is referred to as the **respondent**.

### 2.3 Against whom may a Complaint be Lodged?

A complaint may be lodged against the following classes of people:

- an individual,
- a juristic person,
- a partnership or trust,
- an organ of state,
- an entity owned or directed by an organ of state,
- a person contracted or licensed by an organ of state to offer or supply any goods or services,
- a public private partnership in the ordinary course of business,
- a club, trade union, association, society or other collective, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes
- a body or entity provided elsewhere in the Act.

Where the respondent's principal office is situated outside the country, the NCC still has jurisdiction, provided that the prohibited conduct was committed within the Republic of South Africa.

## 2.4 Types of matters that the NCC may deal with:

In terms of the CPA<sup>3</sup> the NCC will have jurisdiction over the following matters:

- Every transaction occurring within the Republic unless exempted.
- The promotion or supply<sup>4</sup> of any goods or services within the Republic unless those goods or services have been exempted.
- Goods or services supplied in terms of a transaction irrespective whether these are offered or supplied in conjunction with any other goods or services or separate from any goods or services. (for eg: X supplies a copier and X also agrees to service the copier or X subcontracts the servicing)
- If goods are supplied in terms of an exempt transaction as provided for in section 5 (5) of the Act, the importer, producer, distributor and retailer of those goods respectively are still subject to sections 60 and 61. These sections relate to safety monitoring and liability for damage caused by goods.
- Goods or services that are subject to the National Credit Act. "whilst the NCC has no jurisdiction over the credit agreement itself" it would still have deal with contraventions arising from the goods or services that are the subject of the credit agreement.

<sup>3</sup> Section 5

<sup>4</sup> Section 5(1)(b)(i) makes reference to "supplier", it is submitted that it should have read "supply"

- **Franchise transactions irrespective of the value of the transaction in so far as the following<sup>5</sup>:**
  - the solicitation of offers to enter a franchise agreement;
  - an offer by potential franchisor to enter into franchise agreement with potential franchisee;
  - a franchise agreement or supplementary agreement to a franchise agreement
  - the supply of any goods or services to a franchisee in terms of a franchise agreement

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<sup>5</sup> Section 5(7)

The application of this Act extends to all matters irrespective of whether the supplier:

- resides or has their principal office in or outside the Republic
- operates on a for-profit basis or otherwise
- is an individual; juristic person; partnership; trust; organ of state; an entity owned/ directed by the State; a person contracted or licensed by an organ of State to offer or supply any goods or services;
- is a public- private partnership; or is required or licensed in terms of law to avail the goods and services to the public.

## **2.5 Types of matters that the NCC may not Deal With**

The NCC cannot deal with transactions that are as follows:

- 1) Involving the promotion or supply of any goods or services outside the Republic
- 2) Which are exempt.
- 3) Which relate to exempt goods or services.
- 4) Relating to goods and services promoted or supplied to the State.
- 5) Where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value of 2 Million Rand
- 6) A credit agreement in terms of the National Credit Act.
- 7) Services that are supplied in terms of an employment contract.
- 8) Give effect to a collective bargaining or collective agreement in terms of the Labour Relations Act.



## 2.6 The Enforcement of Consumer Rights

The process(s) below may be followed in the enforcement of a consumer's right:

In order to enforce any right in terms of the CPA<sup>6</sup>, a transaction or agreement or if a consumer wishes to resolve any dispute with a supplier, the consumer may:

- refer the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of the particular dispute;
- refer the matter to the applicable Ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such Ombud; or
- if the matter is not in the jurisdiction of an Ombud then it may be referred to an accredited<sup>7</sup> industry Ombud provided the supplier is subject to the jurisdiction of that Ombud.
- apply to the consumer court of the province with jurisdiction over the matter;
- refer the matter to another alternative dispute resolution agent<sup>8</sup>; or
- file a complaint with the NCC in accordance with CPA<sup>9</sup>
- approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. (Of last resort)

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<sup>6</sup> Section 69

<sup>7</sup> In terms of section 82(6)

<sup>8</sup> Section 70

<sup>9</sup> Section 71

## 2.7 What can the NCC do when a Complaint is received in Terms of the Consumer Protection Act

When a complaint is received or initiated, the NCC may deal with it in any one of the following ways:

### 2.7.1 Notice of Non-Referral

A **notice of non-referral**<sup>10</sup> may be issued by the NCC to the complainant. The notice must be in the **prescribed form**. (See Regulations)

A non referral notice will be issued where the complaint;

- (i) appears to be frivolous or vexatious;
- (ii) does not allege any facts which, if true, would constitute grounds for a remedy under this Act; or
- (iii) is made more than three years after
  - (a) the act or omission that is the cause of the complaint; or
  - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.
- (iv) is against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

If the Commission issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Consumer Court or the Tribunal.

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<sup>10</sup> Section 72

### 2.7.2 Referral

The following are the actions the NCC may take in instances of referral:

The NCC may refer the complaint to:

- (i) an alternative dispute resolution agent,
- (ii) a provincial consumer protection authority
- (iii) a provincial consumer court

for the purposes of assisting the parties who would be attempting to resolve the dispute in terms of Section 70 (ADR), unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner;

The complaint may be referred to another regulatory authority with jurisdiction over the matter for investigation;

**PART B**

**COMPLAINTS HANDLING AND INVESTIGATIONS BY THE NCC**

**1. COMPLAINTS HANDLING BY THE COMMISSION**

The Alternate Dispute Resolution (ADR) and Investigation processes to be adopted by the NCC are hereinafter discussed in detail.

**1.1 Receipt of Complaints**

<ul style="list-style-type: none"> <li>Complaints are received from consumers, consumer NGOs and/or any person or entity acting on behalf of consumers. These complaints will be received by the <b>NCC Contact Centre</b> and would be escalated to the <b>Complaints Handling Unit (CHU)</b> of the NCC</li> </ul>	<p style="text-align: center;"> <b>Complaints</b>              ↓  <b>NCC Contact Centre</b>              ↓  <b>Complaints Handling Unit (CHU)</b> </p>

**1.2. Assessment and Allocation**

<ul style="list-style-type: none"> <li>Upon receipt and escalation of the file, the Manager will implement a process of <b>Assessment and Allocation</b>. There are <b>four (4) key steps in the resolution of complaints</b> namely:</li> <li><b>Assessment &amp; Allocation</b></li> </ul>	<p style="text-align: center;"> <b>Receipt and Escalation</b>              ↓  <b>Assessment and Allocation</b>              ↓  <b>Negotiation</b>              ↓  <b>Resolution</b> </p>
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<ul style="list-style-type: none"> <li>• <b>Notices of Non Referral</b></li> <li>• <b>Referral</b></li> <li>• <b>Negotiation /Conciliation-</b></li> </ul>	
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**1.2.1 Assessment & Allocation Phase**

<p>Upon receipt of the escalated complaints from the <b>Contact Centre</b>, the Manager <b>Complaints Handling Unit</b> will assess:</p> <ul style="list-style-type: none"> <li>• <b>validity</b> and <b>problem-type</b> and allocate the file to officials for <b>negotiation</b> and <b>conciliation</b>.</li> <li>• The Manager will <b>allocate</b> the complaint to the appropriate official upon receipt.</li> </ul> <p><b>a) Assessment</b></p> <ul style="list-style-type: none"> <li>• The Manager in complaints will asses information in the file</li> <li>• In order to confirm jurisdiction</li> <li>• Make an initial recommendation</li> </ul> <p><b>b) Allocation</b></p> <p>Record allocation on the <b>Allocation Database</b> (including- Date of allocation, name of official)</p>	<p style="text-align: center;"><b>Assessment For Validity, Problem-type and Jurisdiction by CHU</b></p> <p style="text-align: center;">↓</p> <p style="text-align: center;"><b>Allocate File to Officials For Negotiation and Conciliation</b></p> <p style="text-align: center;">↓</p> <p style="text-align: center;"><b>Allocation</b></p> <p style="text-align: center;">↓</p> <p style="text-align: center;"><b>Allocation Database</b></p>

## Investigating the Complaint

As a rule, the NCC may **direct** an Investigator to investigate the complaint as quickly as practicable. At any time during an investigation, the NCC may designate one or more persons to assist the Investigator conducting the investigation.

It may not be possible for the NCC to investigate every matter depending on whether such matters follow the investigation criteria set by the NCC .

### 1.2.2 Notices of Non Referral

- **Notices of Non Referral will be issued in consultation with management in the CHU.** The reasons for issuing the notice must be objective and all other alternatives must be ruled out before the notice is issued.
- **Managers in the unit will moderate information** contained in all notices before they are issued.
- **Draft letters will be referred to the Commissioner's office for approval and signature.**

### 1.2.3 Referral.

- The unit will establish **Referral Protocols** with Provinces, Regulators, Ombud-schemes and ADR Agents. Referrals will be to such entities in accordance with the referral protocols.
- **Referrals will be in writing** and will include **all documents received** from the complainant.
- **Written confirmation of referrals will be issued in writing to the**

**complainant.** The said written confirmation will include:

- **The name of the institution** to which the matter has been referred,
- Contact details of the person handling the matter.

#### 1.2.4 Negotiation

After allocation of cases, the official dealing with the complaint will:

- **Where insufficient information has been provided:** request the complainant to furnish further information. If the information provided by the complainant is not sufficient to enable officials to determine the core of the complaint, the official must contact the complainant to request further information. The request for additional information can be done telephonically or in writing depending on the appropriate mode of correspondence stated by the complainant in the complaint form.



- **Where sufficient information has been provided:** proceed with a mediation and negotiation process



- **Where the complaint is perceived as complex:** request the intervention of an independent expert or mediator.

