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CONSUMER PROTECTION (FAIR TRADING) ACT

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After many years of lobbying,[1] the *Consumer Protection (Fair Trading) Act*[2] ("*CPFTA*"[3]) was finally passed on 11 November 2003 and came into effect on 1 March 2004. The *CPFTA* represents a milestone and heralds a new era in terms of consumer protection in Singapore.

The aim of this paper is to examine the workings of the *CPFTA* and its implications and to highlight the ambiguities presented by it and the shortfalls, if any. The *CPFTA* is to a large extent based on the Saskatchewan *Consumer Protection Act*.[4] However, the *CPFTA* also bears some resemblance to the Australian *Trade Practices Act*,[5] the Alberta *Fair Trading Act*,[6] the British Columbia *Trade Practices Act*[7] and the New Zealand *Fair Trading Act*.[8] References will be made to these various statutes where relevant.

It might be useful to start by summarizing the basic framework of the *CPFTA*. The basic framework of the *CPFTA* is that, in relation to "goods" and "services" when a "consumer" enters into a "consumer transaction" involving an "unfair practice", he has a right of action against the "supplier". The meaning of these terms will be examined in due course. However, before that, the scope of application of the *CPFTA* will first be briefly mentioned.

I. APPLICABILITY OF THE *CPFTA*

Section 3 provides that the *CPFTA* shall apply where

(a) the supplier or consumer is resident in Singapore or
(b) the offer or acceptance relating to the consumer transaction is made in or is sent from Singapore.

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1 Singapore Parliamentary Debates, Vol. 76, No. 23 at 42.
2 Act 27 of 2003.
3 Unless otherwise stated, all sections referred to in this paper are with reference to the *CPFTA*.
4 Cap. C-30.1, 1996, Statutes of Saskatchewan.
5 Act 51, 1974, Commonwealth Consolidated Acts.
6 Cap. F-2, 2000, Revised Statutes of Alberta.
7 Cap. 457, 1996, Consolidated Statutes of British Columbia.
8 Act 121, 1986, New Zealand Statutes.

Under section 3(a) it would suffice if the consumer or supplier is resident[9] in Singapore. This would appear to be so even if the transaction takes place by electronic means.[10] Thus if a consumer, who is not resident in Singapore purchases a good or service over the Internet from a supplier, who is resident in Singapore, the *CPFTA* would apply assuming Singapore law governs the transaction. Similarly, if a consumer who is resident in Singapore purchases a good or service over the Internet from a supplier who is not resident in Singapore, the *CPFTA* would apply again assuming Singapore law governs the transaction. Though foreseeably in both the situations described above, there may be practical difficulties enforcing such claims. As for section 3(b), assuming again Singapore law governs the transaction, it is wider and seems to even cover situations where neither the supplier nor the consumer is resident in Singapore but the offer or acceptance relating to the consumer transaction is made in or is sent from Singapore, though again as a matter of practice, the likelihood of such a claim arising, must be relatively uncommon.

II. Meaning of Goods and Services

Section 2(1) defines "goods" to mean

(a) any personal property, whether tangible or intangible,[11] and includes chattels that are or are intended to be attached to real property on or after delivery;[12] and credit,[13] including credit extended solely on the security of land;
(b) residential property;[14] or
(c) a voucher.[15]

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9 The term "resident" has not been defined in the *CPFTA*. However, the Oxford English Dictionary definition, meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place", which was adopted in case of *Levene v. The Commissioners of Inland Revenue* [1928] A.C. 217 at 222, may provide a useful point of reference.

10 This view is further fortified by section 3(b).

11 Under section 61(1) of the *Sale of Goods Act* (Cap. 393, 1999 Rev. Ed. Sing.), the term "goods" is defined to include "all personal chattels" and in the context of the *Sale of Goods Act*, it is likely that digitalized software which is downloaded is not covered (*St. Albans City Council v. I.C.L.* [1996] 4 All E.R. 481). In contrast, part (a) of the definition of goods under section 2(1) of the *CPFTA* by making express reference to "intangible" property, arguably, includes items such as digitalized software.

12 Thus for instance, wardrobes or kitchen cabinets installed under a renovation contract are likely to be classified as "goods". If not for this express inclusion such fixtures may not fall within the definition of "personal property"; see *Bain v. Brand* (1876) 1 App. Cas. 762 at 767.