### 1.2.5 Request For Further Information From The Complainant

- The complainant will be given a sufficient time to provide the required information.
- ↓
- Should the complainant fail to provide the required information **the official should conduct a final follow-up.**
- ↓
- Should the complainant still not furnish the additional information **the official should record the action and close the file.**

## 2. Analysis of Facts

When all the facts and all supporting information relating to the complaint have been obtained, the facts in dispute must be analysed in terms of the law, primarily the Act. **Analysis of the facts** may take into consideration any other national legislation, any treaty, international law, convention or protocol.

Upon analysis, the official prioritizes the complaints taking into account the following factors:

- **nature of the complaint;**
- **complexity of the complaint;**
- **harm the consumer may suffer if the matter is delayed.**



### 3. Conciliation

The mediation methods to be employed by officials in Complaints Handling are:

- telephonic mediation,
- written mediation,  
and or
- face to face conciliation.

#### 3.1.1 Telephonic Conciliations

In this method the telephone will be used.

During **telephonic conciliations** the official must begin by introducing her/himself and must provide a brief background of the function of the Commission generally and the **Complaints Handling Unit** in particular. He/ She should then request to speak to a person with the authority to make decisions. He/ She must record the name, position and all relevant details in the initial conversation.

#### Benefits of the Telephone Conciliation Method

- **As a conciliation method, use of the telephone is quicker**, and it has low cost implications for both the consumer and the business.
- It is effective for less complex complaints and in instances where the respondent's business is co-operative.
- The official must then **furnish a summary of the complaint and the redress sought by the complainant** e.g. refund and/or repair etc.
- S/he should **provide the respondent with the opportunity to respond to the allegations**. The respondent must be allowed to suggest possible methods of resolving the complaint. In the event that the complainant is not entirely satisfied with the offer the official should also probe for other possible offers
- **If a settlement is reached it should be confirmed in writing** and a copy of the

confirmation is sent to both the consumer and the respondent/business for reference purposes.

#### Generation of a Consent Order

- Where appropriate, a settlement may be processed so as to generate a **Consent Order** in terms of section 74 of the Act. In the event where there is no settlement and there are reasonable grounds that a business has engaged in a prohibited practice, **the complaint may be escalated for the purpose of obtaining a Compliance Notice in terms of section 100 of the Act.**



The appropriate corrective action will be determined on a case by case basis but may include, inter alia, that the respondent sign a written undertaking to remedy the matter complained about.



If the respondent agrees with one of the remedies suggested by the complainant, i.e. refund or repair, the official should thank the respondent and advise that a written confirmation of the offer will be sent to both the complainant and the respondent, including a Consent Order. The official should then end the call.

#### 1.6.1.1 Written Conciliation

Written conciliation is appropriate where either the consumer or the businesses are, not in close proximity to the office or of each other.

- The official should send a letter to **the respondent** and also attach a copy

of the original complaint (but take caution to exclude offensive statements) and request a response.

- **The first written correspondence** to the respondent must include a statement to the effect that a formal conciliation process may follow, in the event that the complaint is not resolved amicably. The letter is sent to the respondent, Tele-fax or e-mail communication is encouraged because receipt is immediate.
- **Should the response be an offer to settle the complaint, the official will notify the complainant in writing and attach correspondence from the respondent. If settlement is accepted it will be confirmed in writing. A copy of the confirmation is sent to both the consumer and business for reference purposes.**
- In the event that the **complainant is not satisfied** with all the offers made by the respondent, the official must decide, in consultation with the managers, the reasonableness of the refusal by the complainant to accept the offer and may suggest other possible remedies.
- In the event that the **respondent does not agree** with the remedy suggested or disputes the allegations, the official must advise the complainant of the deadlock and/or dispute of fact which results in the matter not being capable of resolution.
- In circumstances where the **response is not forthcoming**, the official should conduct a follow-up by telephone, if more time is requested the official will provide an additional period. **The official will be required to update the file at all times on all steps taken,**

**NB: Guidelines and Procedures for the Conciliation of Complaints in the National Consumer Commission marked ADR Guidelines are attached.**

### 3.1.3 Face to Face Conciliation

- **Conciliation conferences should be held at the Commission's offices. However, they may also be held at the respondent's offices or at a venue agreed upon by both parties.** Conciliation conferences at the respondent's place of business can be used in complex cases. During the conciliation session the official should assist the parties reach a settlement **by finding common ground**. It will be better to work from that premise rather than by attempting to establish true facts because this may lead to a dispute of fact, which cannot be adjudicated



- The official must telephone the respondent, introduce himself/herself and provide a brief mandate of the Commission and in particular that of the Complaints Handling Unit. He/She should then request the name & position of the person on the other end of the line. Ideally officials should request to speak to the senior official of the company who would be able to take decisions. The official will then request to visit the premises of the respondent for a mediation meeting.



- On the day of the visit, the official must advise the respondent about the complaint and the redress sought by complainant i.e. refund and/or repair etc. He/she should provide the respondent with the opportunity to respond to the allegations. The respondent must be allowed to suggest possible methods of resolving the complaint. The official should also probe for other possible offers in the event that the complainant is not entirely satisfied with the offer.



- In instances where the respondent is conducting a prohibited practice, the official must inform the respondent of the CHU's view that the business might be conducting an unfair business practice. The official must further

explain the consequences of the contravention and the sanctions that can be imposed. In the event that there can be no settlement reached and there is reasonable ground to believe that a business has engaged in a prohibited practice, the complaint may be escalated for the purposes of obtaining a **Compliance Notice** in terms of Section 100.



- When a settlement is reached the official should end the mediation conference. The **Settlement Agreement** will be prepared and sent to both parties for reference purposes. The written agreement must be sent within two (2) days. Details of the respondent will be referred to the **Education and Compliance Unit** that will assist the company involved in the prohibited practice to comply.



- In the event that the parties fail to reach an agreement, the official must prepare a report on the reasons for the failure to resolve the complaint and submit it within two (2) days to the Manager. The Manager should then decide on the appropriate action to be taken which may include *inter alia*,
  1. escalation to investigation,
  2. referral to another agency and/or
  3. a written letter to the complainant advising that the matter is incapable of resolution and that legal recourse through the courts is recommended.

### 3.1.4 Extraordinary Conciliation Measures

**Instances when Extraordinary Conciliation Measures may be taken (Employment of Services of independent conciliators, experts, etc) are as follows**

- Employment of services of independent conciliators in cases where

questions about impartiality of the NCC may impede the success of a mediation process or complexity of the case in question.

- Employment of services of experts to assist in analysis of disputed facts in conciliation processes.
- In mass complaints where face to face conciliation against a respondent will not be suitable since all the complainants have a similar dispute against the respondent.
- In the event that a respondent fails to co-operate with the usage of civil means of communication; summons in terms of the Act may be used to bring the respondent to an audience with the Commission.

**NB: Guidelines and Procedures for the Conciliation of Complaints in the National Consumer Commission marked ADR Guidelines are attached.**

#### **4. Finalization Phase**

After a settlement has been reached the official must confirm the settlement in writing. This applies in the case of all mediation methods used. This phase is vital for record purposes and it is also important for the parties to have documented proof of the settlement reached.

In the event that the respondent does not agree with the remedy suggested or disputes the allegations, the official may, depending on the merits, have resource to the following:

- **Refer the matter to the Investigations Unit.**
- **Refer matter to the Provincial Tribunal for adjudication**

- **Refer matter to the NCT or issue a Compliance Notice**

The official must then update the case file and close it.

## **5. Escalations to Consumer Investigations**

- **If the allegations are that a prohibited practice is being conducted then the matter must be escalated to Consumer Investigations. The official must provide a brief Escalation Report. The official must then advise the complainant of the escalation and explain the process in terms of the Consumer Protection Act. In the event that there are other available remedies i.e. or legal remedies via the courts, the official must inform the complainant accordingly. In the event that a settlement is not reached and there is reasonable ground to believe that a business has engaged in a prohibited practice, the complaint may be escalated for the purposes of obtaining a Compliance Notice in terms of Section 100.**
- **This action should be followed by a written confirmation that the matter is incapable of resolution and would be escalated to the Consumer Investigations Unit and/or referred to other relevant bodies, whichever is applicable. The official must then update the case file, escalate it for investigation and close the file.**
- **In the event that a Settlement Agreement has been obtained from the respondent a period of time may be allowed, to ensure that the respondent honours the settlement; failing which the matter shall be escalated for the purposes of obtaining a Consent Order to be issued and confirmed by the National Consumer Tribunal.**

## 5.1 Procedure for Escalation

An **Escalation Report** should be prepared in order that a decision to escalate the matter is made. The Report should be brief and must contain details of both the complainant and the respondent. There should be a summary of the complaint and a break down be made of actions taken in attempting to resolve the matter. The reasons for concluding that the complaint is incapable of an amicable resolution should be clearly indicated.

## PART B

### 2. INVESTIGATIONS BY THE NCC

All matters either escalated from the **Complaints Handling Unit** or are received by the **Investigations Unit** of the NCC will be screened by the Investigations Unit.

#### 2.1 Screening of Complaints and Screening Standards/ Enquiries of the NCC

**Screening meetings** will be held at least once (1) per week and as often as may be necessary. The purpose of the screening meetings is to determine the following:

- whether the enquiries indicate a prima facie breach of the CPA
- which enquiries the NCC should investigate,
- what further action is required to enable a more informed analysis of the possible breach.
- Evidence
- NCC's target areas as set out in the Enforcement Strategy
- NCC's enforcement criteria to be implemented



Critical to the screening is the determination of the following, in terms of Section 4 (1) of the CPA:

- whether there is an allegation that the consumer's rights as contained in the CPA have been:
  - **infringed;**
  - **impaired;**
  - **threatened; and or**
  - **whether there is an allegation of prohibited conduct (Chapter 2 and regulations) that occurred or is occurring.**

## 2.2 Identifying the Source of a Complaint

Another important aspect to the screening phase is the determination of the profile of the person who has lodged the complaint. Section 4 of the CPA permits a complaint to be lodged by;

- the consumer him/herself;
- a person who has done so on behalf of the consumer (provided the consumer cannot act in his/ her own name.(the intention here is to dissuade consumers from seeking costly legal assistance on consumer complaints. Lawyers should be encouraged to send such complainants directly to the NCC or other relevant consumer protection authorities;
- a person acting as a member of or in the interests of a group/ class of affected persons (this is important from a class action point of view which could speak to impact);
- a person acting in the public interest and if so, with leave of the tribunal or court
- an association, and if so, whether the association is acting in the interests of its members.

## 2.3 The Procedure to be Followed

From a procedural perspective, Section 71 of the CPA requires that:

- The complaint to the NCC be filed in the prescribed form.
- The Regulations contain the said form and all complainants should be encouraged to follow this requirement.

### 3. Complaints Initiated by the NCC

It should be noted that the NCC, in terms of Section 71 of the CPA, is also permitted to initiate complaints. It can do so only in the following instances:

- if directed by the Minister of Trade and Industry;
- on its own motion;
- on the request of a Provincial Consumer Protection Authority, a Regulatory Authority or an accredited Consumer Protection Group.

#### 3.1 Decision to Pursue or Not to Pursue

It is at the screening phase (on receipt of a complaint) that a decision has to be made whether to pursue the complaint or not. A decision may be made not to pursue the complaint even where an apparent contravention exists. This would occur with complaints that do not meet the NCC's Enforcement Criteria.

#### 3.2 Enforcement Criteria

**The Enforcement Criteria** → are the sets of factors or principles that the NCC uses in order to arrive at a decision as to whether to commence and continue with an investigation.

**The Enforcement Criteria** → give an indication of what the most appropriate type or types of enforcement action should be.

**The Enforcement Criteria** → give an indication of what the appropriate response should be in each case.

**The Enforcement Criteria** → provide standard, objective factors against which to measure the complaints received and issues raised.

The different Provinces may also have priority areas that they would want to enforce.

**Those attending the weekly screening meetings are responsible for determining the appropriate action that must be taken in each enquiry.**

#### **4. Determining the Appropriateness For Investigating a Complaint**

In order to assist the NCC determine whether a complaint that has been lodged in accordance with the CPA, is indeed a matter that is appropriate for investigation by the NCC, certain **enforcement criteria**, amongst others will be considered.

Likewise, **a decision not to investigate** a complaint will be made by the NCC and will be based on several factors or criteria.

##### **4.1 Criteria to be Considered in Investigating a Complaint**

The following criteria, amongst others will be considered:

###### **4.1.1 Jurisdiction of National Consumer Commission**

In determining whether the NCC has jurisdiction it should establish whether:

- **the alleged conduct is a breach of the CPA;**
- **a consumer court exists, or for that matter, an alternate dispute resolution agent duly accredited by the NCC; (NCC can co-operate or conduct a joint investigation within or between Provinces).**
- **it has been decided by the NCC, as a matter of policy/strategy, to apply a particular sanction to all conduct of the kind alleged.**
- **the alleged conduct is in breach of a NCC enforcement priority area or a current NCC strategic enforcement program.**
- **The investigation may further be part of joint compliance priorities as may be determined in consumer forums or in working together with the**

**Competition Commission, Credit Bureaux or other similar authorities.**

#### **4.1.2 Strategic Significance and Seriousness of the Matter**

When a complaint is received it is imperative that the issue that comes to the fore must be of such weight, significance and or importance as to warrant an investigation.

#### **4.1.3 Determining Whether a Matter Warrants an Investigation**

In determining whether a matter warrants investigation, the following factors will be considered:

- **whether intervention by the NCC will have a timely impact on market conduct;**
- **quantum of financial loss or other detriment suffered by the consumer(s). In relation to loss or detriment, consideration may be given to the number of consumers affected or an assessment of the impact of the conduct on an affected individual;**
- **the health and safety of the community or other public interest;**
- **prevalence of the alleged prohibited conduct. Whether the conduct is widespread and the application of a sanction is likely to have a deterrent effect;**
- **the conduct is systemic; deliberate and not inadvertent; a blatant or flagrant breach.**
- **the complaint is not trivial and/or a technical breach without harm.**

## 5. Special Circumstances Surrounding the Complaint and Quality of Evidence

In determining whether special circumstances surrounding the complaint and whether sufficient evidence exists, the following issues should be given consideration:

- any special circumstances attached to the complaint that give the complaint added significance ie: any disability and/or characteristic of the class of complainant that puts them in a susceptible or a high risk category, these could relate to rural, poor, young, aged consumers, in other words, vulnerable consumers;
- the matter has been referred by another consumer protection agency or consumer advocate;
- the complainant is willing to support fully proposed NCC action;
- an assessment of the credibility of the witness;
- timeousness of the complaint as compared to the time of the alleged offence and the effect of any statute of limitations;
- availability of corroborative evidence;
- availability of obvious defences;
- the likely outcome in the event of a finding of guilt, having regard to the penalty options available to the Tribunal or Court and the impact of such an outcome on the community;
- a history of complaints against the alleged offender;
- the alleged offender has been the subject of previous enforcement action by NCC.
- alleged offender is not responsive to consent orders and/or dispute resolution;
- a risk of continuing misconduct;
- legislative requirement for NCC to undertake an investigation.

Once a matter has been assessed against the aforementioned criteria, **it is prioritised as high, medium or low. The level of priority determines the appropriate enforcement outcome.** Not all criteria need to be met in order for a specific priority to be attributed. The NCC will also use its discretion in allocating priority.

### **5.1 How Enquiries are Resolved at Screening Meetings**

Having screened the matters at the weekly screening meeting, the **Commission may, in terms of section 72 of the CPA, make any one of the following resolutions:**

- i) Issue a Notice of Non-Referral**
- ii) Referral to ADR Agent Provinces**
- iii) Referral to another Regulator/ Agency**
- iv) NCC Investigation**

#### **5.1.1 Issue a Notice of Non-Referral**

If a notice of non referral is issued to the complainant it has to be done in the prescribed form as contained in the regulations. The following are the reasons that a Notice of Non-Referral may be issued if the matter is:

- of a frivolous nature;**
- of a vexatious nature;**
- does not constitute grounds for a remedy under the CPA;**

- **it is not permitted in terms of section 116 of the CPA, in that the complaint was made more than three years after- the act or omission (which is the cause of the complaint); the conduct/ practice ceased;**
- **The matter is against a respondent who already is before the Tribunal on a matter under one section of the CPA and then brought again under a different section on the same facts- in other words, a duplication of charges is not permitted;**

### **5.1.2 Process of Issuing a Notice of Non-Referral**

If the weekly screening meeting concludes that a notice of non referral must be issued, the enquiry is recorded in the minutes as **notice of non-referral**.

A brief letter signed by the Commissioner explaining why the matter will not be investigated further is prepared and issued to the Complainant.

### **5.1.3 Referral to ADR Agent and Provinces**

The Commission may resolve that the matter be referred to:

- **An ADR Agent;**
- **Provincial Consumer Protection Authority;**
- **Another Regulatory Authority**
- **Consumer Court**

- So that the parties could attempt to resolve the dispute in terms of Section 70 of the CPA. However, such a referral is not permitted if the attempt at resolving the matter was unsuccessful and where an ADR agent was used; or where a notice was issued by the ADR agent to the effect that the ADR agent has failed to arrive at an amicable resolution.
- If the weekly screening meeting concludes that it is more appropriate for the alleged conduct to be handled by an ADR agent; Provincial Consumer Protection Authority; or Consumer Court the enquiry is recorded in the minutes as Referral to ADR agent; Provincial Consumer Protection Authority; or Consumer Court.
- The enquiry is referred to the relevant entity by the relevant component of the NCC who then advises the complainant to contact that entity and thereafter monitors progress.

#### 5.1.4 Referral to another Regulator/ Agency

- If the weekly screening meeting concludes that it is more appropriate for the alleged conduct to be handled by another enforcement or regulatory agency who has jurisdiction over the matter, the enquiry is recorded in the minutes as ADR Referral to Regulator/ Agency together with the details of the party to whom the matter is referred. The enquiry is referred to the relevant entity of the NCC who then advises the complainant to contact the relevant entity and thereafter monitors progress.
- A referral is not merely a simple forwarding of a matter to the relevant person or entity. Any referral has to be done in accordance with the NCC's Referral Policy and Procedures. The monitoring of such referrals is crucial. Such monitoring will occur in terms of the Monitoring Policy and Procedures of the NCC.



### 5.1.5 NCC Investigation

- **If the weekly screening meeting concludes that it is likely that a breach of the CPA has occurred and that the matter be investigated by the NCC, then the enquiry will be assigned to the Manager: Investigations. The Manager will be responsible for assigning the enquiry to an investigator.**

### 6 Complainant Disagrees with Screening Committee's decision

If the complainant does not accept a Screening Meeting decision with regard to an enquiry, then the matter is placed on the agenda for the next Screening Meeting for reconsideration. If the decision following the reconsideration is the same as the previous one, then full reasons will be provided to the complainant in a letter signed by the Commissioner.

### 7. Approval and Allocation of Cases

Once an investigation is assigned, the complainant is contacted telephonically to verify the complaint and for the Commission to acknowledge receipt thereof. This verbal acknowledgement is immediately followed up with a written acknowledgement of receipt.