13 It is not clear what the term "credit" refers to. Under paragraph 1 of the First Schedule certain transactions are excluded from the ambit of the *CPFTA*. These include any transaction or activity that is regulated under any written law specified in paragraph 2. Paragraph 2 goes on to list the statutes and this includes the *Banking Act* (Cap. 19, 1999 Rev. Ed. Sing.), *Finance Companies Act* (Cap. 108, 2000 Rev. Ed. Sing.), *Pawnbrokers Act* (Cap. 222, 1994 Rev. Ed. Sing.) and the *Moneylenders Act* (Cap. 188, 1985 Rev. Ed. Sing.). Thus the term "credit" must refer to a transaction or activity not regulated by these statutes (see *infra*, text at note 25). One such possibility could be credit granted by a company whose primary business is not to grant such credit. Such companies may not be regulated under the statutes mentioned above and thus the credit they grant may fall under the ambit of the *CPFTA*. Even then, it is unlikely that such companies grant credit on "security of land" and even if they do, the $20,000 prescribed limit (see *infra*, text at note 191) is unlikely to be met in such a situation. Thus the reference to "including credit extended solely on security of land" is a little puzzling.

14 But see *infra*, text at note 18.

15 The term "voucher" is defined in section 2(1) of the *CPFTA* to mean "any document that purports to give the holder of the document the right to obtain goods or services or the right to obtain goods or a service at a discounted or reduced price".

In contrast in relation to services, there is no exhaustive definition. Section 2(1) merely states that "services" includes:

(a) a service offered or provided that involves the addition to or maintenance, repair or alterations of goods or any residential property,
(b) a membership in any club or organisation if the club or organization is a business formed to make a profit for its owners,
(c) the right to use time share accommodation[16] under a time share contract.[17]

One issue that could arise in relation to services is whether the term "services" extends to professional services (such as legal or accounting services). It is difficult to see why they should be excluded and indeed in Australia, in relation to section 52 of the *Trade Practices Act*, it has been held that such services are covered even though professional services are not specifically referred to in that section.[18]

Whatever, the exact ambit of the term "goods" or "services", several transactions are stated to be outside the scope of the *CPFTA*.[19] Firstly, paragraph 1(a) of the First Schedule excludes the acquisition of an estate or interest in any immovable property (but not including any lease of residential property granted in consideration of rent[20] or any time share contract). Hence when the definition of goods in section 2(1) refers to residential property it is actually a reference to residential property which is leased under rental and not residential property which is bought.

Secondly, paragraph 1(b) of the First Schedule excludes a service provided under a contract of employment.[21] The necessity of this exception is not immediately clear as the user of the service, namely the employer, is unlikely to be a "consumer" and

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16 The term "time share accommodation" has been defined in section 2(1) to mean "any living accommodation, in Singapore or elsewhere, used or intended to be used (wholly or partly) for leisure purposes by a class of persons all of whom have rights to use, or participate in arrangements under which they may use, that accommodation or accommodation within a pool of accommodation to which that accommodation belongs".

17 The term "time share contract" has been defined in section 2(1) to mean "a contract which confers or purports to confer on an individual time share rights that are exercisable during a period of not less than 3 years". Thus for instance, if an airline offers a choice of subsidized hotel accommodation to a passenger who has booked a ticket with it as part of a package, since that is unlikely to run for 3 years; that would not be a "time share contract". The term "time share rights" is in turn defined in section 2(1) to exclude rights conferred under a contract of employment or an insurance policy. Thus if an employee or an insurance policy holder is granted a right in that capacity to use certain accommodation for his leisure purposes, that would not be classified as a "time share right".

18 *Bond Corporation Pty. Ltd. v. Thiess Contractors Pty. Ltd.* (1987) 71 A.L.R. 615 at 620. See also the Alberta Provincial Court decision of *Chen v. Campbell, Douglas & Randall Associates, Inc.*, 2002 AB.C LEXIS 2645. Further, see Singapore Parliamentary Debates, Vol. 76, No. 24 at 24.

19 See definition of "consumer transaction" in section 2(1).

20 Hence "leaseholds", such as a 99-year leasehold, are excluded as well. Further, it is not every other lease of property for rent that is included. This is due to the definition of the term "supplier" (see *infra*, text at note 29).