The inspector/ investigator also assesses and considers the complaint as to be discussed at a case discussion meeting. The inspector/investigator must update the case management system and ensure that it is updated at every step.

**When a matter has been approved for investigation inspectors/ investigators will;**

- **prepare an Initial Screening Report upon receiving the**

**complaint. The Screening Report will briefly describe the nature of the complaint, identify key issues for initial investigation, and offer a recommendation (if possible) for/against early disposition**

- **investigate the relevant criteria as set by the NCC;**
- **prepare an Investigation Report with recommendations;**
- **table the report to the Commissioner**

**NB: If, after an investigation, a referral is not made, then there are essentially only two recommendations that an investigator/ inspector can make, namely:**

- (1) propose a Consent Order; or**
- (2) propose a Compliance Notice.**

#### **8. Purpose of the Investigation**

The purpose of the investigation is to determine:

- 1) Whether an offence has been committed in terms of the CPA or
- 2) Whether the Respondent has engaged in a prohibited conduct.
- 3) The remedy to be put in place to resolve a transgression

**NB: an explanation of Prohibited Conduct is to be found in Chapter 2 of the CPA and in the Regulations.**

#### **9. Receipt of Complaint by Investigations Unit**

Complaints will be dealt with, in a manner provided for in terms of Section 72 of the Act.

##### **9.1 Case Discussion Meetings**

Case discussion meetings are held once (1) a week. At these meetings the officials of the Division give input into:

- new complaints;
- progress and direction of existing investigations and,
- any other case related issues.

At these case discussion meetings:

- a change of inspectors may occur and where matters may be re-allocated;
- new complaints may be allocated;
- input that may be contained in the Report to Senior Management (Exco) on new complaints is canvassed

**It is imperative that the personnel from the Legal Unit be invited to case discussion meetings.**

#### **10 Report on Receipt of New Complaint to Exco and Progress Report**

**This Progress Report is provided to Exco upon receipt of a new complaint. The Report to Exco is a synthesis of three processes, namely,**

- **the Screening Report,**
- **the input from the inspector (primarily the verification of the complaint) and,**
- **the input from the Division staff at the case discussion meeting.**

The Progress Report will contain such information as:

- 1. the case number,**
- 2. the names of the parties,**
- 3. the sector/ industry within which the conduct occurs,**
- 4. a short description of the complaint,**
- 5. the relevant sections of the Act and**
- 6. the name of the senior inspector**

Confidential information will not be made available to the public except to the NCC management, experts appointed by the NCC, external conciliators and Exco. The Progress Report will be based on the report to Exco. It will contain regular updates on the status of the investigation. Reports on status involve short statements, such as example "request for information from complainant sent on a particular date." **Updates will be done by the inspectors and the full report on all cases will be compiled on a monthly basis.** This Report will contain very brief descriptions of the matter and the current status of all open investigations. The Report is restricted information and will be available on the intranet/ case management system to all NCC staff for their information and for incorporation into the reports of the NCC.

### **10.1 Request for Input From Complainant**

Once the inspector has formed a preliminary opinion as to whether he/she should recommend a non-referral, he/she writes to the complainant setting out the reasons for the non-referral. The complainant is then requested to give input within one to two weeks. The inspector takes that input into account when preparing the final report to Exco.

### **10.2 Evidence Gathering**

Evidence will be gathered by the investigator. The evidence aspect is dealt with in Part C. It is envisaged that the NCC will often make use of summonses which it is empowered to issue in order to gather evidence. This is more fully dealt with later in this Part.

It will be the investigator's task to relate the law to the facts in each matter. Relating the law to the facts simply means that there has to be a comparison of each element of the breach with the facts as revealed throughout the investigation. Some facts will prove of one element only, while some may assist in the proof of more than one element. Some facts may not assist in the proof of any element and are therefore irrelevant material which can be ignored.



It is **helpful** to write a list of the elements of each breach and, next to that list, itemise the facts that assist in its proof. By carrying out this exercise an investigator is immediately alerted to any potential deficiencies in proving any breach. One can then identify any further investigation which must be undertaken in order to complete the proof. This is commonly known as a '**liability sheet**'.

If the facts already on file are sufficient to prove each element of a breach then establishing liability is straightforward. If not, seek additional facts required and if such additional facts have been exhausted and cannot be established, then cease with the investigation into that breach.

One would normally only choose to end a low priority investigation after having consulted with the Supervisor or Manager. However, it may still be possible to issue a Consent Order if the evidence gathered supports this level of action.

For a routine investigation one would be able to issue a Compliance Notice or enter into an agreed Consent Order.

It will often be found that no one fact will prove an element of a breach. Usually, the accumulation of several facts or pieces of evidence will assist in establishing or providing proof. Sometimes none of the facts will directly prove the element of the breach. However, when all the facts are put together they may constitute a strong inference leading to the conclusion that the element is proved. Such facts are known as a **preponderance of possibilities** and it is perfectly acceptable to prove an element of a breach of conduct in this way. Remember also that the inference must be sufficiently strong to prove the case. This, again, is a matter of judgment and it is advisable to discuss the strength of any circumstantial evidence with the Supervisor/ Manager

The matters of justification or excuse are sometimes explicitly highlighted in legislation by the use of phrases such as:

- “reasonable ”
- “reasonably likely”
- “calculated to”


Thus the CPA creates a number of defences that may be available in respect of breaches under the Act. The CPA often, for example, states that “it is not a contravention of section ...if” Those defences define circumstances which, if the Respondent proves them, provide a defence against the alleged breach. Such justifications, if available, must be reported on.

### 11. The Investigation Report

Once an investigation is completed and an action or an NCC settlement is proposed, a detailed **Investigation Report** must be prepared. The primary purpose of an Investigation Report is to aid the **Enforcement Division** of the NCC in making a decision as to the appropriate enforcement action to be taken. The Investigation Report provides the Division with the Investigator's recommendations as to the appropriate enforcement action that should be taken. The Report includes clear and concise information in support of the recommendations made.

The **Investigation Report** should contain recommendations as to:

- the appropriate resolution
- any further action required e.g. where referral to the Tribunal is the recommended outcome, the recommendations should include appropriate guidance to the Legal Unit.
- The report and the recommendations made in it should be objective and legally precise. This is the case even though a good investigation usually starts out with some basic facts mixed with intuitive feeling. That initial approach is gradually refined to indicate liability through a more robust and objective analysis of the facts.

- 
- For routine investigations, one would not normally prepare a detailed report but this may be warranted in many cases. However, where a report is not prepared for routine investigations, a summary in the form of a memorandum is required. Regardless, one should still reach a conclusion and make a recommendation to the Manager as to how the investigation should be resolved.

### 11.1 The Investigation Report Format

All finalisation reports should at least contain the following:

- details of parties
- relevant information of parties (eg- if complainant a business- size of business etc)
- issue/ allegation investigated (as identified when initially categorising the complaint);
- any other issues/ breaches identified;
- supplier's response;
- avenues of inquiry undertaken;
- legal analysis (Case Law, Legislations, legal writings, international jurisprudence)
- findings and supporting reasons;
- recommended action;
- any other issues that may be of interest to NCC, e.g., loophole in, or inadequacy of legislation;
- any likely prosecution or compliance issues that may have media value for NCC;
- reference and disposal of evidentiary material; and
- confirmation of redress being provided by the supplier to the consumer, where relevant.
- certification of the report by both Legal Unit and Investigations Manager

Unless an investigation is extremely serious, complex or requires briefing at a more senior level, **a formal memorandum can be replaced with a shorter, dot point, reporting style that still addresses the above criteria**, as long as appropriate file notes are maintained during the course of the investigation.

## 12. Recommendations

The following recommendations may be made by an investigator.

### A. Consent Order

If, after an investigation, sufficient evidence is available to support a clear finding that the Respondent has engaged in prohibited conduct then a **Consent Order** can be considered and proposed, provided that, such matter falls within the **Consent Order Strategy** of the NCC operating at the time in question.

A **Consent Order** is an agreement which is drafted in the form of an order to be confirmed by the NCT or Court. The parties to such an order will be the Respondent and the NCC and not between the Respondent and Complainant.

The form of the **Consent Order** that is proposed must be drafted in line with the pro forma approved by the NCC. There is no need to consult with the complainant when concluding a draft **Consent Order** as the complainant is not a party thereto.

**However**



In terms of the CPA<sup>11</sup> a **Consent Order** can include an award of damages. This award can only be included if the Complainant consents thereto. In such an instance the

<sup>11</sup> Section 74(3)



consent of the Complainant will have to be acknowledged. Presumably this can be done on the draft order itself or on a separate document but with reference to the draft order.

An award for damages is not a matter that must be trifled with and must be approved by the Legal section of the NCC prior to the Respondent appending a signature thereto.

**Ordinarily, neither the NCC nor the NCT has the power to award damages. Caution must be exercised in the inclusion of damages in a draft order.**

In order to award damages under Section 74(3), the following should apply:

1. an offer made to the respondent will be tabled to the complainant.
2. In case a dispute arises between both the respondent and the complainant on the offer so tabled, the matter will be referred to an ADR agent.
3. Since the order is entered into between the NCC and the Respondent it would follow that it must be approved by the NCC. Thus, the investigator/inspector will propose a draft consent order, in consultation with the parties. It is critical that the Respondent and Commission agree to the proposal. If either party does not agree there cannot be a **Consent Order**. At all times, it must be explained and understood by the parties that it is a draft and that it is subject to the approval of the NCC and then further subject to it being made an order by the NCT or a court. The draft order is then submitted to the Manager Investigations who will present this to the Legal section of the NCC in accordance with the approved processes followed in such circumstances.

- **Thereafter, the matter is submitted by the Head of Enforcement to the Executive Committee for their input, deliberations, approval or rejection.**
- **All Consent Orders will be signed on behalf of the NCC by the Commissioner or by any other duly delegated employee of the NCC.**

It must be remembered that suppliers and service providers conduct their business through various types of entities- sole proprietorship, partnership, close corporations, private and public companies, not for profit entities etc. For a Consent Order to be effective, it must be confirmed that the person signing as Respondent or on behalf of the Respondent is duly authorized to do so.

### 13 Confirmation of the Consent Order

In order for the Consent Order to be confirmed by the NCT or a court, there must be an application, presumably made by the NCC to the NCT. The legal section of NCC will deal with this aspect once the Consent Order is signed.



The NCT or court, on hearing the application, with or without hearing any evidence, must do one of the following things;

- 1) make an order as agreed between the parties;
- 2) suggest changes that must be made to the draft order before it can be made an order;
- 3) refuse to make the order



If the NCT suggests changes that must be made to the draft order before it can be made an order these changes have to be canvassed with both the Respondent and the NCC. Both the parties must agree. If there is no agreement then the assumption is that there can be no Consent Order.



Investigators must ensure that their investigation diaries, files, including evidence therein are in order as this will be the reference point when the NCT requires evidence to be adduced prior to making an order. It cannot be assumed that the NCT will merely confirm a proposed order.



If the Respondent is keen on a Consent Order, it does not necessarily mean that the NCC must then enter into a consent arrangement with the Respondent. There will be times when it may not wish to do so. Guidance must be sought from senior personnel in the Unit.



Proposed Consent Orders must be recorded on a **Consent Order Register** upon the Respondent's signature and updated until the order is finalised.



If a consent order is not entered into then the issuing of a Compliance Notice may be considered. The case management system must be updated.

## **B. Compliance Notices**

A Compliance Notice is issued in terms of Section 100 of the CPA<sup>12</sup>. This notice can only be issued if a provision of the CPA has been breached, in other words, if the Respondent has engaged in prohibited conduct.



Before the NCC issues a Compliance Notice:

- against a regulated entity, the NCC must consult with the regulator that issued a licence to that entity;
- it must on reasonable grounds believe that a person has engaged in prohibited conduct



The consultation with the regulator is **firstly** to inform the regulator that the NCC intends taking action against its member or licensee; and **secondly** to allow the regulator to make representations in relation to the impending proceedings. Thus, if there are complaints against an attorney or an estate agent, the NCC will consult with the Law Society or Estate Agency Affairs Board respectively.

Until it is proved otherwise regulated entity will refer to an entity regulated by a statutory regulator, that is, one established in terms of an Act of Parliament.



<sup>12</sup> section 100

In order to justify or establish a belief, on reasonable grounds, the NCC will need evidence of the breach. Such evidence will usually be available subsequent to an investigation being concluded. A recommendation that a Compliance Notice to be issued will mainly emanate from the investigator/ inspector.



The Compliance Notice, which must be issued in the prescribed form (see regulations), must set out the following:

- a) the person or association to whom the notice applies;
- b) the provision of the CPA that has not been complied with;
- c) the details and extent of the non compliance;
- d) any steps required to be taken;
- e) the period within which those steps are to be taken;
- f) any penalty that may be imposed in terms of the CPA if those steps are not taken.



### **Drafting of Compliance Notice**

The Compliance Notice will be drafted by the Investigator/ Inspector checked by Legal and then issued together with an Investigation Report to the senior official in the unit. The matter will be canvassed at the NCC Exco. If approved, it will be signed by the Commissioner or duly delegated employee, recorded in the Compliance Notice Register and then despatched in an appropriate manner.



Upon receipt of the Compliance Notice, the respondent may approach the NCT or a court for it to be reviewed. If it is not set aside then compliance therewith must be monitored.



It is possible that there could be a number of reviews to the NCT relating to the notice period. Certain respondents could use the review by NCT to simply buy more time. This could result in matters clogging up the NCT rolls or delaying the work of the NCC.

To avoid this it is advisable to issue, with the consent of the NCC, a draft notice to the Respondent, for a response thereto within 5 (five) days. The response must clearly indicate the issues in dispute together with sound proposals on the resolution of the dispute. If there is no response then the Compliance notice is issued immediately after the expiry of the 5 days. If any response is received then this must be canvassed immediately with the senior manager.

**The response could dispute:**

- i) the provision of the CPA that has not been complied with;
- ii) the details and extent of the non compliance; or
- iii) the steps required to be taken; or
- iv) the period within which those steps are to be taken

In the event that there is a response to the effect that a dispute exists then the matter must be referred immediately to the senior officer with a recommendation for an acceptance or a rejection of the proposals made by the Respondent. The senior manager or officer will refer the matter either to the Legal Division or to EXCO depending on the circumstances. Thereafter, a directive will be issued as to how to proceed with the Compliance Notice.



**Once a Compliance Notice has been issued**, compliance thereto must be monitored. In order to monitor compliance, the Investigator/ Inspector will create a checklist that reflects the various compliance elements required within the notice and make the necessary arrangements to verify compliance following the expiry date of the Notice.

**The recommendation may be that the:**

- 1) NCC issues a Compliance Certificate.
- 2) NCC applies to the Tribunal for a fine to be imposed.
- 3) NCC refers the matter to the National Prosecuting Authority for prosecution as an offence in respect of any particular Compliance Notice. (Cannot impose an administrative fine and prosecute at the same time).



If there is full compliance and this has been verified and proof thereof is available, the findings must be included in a **Compliance Report** with proof of compliance included therein. In addition a draft **Compliance Certificate** must be included for the Commissioner's signature. The report must be submitted to the senior within 3 days calculated from the first working day following the expiry of the compliance notice period.



The despatch of the notice must be verified, a copy of the notice must be included in the file and the file must be closed.

At all times the case management system must be updated.

## 14. Recommendation of Referral to the Tribunal

Apart from recommending a Consent Order or a Compliance Notice, it may also be recommended that the matter, after investigation be referred to the NCT. This will occur primarily where it is felt that neither a Consent Order or Compliance Notice is to be issued. This could occur when there may be a need for the NCT to impose a penalty as proposed in the Act.



**If Exco and the NCC accept the referral recommendation, the matter is taken to the Tribunal. The matter then gets transferred to the Legal Services Division of the NCC.**

## 15 Finalisation of Investigations and Turnaround Times

### 15.1 Finalisation of cases in terms of the CPA



Investigation into a matter is deemed to be finalized, in terms of the CPA, on any one of the following grounds:

- (a) When a notice of **non-referral** is issued on the grounds contemplated in Section 116<sup>13</sup>, and on any other grounds the Commission may reasonably believe to exist<sup>14</sup>
- (b) When the matter is referred to the **National Prosecuting Authority**; if the Commission alleges that a person has committed an offence in terms of this Act (for offences refer to 110).<sup>15</sup> The matter will be dealt with under the Criminal Procedure Act.
- (c) When the matter is referred to the **Equality Court**, as contemplated in Section 10, if the complaint involves a matter in terms of Part A of Chapter 2 of the

<sup>13</sup> Section 73(1)(a)

<sup>14</sup> Section 75(1)

<sup>15</sup> Section 73(1)(b)

Promotion of Equality and Prevention of Unfair discrimination Act.

- (d) When the **Consent Order** that has been agreed to is signed by the parties and submitted to Legal Services before it is confirmed by the NCT.
- (e) When the matter is referred to a **Consumer Court** of the Province in which the supplier has its principal place of business.<sup>16</sup>
- (f) When the matter is referred to **the Tribunal** for the imposition of an administration fine in terms of Section 73(2)(b).

## 16 Categories of Cases and Turnaround Times

### 16.1 Categories of Cases

Investigation matters are/ will be divided into three categories i.e. **Non-Complex, Complex and Exceptional Matters**.

- (i). **Non-Complex Matters** are those matters that after investigation a Commission may issue a non-referral in terms of Section 116, a referral to the Provincial Court in terms of Section 73(2), a referral to Equality Court in terms of Section 73(1)(i). Usually matters of a non-complex nature are decided on the presentation of facts whether without or with minimal evidence.
- (ii). **Complex Matters** are those matters that after investigation the Commission will issue a Compliance Notice, agree to a Consent Order; refers the matter to the National Prosecuting Authority, or applies to the Tribunal for the imposition of an Administration Fine. Complex Matters will be decided mainly on the evidence gathered.

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<sup>16</sup> Section 73(2)



- (iii). **Exceptional Matters** are those matters that after investigation, the Commission will issues a Compliance Notice; agrees to a Consent Order; refers the matter to the National Prosecuting Authority, or applies to the Tribunal for the imposition of an Administration Fine. In these matters, the evidence gathering exercise relies on external forces i.e. court order for search and seizure, warrants to enter premises.

## 17. Turnaround Times

- **Turnaround times for purposes of conducting an investigation cannot be categorically or specifically be decided as each case will vary on the duration of the various actions that are to be taken. There will be instances where finalization is delayed as a result of factors outside the control of the officials and the Commission.**

## 18. Summary

- **Non- complex matters**- draft non- referral or referral notice
- **Complex and Exceptional Matters** - Agree to issue Consent Orders, or issue Compliance Notices or refer the matter to the National Prosecuting Authority (NPA) and apply to the Tribunal for the imposition of an administrative fine.
- **Beginning of Investigations** - at this stage the Investigator starts the investigations by gathering and assessing evidence, consulting with experts, product testing, interviews, inspection, summons etc.