21 It is likely that that the term "service provided under a contract of employment" refers to the service of the employee and not the "service" of the employer as it is unlikely that the employer can be said to be providing a service to the employee. Even if were held otherwise, paragraph 1(b) above disallows employees from taking action against employers for unfair practices under the *CPFTA*. However, the position could be different with respect to employment agencies which can be considered as providing a service; see for instance the Alberta Provincial Court decision of *Chen v. Campbell, Douglas & Randall Associates*, *Inc.*, 2002 AB.C LEXIS 2645.

the provider of the service, namely the employee, is unlikely to be a "supplier" as defined in the *CPFTA*.[22]

Thirdly, paragraph 1(c) of the First Schedule excludes "any transaction or activity" that is regulated by the statutes listed in paragraph 2. The statutes referred in paragraph 2 include the *Banking Act*, *Finance Companies Act*, *Insurance Act*, *Moneylenders Act* and the *Securities and Futures Act*.[23] The reason why such financial services are excluded is that such services are already regulated by other statutes[24] or codes of practice[25] and it may result in confusion and increase the cost of compliance if yet another set of obligations is introduced. However, the rationale for excluding such financial services is debatable. While some unfair practices such as making misleading statements may be regulated under existing statutes, not all are. For instance, the usage of small print to conceal material facts[26] or the introduction of terms that are harsh, oppressive or excessively one-sided[27] may not be regulated by those existing statutes. That problem aside, it is also not entirely clear what is meant by the term "any transaction or activity". For instance, under section 35R of the *Insurance Act*, insurance intermediaries are prohibited from making certain false or misleading statements. Since the "activity" of making false or misleading statements is regulated by the *Insurance Act*, the *CPFTA* should not apply. However, what if the consumer claims that undue pressure[28] was exercised? Can it be argued that that specific activity is not covered by the *Insurance Act*, or should the term "activity" be interpreted broadly to mean the activity of inducing someone to enter into an insurance contract? Further in relation to the same problem, can it be argued that the "transaction", namely the entering into of an insurance contract, is not regulated by the *Insurance Act*? Can it be said that the *Insurance Act* regulates the carrying on of insurance business and insurance intermediaries and not insurance contracts *per se* unlike some other statutes which specifically regulate certain types of contract?[29] There is certainly some ambiguity in this regard, but it likely that the intention was to exclude such financial services altogether.[30]

III. Meaning of Supplier

The term "supplier" is defined in section 2(1). It provides that the term "supplier" refers to a person who in the course of the person's business:

(a) provides goods or services to consumers,[31]
(b) manufactures, assembles or produces goods,

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22 See *infra*, text at note 33.
23 Cap. 289, 2002 Rev. Ed. Sing.
24 For instance, section 26 of the *Financial Advisers Act* (Cap. 110, 2002 Rev. Ed. Sing.) regulates the making of misleading statements by financial advisers. Similarly section 35R of the *Insurance Act* (Cap. 142, 2000 Rev. Ed. Sing.) regulates the making of misleading statements by insurance intermediaries.
25 See for instance, the Code on Collective Investment Schemes.
26 See *infra*, text at note 156.
27 See *infra*, text at note 145.
28 See *infra*, text at note 145.
29 See for instance, the *Hire Purchase Act* (Cap. 125, 1999 Rev. Ed. Sing.).
30 See also Singapore Parliamentary Debates, Vol. 76, No. 24 at 24.
31 This would cover persons such as retailers.

(c) promotes[32] the use or purchase of goods or services[33] or
(d) receives or is entitled to receive money or other consideration as a result of the provision of goods and services to consumers.[34]

It will be evident from the definition that if the goods or services are not provided in the course of a person's business, then the *CPFTA* would not be applicable.[35] Thus if a person sells his car or leases out his flat and he is not respectively in the business of selling cars or leasing out flats, the *CPFTA* would have no application.

It may also be noted that under section 2(1), the term "supplier" includes any employee or agent of the persons enumerated above. Thus it would appear that the employee himself can be directly liable to the consumer,[36] though consumers are unlikely to take action against employees directly as they may not be in as good a financial position as employers to meet liabilities.