- (i) Receive a file, assess the information. Acknowledge receipt and request further information.
- (ii) Diarise file for which the complainant should furnish the outstanding information

(iii) **Initial investigation** – preliminary investigation to decide whether referral, non referral or develop an investigation plan and draft report to Exco with recommendation

- **Status Report** – prepare a Status Report on the findings of the investigation as well as the recommendations. The Status Report should recommend either a referral, non-referral, issuance of Compliance Notice, agree to a Consent Order or apply for imposition of an administrative fine. Compliance Notices must be monitored to ensure that compliance is adhered to.
- **Monitoring of Compliance Notice**
- **Matters Referred to Legal Services** (Consent Orders, administrative fines and matters to NPA)

### 3 THE DEBRIEF

**A debrief will be held as soon as possible after the conclusion of the Investigation.**

A debrief should also be held after significant phases have taken place such as the execution of a search warrant and/or after an investigated party's interview.



The form that the debrief takes will depend on the nature of the investigation. The form could range from a formal meeting to an informal chat. Whatever the form of debrief, it should serve as a learning exercise and incorporate discussion as to the good and bad aspects of the investigation. The focus of the debrief should be on reviewing the way in which the entire process was implemented, how effective it has been, what has worked well and what could have been done differently the next time, as well as what those involved have learned.



Some debriefs will result in a documented account of the debrief, including any learning to be taken from the investigations.



The debrief may involve any Divisions that manage larger investigations and in which litigations are on the whole, successful.



Debriefing must be documented in a file and kept for future reference.

#### **4 CONCLUSION**

The establishment of a person's liability for breach of the CPA comes about as a result of a well conducted investigation. Although others may provide guidance, it is the Investigator's role to conduct the investigation and reach an outcome. The primary role of Counsel for the NCC is to present the evidence obtained by the Investigator to the relevant forum.

#### **5. POWERS IN SUPPORT OF AN INVESTIGATION**

##### **5.1. Summons**

##### **5.1.1 Why will summons be issued?**

At any time during an investigation conducted in terms of the CPA<sup>17</sup>, that is, an investigation approved by the NCC, the NCC may issue a summons to any person:

- who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject ;
- to appear before the NCC, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or
- to deliver or produce to the NCC, or to an inspector or independent

<sup>17</sup> section 72 (1)(d).

investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons.

### 5.1.2 Validity of Summons

There are two important factors necessary for a summons to be valid:

- It must be signed by the Commissioner, or by an employee of the NCC **designated** by the Commissioner; and
- It may be served in the same manner as a **subpoena in a criminal case** issued by the magistrate's court.

### 5.1.3 Duty of Inspector/ Investigator after Summons served

The following are the actions expected of an Inspector or Investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object:

- May interrogate and administer an oath to, or accept an affirmation from, the person named in the summons; and
- May retain any such book, document or other object for examination, for a period not exceeding two months, or for such longer period as the Tribunal, on application and good cause shown, may allow.
- Must inform a summoned person that he/she is not obliged to answer any question if the answer is self-incriminating;

### 5.1.4 Duty of a Person to whom a Summons is Served

A person questioned by the NCC or by an inspector or investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but –

- a person is not obliged to answer any question if the answer is self-incriminating; and
- the person asking the questions must inform that person of the right not to provide any self-incriminating answer

**No self-incriminating answer given or statement made by any person to the NCC, or an inspector or investigator exercising powers in terms of this Act, will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 108 (3) or 109 (2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.**

## **5.2 AUTHORITY TO ENTER AND SEARCH UNDER WARRANT**

### **5.2.1 Obtaining a Search Warrant**

Executing a search warrant causes a person's interests rights and interests to privacy, property, confidentiality, personal freedom and dignity to be overridden. It is therefore not something to be done lightly, nor without a full understanding of the seriousness of the action.

### **5.2.2 Who can issue a Search Warrant?**



A judge of the High Court or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate.

### **5.2.3 When can a Search Warrant be issued?**



A Search Warrant may be issued only when an affidavit is produced to the Judge or Magistrate and it is clear from that affidavit that there are reasonable grounds to believe that –

- a contravention of the Act has taken place, is taking place, or is likely to

take place on or in those premises; or

- that anything connected with an investigation in terms of the Act is in the possession of, or under the control of, a person who is on or in those premises. A warrant to enter and search may be issued at any time.

#### 5.2.4 Requirements for a Valid Search Warrant

A search warrant must specifically –

- identify the premises that may be entered and searched; and
- authorise an *inspector or a police officer* to enter and search the premises and to do anything listed in section 104.

#### 5.2.5 Duration of a Valid Search Warrant

A warrant to enter and search is valid until one of the following events occurs:

- the warrant is executed;
- the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
- the purpose for issuing it has lapsed; or
- the expiry of one month after the date it was issued.

#### 5.2.6 Execution of a Search Warrant

- A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate, or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.
- A person authorised by the warrant may enter and search premises named in that warrant.

- Immediately before commencing with the execution of a warrant, a person executing that warrant must meet the following requirements if the owner, or person in control, of the premises to be searched is present;
  - **provide identification** to that person and explain to that person the authority by which the warrant is being executed; and
  - **hand a copy of the warrant** to that person or to the person named in it; or
  - **if none of those persons is present**, affix a copy of the warrant to the premises in a prominent and visible place.

### 5.2.7 Powers to Enter and Search

A person who is authorised under section 103 to enter and search premises may<sup>18</sup> –

- **enter** upon or into those premises;
- **search** those premises;
- **search** any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
- **examine** any article or document that is on or in those premises that has a bearing on the investigation;
- **request** information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
- **take extracts** from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
- **use any computer system on the premises**, or require assistance of any person on the premises to use that computer system, to –

<sup>18</sup> Section 104

- i. search any data contained in or available to that computer system;
- ii. reproduce any record from that data;
- iii. seize any output from that computer for examination and copying;  
and
- iv. attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

**An Inspector authorised to conduct an entry and search in terms of Section 103 may be accompanied and assisted by a police officer<sup>19</sup>.**

#### **5.2.8 Conduct of Entry and Search<sup>20</sup>**

**A person who enters and searches any premises under Section 104 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.**



**During any search under Section 104 (1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.**



**A person who enters and searches premises under Section 104, before questioning anyone:**

- must advise that person of the right to be assisted at the time by an advocate or attorney; and
- allow that person to exercise that right.



**A person who removes anything from the premises being searched must:**

<sup>19</sup> Section 104 (i)(3)

<sup>20</sup> Section 105



- issue a receipt for it to the owner of, or person in control of, the premises; and
- return it as soon as practicable after achieving the purpose for which it was removed.

### 5.2.9 Right of Refusal to Inspection

**During a search, a person may refuse to permit the inspection or removal of an article** or document on the grounds that it contains privileged information and if the owner or person in control of a privileged article or document refuses to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.



A police officer who is authorised to enter and search premises under Section 103, or who is assisting an inspector who is authorised to enter and search premises under Section 104 may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises<sup>21</sup>.



Before using force in terms of Subsection (6), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.



The NCC may compensate any authorised person who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

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<sup>21</sup> Section 105(7)

### 5.2.9 Storage for Seized Goods

The Commission must maintain on its premises a facility to be utilised for storage purposes of any items or goods seized during the course of the investigation. Access to such facility will be limited to personnel with authority.

## 5.3 CONFIDENTIALITY

### 5.3.1 Claims That Information Is Confidential

When submitting information to the NCC, the Tribunal, or an Inspector or Investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.

Any such confidentiality, as claimed, must be supported by a written statement explaining why the information is confidential.

The NCC, Tribunal, Inspector or Investigator, as the case may be, must:

- consider claims of confidentiality; and
- immediately make a decision on the confidentiality of the information and access to that information, which decision may or may not be supported by reasons.

When making any ruling, decision or order in terms of this Act, the NCC, or Tribunal may take confidential information into account.

If any reasons are provided, in terms of the Act, that a decision be made to declare the information as confidential, the NCC or Tribunal as the case may be must provide a copy of the proposed reasons to the party claiming confidentiality, at least five (5) business days before publishing those reasons.

After receiving a copy of the proposed reasons in terms of subsection (5), a party may

apply to the court for an appropriate order to protect the confidentiality of the relevant information within five (5) business days.

The Commission must make an independent determination of what information should be classified as confidential.

### **5.3.2 Breach of Confidence**

It is an offence to disclose any personal or confidential information concerning the affairs of any person obtained<sup>22</sup>:

- in carrying out any function in terms of the Act; or
- as a result of initiating a complaint or participating in any proceedings in terms of this Act.

However, this does not apply to information disclosed:

- for the purpose of the proper administration or enforcement of the Act;
- for the purpose of the administration of justice; or
- at the request of an inspector, regulatory authority or Tribunal member entitled to receive the information.

## **5.4 OFFENCES AND PENALTIES**

### **5.4.1 Offences Relating to Prohibited Conduct**

It is an offence<sup>23</sup>:

- for any person to alter, obscure or remove a displayed price or trade description, without authority.

<sup>22</sup> Section 107

<sup>23</sup> Section 108

- It is an offence to fail to act in accordance with a compliance notice, but no person may be prosecuted for such an offence in respect of compliance notice if, as a result of the failure of that person to comply with that notice, the NCC has applied to the Tribunal for the imposition an administrative fine.

#### **5.4.2 Penalties**

**Any person convicted of an offence in terms of this Act, is liable –**

- in the case of a contravention of Section 107 (1), that is, when disclosing personal/ confidential information- to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

**Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in this section.**

#### **5.4.3 Administrative fines**

The **National Consumer Tribunal** may impose an administrative fine only in the circumstances expressly provided for.

**An administrative fine imposed in terms of this Act may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year; or R 1 000 000.**

When determining an appropriate administrative fine, the National Consumer Tribunal must consider the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has co-operated with the National Consumer Commission and National Consumer Tribunal.

## PART C

### EVIDENCE & PROCEDURAL FAIRNESS

#### 1 Evidence Handling

Documentary or other additional evidence must be appropriately collected, recorded, seized and secured in accordance with NCC's **Exhibit and Property Handling Policy**.

##### 1.1 Witness Statements

All relevant information required for enforcement before a Court or Tribunal is recorded in **Witness-Statement Format**.

##### 1.2 A signed statement is desirable because:

- it serves as a basis for investigation and provides information for further enquiry where necessary
- the interviewee endorses the accuracy of its content by signing it
- it is easy to review and assess

<ul style="list-style-type: none"> <li>• it reduces the time required to produce briefs of evidence for those interviewees who will be required to give <u>evidence</u></li> </ul>
<ul style="list-style-type: none"> <li>• the interviewee can refer to the statement to refresh his or her memory if they come to the NCT or appear in Court, and</li> </ul>
<ul style="list-style-type: none"> <li>• it allows an interviewee to be cross examined on the contents of the statement if: <ul style="list-style-type: none"> <li>▪ he or she is called to give <u>evidence</u> for the NCC and is not declared hostile, or</li> <li>▪ the NCC decides not to call him or her as a witness but he or she is called by the defence and gives <u>evidence</u> inconsistent with the contents of the statement.</li> </ul> </li> </ul>

**1.3 Investigators should record statements in writing at the time of the interview,**

<ul style="list-style-type: none"> <li>• If that is not possible, as soon as practicable after the interview.</li> </ul>
<ul style="list-style-type: none"> <li>• Investigators should not record an interview on a dictaphone, tape or laptop in order what the witness said can be drafted into a statement later.</li> </ul>
<ul style="list-style-type: none"> <li>• Recordings are acceptable since any inconsistencies may affect the witness's credibility in the NCT or in Court.</li> </ul>
<ul style="list-style-type: none"> <li>• It is important that the witness is able to fully reconstruct and clarify his or her recollections before this is committed to a statement.</li> </ul>
<ul style="list-style-type: none"> <li>• If a statement cannot be taken at the time of interview, it is considered</li> </ul>

better practice to make handwritten notes of the interview and then draft a statement based on those notes.

#### 1.4 Reasons for taking a statement

Statements are used for the following purposes:

- gaining evidence
- comparing evidence
- serving as a basis for further investigation
- recording observations while still fresh in the interviewee's memory
- linking physical evidence to the investigation
- identifying exhibits and people
- checking and corroborating stories
- assisting with preparing the file for Court (briefs of evidence) and serving as a basis for examining a witness in Court
- allowing a Court witness to refresh their memory prior to giving evidence

#### 1.5 Conducting the interview and taking the statement

*Before commencing with an interview an attempt should be made to put the interviewee at ease. Many interviewees will not have dealt with an enforcement agency before and may be anxious. One should only begin the interview once the interviewee is relaxed and ready to talk. Do not bring out the laptop or pen and paper to make notes until that point or later.*



Once one begins with the interview allow the interviewee to tell the story in his or her own words. Only interrupt if necessary. Allow the interviewee to digress. The digression may lead to the disclosure of additional information of which you were not aware.



Once the interviewee has told the story and appears to have exhausted his or her

recollection, go through the story again with him or her. Ask questions to probe and clarify inconsistencies. Notes may be taken at this point.

When satisfied that the interviewee has told everything possible begin to record the statement by writing or typing it. Record the story from beginning to end with as much relevant detail as possible.

Do not be concerned if the interviewee says something that will be inadmissible in Court (for example hearsay). It could still be valuable information to help guide the investigation.

**1.6 During the information gathering phase best results will be achieved if:**

- the interview has been planned
- a logical and/or chronological flow is followed
- each point is exhausted before moving to the next

**1.7 When recording a statement**

When taking a statement:

- record the statement in chronological order using separate paragraphs for each change of subject or part of an event
- Exhaust each point before moving on to the next
- If the interviewee is talking about more than one event or offence, deal with each one in full before starting the next event or offence
- Write in the first person i.e. in the words of the person making the statement
- Do not correct the interviewee's vocabulary or grammar unless it is necessary to clarify what they mean
- Avoid the use of abbreviations or slang unless it has already been clarified and recorded as to its meaning



- Do not underline, mark or otherwise draw attention to any part of the statement
- Include specific dates and times – not just “last night”
- Be explicit when referring to people or objects
- Where exhibits are involved, the chain of evidence needs to be proved by including information such as when the interviewee
  - Saw the item
  - Located or uplifted the item
  - Sold or disposed of the item
  - Handed it to an investigator

If electronically recording an interviewee endeavour to manage the interview with reference to the above.

### 1.8 Statement Endorsements

1. Whenever possible have an interviewee endorse and sign his or her statement. Once the statement is recorded in writing ask the interviewee to read it. If necessary read the statement aloud to him or her.
2. At the bottom of the statement, write or have the interviewee write the following:  
***"I have read the above statement (or the above statement has been read aloud to me) and to the best of my knowledge it is true."***
3. The interviewee should then sign the statement below the endorsement.
4. The investigator then witnesses the endorsement by writing:  
***"The above statement was recorded and signature witnessed by me at (location) on (date)",***
5. If the interviewee has written out the statement himself or herself in the presence of the investigator, the investigator should endorse the statement as follows:

***"The above statement was made in my presence and signature witnessed by me at (location) on (date)".***

### **1.9 Activity Recording**

**All occurrences, actions and decisions must be recorded on an Investigation Running-sheet or File Note.** Until the introduction of an online compliance system is possible, a legibly handwritten report is acceptable. (word-processed documents are preferred. These should include the following where relevant:

- actions taken in investigating the complaint;
- significant incidents/ events during the course of investigation of the complaint, especially, any occurrences of a breach;
- decisions made that affect the course or outcome of an investigation.
- All records made are dated, timed and signed by the writer and either placed without delay on the investigation file, or an annotation made on the file as to where the records may be located.

## **2 Procedural Fairness**

If a supplier is suspected of having breached NCC administered legislation the allegation should be personally put to the supplier. When this occurs the following actions should take place:

- the supplier's response should be recorded by the use of contemporaneous notes;
- if the matter is serious then the supplier should be invited to participate in a formal interview;
- should the supplier consent to a formal interview then it may be conducted on audiotape;
- the formal taped record of interview should have appropriate structure and protocols; and
- in all cases only one person suspected of committing the breach should be

interviewed at a time.

- the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA) must be taken into account.

### 3 Assessment of Evidence

**When considering enforcement action other than issuing a compliance notice, the following assessment criteria should be taken into account:**

- Whether the NCC has the necessary jurisdiction;
- The availability, competence and credibility of witnesses;
- The manner in which evidence was obtained;
- The availability of independent and corroborative evidence;
- The availability of competent and admissible evidence;
- Sufficient weight of evidence behind each element of an offence;
- The supplier has had an opportunity to respond to an allegation;
- Lines of defence are open to, or indicated by, the supplier; and
- Any other factors that could affect the likelihood of successful enforcement action.
- Adherence to all chains of evidence at all times.

NCC requires admissible, substantial and reliable evidence relating to any alleged breach. Only if this evidence is present will tribunal or court enforcement action be considered.

#### 3.1 Sufficiency of Evidence

**The assessment of evidence gained in the inquiry process is a crucial part of the compliance process.** One of the primary objectives of an investigation is to obtain the facts and evidence to determine if enforcement action is appropriate.



There may be insufficient evidence to support the alleged substantive breach. During an investigation, however, sufficient evidence may be gained to support enforcement action for another type of breach.

The test of whether sufficient evidence exists must be applied regularly throughout the investigation review process to ensure that matters continue to be investigated effectively and efficiently.

### **3.2 Insufficient Evidence**

**If there is insufficient evidence the investigation should be reviewed to identify other avenues of inquiry that can reasonably be expected to reveal further facts to clarify the matter one way or another.**

- If these avenues of inquiry exist they should be followed within reason.
- An investigation may be closed at any time if there is insufficient evidence to take further action, and continued exploration of the matter cannot reasonably be justified, or for a policy reason.

## **4 Investigation Reporting**

**Investigation files and processes have to stand up to both internal and external scrutiny and should therefore contain only the information that explains how the matter was investigated, assessed and dealt with.**

## **5 Dealings with the Complainant**

The investigation officer is required to deal fairly and efficiently with the complainant. The following is to occur on receipt of an investigation file by the investigation officer:

- contact the complainant within five (5) working days;
- confirm the issues for investigation with the complainant;

- explain what NCC can and cannot do;
- advise the estimated time frame for the investigation; and
- make a file note recording the contact made and listing the issues discussed.



Whilst a matter remains open for investigation, the complainant is to be updated on at least a monthly basis about what action is occurring. Contacts with the complainant are to be recorded on the investigation file and / or online compliance system.

When informing the complainant about the outcome of an investigation, where possible, written advice should be given to the complainant outlining the:

- issues originally confirmed with the complainant and subsequently investigated;
- Act and Section (title and reference) of the substantive breach;
- investigation findings and the basis upon which the findings are supported; and
- contact name and number of the investigation officer, inviting the complainant to contact the officer if they wish to discuss the matter further.

Consideration is given to contacting the complainant telephonically in the first place to advise them of the findings before sending out a written reply. In cases where the matters have been complex or extended over a period of time consideration should also be given, where practical to do so, to visiting the complainant personally to discuss the outcome, before sending out the written reply.