The question may also arise whether the employer could be vicariously liable for the acts (such as representations) made by his employees or agents. While the original draft of the *Consumer Protection (Fair Trading) Bill* did not expressly provide for such liability, the current *CPFTA* expressly does so pursuant to section 5(3)b.[37]

It may also be noted that the term "supplier" in section 2(1) includes persons such as manufacturers and promoters. One interesting question is whether such persons must have a direct contract with the consumer, before they can become liable for unfair practices. In this regard, section 8(3)b of the *Saskatchewan Consumer Protection Act* provides it is an unfair practice notwithstanding that "there is no privity of contract between the supplier and any specific consumer affected by the unfair practice".[38] This provision has been omitted from the Singapore legislation. Notwithstanding this omission, it is suggested that it is not necessary for there to be a direct contract between manufacturers or distributors and consumers before liability

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[32] However, under section 16 any person who on behalf of a supplier, prints, publishes, distributes, broadcasts or telecasts an advertisement in good faith in the ordinary course of business, will not incur any liability. Section 16 clearly covers the media. However, it is not clear if it covers the advertising agency (see for instance the Australian case of, *Gutherie v. Metro Ford Pty. Ltd.* (1977) A.T.P.R. 40-030). It would have been clearer if the section expressly included any person who on behalf of a supplier "designs, makes or produces" an advertisement.

[33] This could cover persons such as distributors.

[34] This could cover persons such as agents. But not all agents may be included. As stated earlier, under the First Schedule to the *CPFTA*, any transaction or activity that this is regulated by various statutes that are listed is excluded. Thus for instance, since the making of misleading statements by insurance intermediaries is covered under section 35R of the *Insurance Act*, insurance intermediaries will not be subject to the *CPFTA*, at least in respect of this (see *supra*, text at note 25).

[35] This is also the position in Saskatchewan. See for instance, the Saskatchewan Small Claims Court decisions of *Gossner v. Ziegler* (2001) online: Canadian Legal Information Institute <http://www.canlii.org/sk/cas/skpc/2002/2002skpc10002.html> and *Parker v. Long* (2002) online: Canadian Legal Information Institute <http://www.canlii.org/sk/cas/skpc/2001/2001skpc10042.html>.

[36] See for instance, the Alberta Provincial Court decision of *Patterson v. Hartman* (2001) 290 A.R. 154.

[37] See also section 45(1) of the New Zealand *Fair Trading Act* which lays the ground for such liability and the New Zealand cases of *Commerce Commission v. Grenadier Real Estate* [2002] D.R.C. 740; *Sharoodi v. Lochores Real Estate* [1997] D.C.R. 349, in this connection.

[38] This is also the position under the *British Columbia Trade Practices Act* (section 1). See also the British Columbia case of *Robson v. Chrysler Canada Ltd.* [2001] B.C.T.C. 40 where the court held that a distributor could be liable for unfair practices even though there was no privity of contract between him and the ultimate consumer.

can arise.[39] This is so for several reasons. Firstly, if it was the intention to restrict to such persons who have a contract with the consumer, it would not have been necessary to provide for parts (b) to (d) in the definition of the term "supplier", as persons in such situations would all also fall under part (a). In addition, section 16 provides that a person who on behalf of a supplier prints, publishes, distributes, or broadcasts or telecasts an advertisement in good faith and in his ordinary course of his business shall not be liable under the *CPFTA* in respect of any statement, representation or omission in that advertisement. Clearly, if the intention was to restrict the term suppliers to persons who have contracts with consumers, section 16 would not have been necessary. Similarly, employees and agents are included in the definition of supplier though they are most unlikely to have a contract with the consumer. Further it would appear that a consumer who has received a gift from a supplier would be able to sue the supplier for an unfair practice even if he does not have a contract with him.[40] It would also appear that a consumer who has received a good or service from a supplier, but which good or service has been paid for by another individual, may be able to sue the supplier for an unfair practice even if he does not have a contract with the supplier.[41] All these factors suggest that the *CPFTA* is not a reflection of contractual rights[42] and that rather it creates new statutory rights.[43]

However, reference must also be made to section 4 of the *CPFTA* which is the main section giving rise to liability. It starts off by stating "It is an unfair practice for a supplier, in relation to a consumer transaction" to carry out unfair practices.

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[39] In Australia under the *Trade Practices Act*, there is no similar provision which dispenses with the concept of privity of contract. Nonetheless, Australian cases have held that there could be liability in such circumstances. See for instance, *Barton v. Croner Trading Pty. Ltd.* (1984) 54 A.L.R. 541 (wholesale merchant selling toys to retailer which contained misleading labels held liable). However, this may be of little relevance as the definition of who is not to engage in unfair practices in Australia is different and much wider.

[40] See definitions of "consumer" and "consumer transaction" in section 2(1) (*infra*, text at note 57 and note 57).

[41] See definition of "consumer" (*infra*, text at note 57 and note 59).