## **PART D**

### **INVESTIGATION CASE FILE REVIEW AND AUDIT PROCESSES**

The Supplementary Standard governing the investigation, the case file review and audit processes is of critical importance to the Investigations Directorate.

*The Supplementary Standard is intended to serve as a guide for NCC investigators, supervisors, managers and reviewers who will be responsible for conducting case file reviews*

#### **1. Scope**

**This Standard is of critical importance to, amongst others, staff engaged in investigations, compliance and enforcement duties.**

Investigation case file review and audit introduces systematic assessment processes for matters currently under investigation and also of investigations finalised within the review period. The processes seek to measure compliance with accepted investigation methodologies and NCC's Enforcement Framework requirements.

#### **2. Business Process – Investigation Case File Review and Audit**

The business process framework is composed of four elements that work together to:

- assess,
- enquire,
- address and analyse information relating to complaints and suspected breaches of legislation,
- undertake appropriate enforcement, whilst ensuring Policy and Standards are appropriately applied. These elements are:
  - case assessment;
  - inquiry;

- enforcement and review.

All incoming complaints referred for enforcement action are assessed against framework requirements (see PART C- Screening Phase). Supplementary Standards may be developed and issued from time to time to provide additional detail or to clarify framework policy issues and/or standards.

The File Review and Audit Process is conducted in several parts, namely:

- Self / Peer review;
- Manager / supervisor review;
- Divisional audit;

### 3. Self / Peer Review

The Self / peer review assists investigators in achieving satisfactory case file outcomes. This occurs through regular reappraisal of work in progress and results obtained, and the in-confidence sharing of information about cases with experienced colleagues, seeking confirmation or alternative viewpoints and opinions.



The Case File Review Checklist –

- Self / Peer Review is to be used to review all files on at least one occasion, preferably nearer to the completion of the investigation.
- It is suggested that the review take place when the investigation is well progressed, but before any final recommendation is made.
- Completed checklists are to be placed on the case file and entries made on the Investigation / File Activity Sheets stating when and by whom the last self / peer review was conducted.

#### 4. Management Review

**Management Reviews** are an essential part of the **Case File Review and Audit Process**. Drawing on the expertise of Supervisors or Managers of Investigations staff, will ensure a balanced overview of each file is maintained, with appropriate follow-up actions recommended and monitored. Supervisors and/or Managers will complete the Case File Review Checklist – Management Review assessing compliance with accepted investigations methodology and framework requirements.

- Completed checklists are to be placed on file and entries made in the Investigation/File Activity Sheets stating when and by whom the last Management review was conducted.
- An essential prerequisite for completion of the branch review and associated checklist will be the timely and accurate completion of the self / peer review checklist.
- Reviewing officers are encouraged to provide feedback to ensure that the review process is both effective and value adding.

#### 5. Issues of Management

The **review process** may identify issues requiring **follow-up action** to be taken by **investigating officers**. In such cases, investigators will be notified of necessary follow-up action, or recommendations to improve future case file management and/or review outcomes.



Managers, Supervisors and NCC staff performing case file reviews, **will be required to monitor progress. Subsequent reviews will assess the effectiveness of follow-up action or recommended improvements to case file management methodology and compliance with framework requirements.**





NATIONAL CONSUMER COMMISSION

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## GUIDELINES AND PROCEDURES FOR THE CONCILIATION OF COMPLAINTS IN THE NATIONAL CONSUMER COMMISSION

### 1. INTRODUCTION

- 1.1 In terms of Section 3(1) of the Consumer Protection Act 68, of 2008, the purpose and policy of the Act, is to promote and advance the social and economic welfare of consumers in South Africa by, amongst others: providing for a consistent, accessible and efficient system of **consensual** resolution of disputes arising from consumer transactions; as well as providing for an **accessible**, consistent, harmonized, effective and efficient system of redress for consumers

These Guidelines are meant to ensure that the NCC gives effect to Section 3(1) by ensuring that the NCC resolves complaints in a procedurally fair, economical and expeditious manner through Conciliation.

- 1.2 NCC seeks to ensure that parties first attempt to resolve a dispute through Conciliation prior to investigating a complaint. In order to achieve this objective, the Commission formulated these Guidelines to prescribe circumstances in which parties will be required to attend Conciliation.
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- 1.3 The Guidelines lay down general procedures and principles to be followed in the Conciliation process.
- 1.4 The Guidelines also prescribe the powers and functions of Conciliators.
- 1.5 Conciliation under the auspices of the NCC will be confidential and conducted without prejudice to the parties.

## **2. PURPOSE OF THE GUIDELINES**

- 2.1 To promote an understanding of Conciliation by the NCC
- 2.2 To inform parties in a dispute of the policies and procedures of Conciliation under the auspices of the NCC.
- 2.3 To prescribe the powers and functions of the Conciliator.
- 2.4 To guide Conciliators in the performance of their functions.

## **3. WHAT IS CONCILIATION?**

- 3.1 In broad terms, Conciliation is a process in which an independent, objective person, who without prejudice, attempts to assist disputing parties reach an agreement towards the resolution of a complaint.
- 3.2 Under NCC Conciliation, the Commission will provide the forum for the parties to a complaint to engage in a process of open negotiation around the complaint with the aim of reaching an agreement.

#### **4. ROLE OF THE COMMISSIONER**

- 4.1 To facilitate speedy resolution of disputes in terms of the CPA
- 4.2 To decide what complaint is appropriate for Conciliation.
- 4.3 To assist in narrowing the range of issues in the complaint.
- 4.5 To appoint Conciliators.
- 4.6 To provide assistance to the parties to arrive at an amicable resolution of the complaint.

#### **5. PROCEDURES**

- 5.1 Prior to investigating a complaint, the Commission will determine whether that complaint is appropriate for Conciliation.
- 5.2 Once the Commission has determined that a complaint can be conciliated, the parties to the complaint will be notified of the Conciliation in writing, by telephone or other appropriate means.
- 5.3 Conciliation proceedings are private and confidential. No person may refer to anything said at Conciliation proceedings during any subsequent proceedings, save where such issue is not likely to cause prejudice to any of the parties.
- 5.4 Generally, documents will be exchanged between the parties prior to the holding of Conciliation in the form of the referral form and other relevant documents determined by the Conciliator.
- 5.5 The Conciliator will decide on the form and method of Conciliation which could include a telephonic Conciliation.

- 5.6 If the parties to a Conciliation reach a settlement of the complaint, the Conciliator will confirm the outcome in writing to all parties. Following this a Consent Order will be drafted and signed by the supplier and the Commissioner in terms of Section 74.
- 5.7 The parties to the Conciliation may not be represented by a legal representative.
- 5.8 The venue of the Conciliation Proceedings will be determined by the Commission with due consideration to the costs of such an arrangement.

## **6. FUNCTIONS AND RESPONSIBILITIES OF A CONCILIATOR**

- 6.1 To ensure that the names of all parties in attendance have been properly recorded in the attendance register.
- 6.2 The Conciliator will be guided by the principles of objectivity, transparency, fairness and justice in the discharge of the Conciliator's duties.
- 6.3 The Conciliator must disclose if the Conciliator has any interest in the outcome of the complaint. The Conciliator must withdraw from the process if the Conciliator believes there is a reasonable apprehension of bias or partiality.
- 6.4 The Conciliator shall assist the parties in an independent and impartial manner in an attempt to reach an amicable settlement to the dispute within the context of the Consumer Protection Act 68, of 2008.

- 6.5 The Conciliator should outline to the parties how the Conciliation will be conducted and deal with any concerns or queries raised by the parties about the process.
- 6.6 At the completion of the Conciliation, the Conciliator will issue a Certificate of Outcome of a Dispute (COD Form).
- 6.7 If the parties reach a settlement, that agreement must be recorded in writing and signed by the parties to the dispute.

## **7. FORMS OF CONCILIATION**

- 7.1 The Conciliator may conduct the Conciliation in any manner that the Conciliator deems appropriate.
- 7.2 The process may be conducted telephonically or through mediation and facilitation in order to achieve an expeditious resolution of the complaint but in all cases mindful of the principle of fairness.

## **8. LANGUAGE POLICY**

- 8.1 The Conciliation will be conducted in English.

## **9. CONSENT AGREEMENT**

- 9.1 Consent Agreement in terms of Section 74 of the Consumer Protection Act 68 of 2008 will be signed by the supplier and the Commission .The Commission will forward the Consent Agreement to the Consumer Tribunal to be confirmed as a Consent Order.

## **10. POSTPONEMENT**

10.1 Conciliation may be postponed if all the parties to the dispute agree in writing to the postponement and the written agreement for postponement is received by the Commission more than five days before the scheduled date of the Conciliation.

10.2 Any party may also formally request a postponement at the Conciliation.

## **11. ATTENDANCE AT CONCILIATION**

11.1 Attendance and participation at Conciliation must be in person, in the case of a natural person or a representative in the case of a juristic person.

12.1 As a procedural step, the Conciliation coordinator shall first establish the availability of the parties telephonically before a matter is set down for Conciliation.

## **15. TRAVEL COSTS**

15.1 Travel and all associated costs will be borne by the individual parties.

## **16. CO-OPERATION OF PARTIES WITH THE CONCILIATOR**

16.1 The parties will co-operate with the Conciliator and, in particular, will endeavor to comply with requests by the Conciliator to submit documents, provide evidence and attend Conciliation hearings.

**17. COSTS**

- 17.1 Issues of costs in Conciliation may only be met by the Commission only in exceptional circumstances. Costs relating to frivolous or vexatious conduct will under no circumstances be entertained.

**18. DISPUTE RESOLUTION**

- 18.1 Any dispute about the interpretation or implementation of these Guidelines must be referred to the Commission in writing and the Commission's decision will be final and binding on all parties.
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