[42] Section 7(3) of the *CPFTA* provides that an action under the statute shall be deemed to be a claim founded in contract. However, this classification is only for the "purposes of determining" whether an action exceeds the District Court limit or the Magistrate Court limit within the meaning of the *Subordinate Courts Act* (Cap. 321, 1999 Rev. Ed. Sing.) Hence, it is suggested that this does not imply that there has to be contract between the parties before an action can arise. (In fact quite to the opposite, it may be argued that since this section "*deems*" all actions under the *CPFTA* to be founded in contract, there is no actual necessity to prove the presence of a contract. However, it is suggested this argument is a little weak as the said classification is only for the limited purpose of determining whether an action exceeds the District Court limit or the Magistrate Court limit within the meaning of the *Subordinate Courts Act*). Another point which suggests that the *CPFTA* is not a reflection of contractual rights is section 5(1). Section 5(1) provides that an unfair practice (such as a misrepresentation) can take place before during or after a transaction. In so far as unfair practices "after a transaction" may give rise to liability, this certainly goes beyond what is recognized by contract law. Take the following example: X buys a product. The contract provides in small print that goods purchased may be exchanged within 7 days without any qualification. X does not like the product though it is of satisfactory quality. He goes to the shop the very next day and tries to return the product, whereupon an employee of the shop (innocently) tells X that since the product is of satisfactory quality, he cannot do so. As such X does not return the product. Subsequently, after the 7 day period, X realizes his rights. In such a situation, X may not have a remedy in contract, but could have one under the *CPFTA* (see specific unfair practice 9 in the Second Schedule, *infra*, text at note 140).

[43] See for instance, regulation 5(4) of the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations* 2003 (S. 620/2003 Sing.).

It would be noted that liability only arises if the unfair practice arose in relation to a "consumer transaction". The term "consumer transaction" has been defined in section 2(1) to mean:

(a) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift,[44] contest or other arrangement[45] or
(b) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement.

In relation to a manufacturer, it may be argued that part (a) must be read to mean that there must be a direct supply between the manufacturer and the consumer and if there is no such direct supply, then the manufacturer would not be liable for any unfair practice such as a false statement in an advertisement or brochure or label. However, if it is read restrictively in that way, then part (a) seems unnecessary as that would also be covered under part (b). It is suggested that part (b) by using the term "agreement", covers situations where there could be a contract between the parties and part (a) by not including the term "agreement" covers situations in which there is no contract between the parties. Thus it is suggested that part (a) should be read widely to include both direct and indirect supply. If such a construction is accepted, manufacturers would be covered as they indirectly supply the consumers with goods.

Another way of achieving a similar result would be to argue that the term "a supplier" in the definition of the term "consumer transaction" need not necessarily be the same person as the supplier who is being sued for the unfair practice under section 6(1).[46] So long as a supplier engages in some unfair practice and is involved in a consumer transaction, liability can arise. Under such an interpretation, in the case of a manufacturer, the term "a supplier" in the definition of the term "consumer transaction" would refer to the retailer whereas the person who is being sued for the unfair practice under section 6(1) could be the manufacturer. Such a construction also works well in other situations. For instance, in defining "supplier" section 2(1) includes employees. In this context employees, the term "a supplier" in the definition of the term "consumer transaction" could refer to the employer (who could be a retailer for instance), but the person who is being sued for the unfair practice under section 6(1) could be the employee. Similarly, if a tour operator books a tour with a foreign entity on a consumer's behalf as an agent, but makes some misrepresentation in the process, the term "a supplier" in the definition of the term "consumer transaction" could refer to the foreign entity but the person who is being sued for the unfair practice under section 6(1) could be the agent.[47]

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[44] *Infra*, note 57.

[45] The term "other arrangement" is highly vague, but as to one possible illustration, *infra*, note 47. Another possible illustration could be goods or services supplied pursuant to a lucky draw in so far as the lucky draw cannot be classified as a "gift" or "contest".

[46] Section 6(1) is the section which gives the consumer the right to sue the supplier for breach of section 4 and it reads: "A consumer who has entered a consumer transaction involving an unfair practice may commence an action in a court of competent jurisdiction against the supplier".

[47] In the above example of the tour operator, it is also possible to argue that there are two services being performed. One service would be the tour and the other would be booking the tour on behalf of the consumer. Recognizing that there may be two services being supplied does not really make much of

However, it does not follow that a manufacturer or promoter would be liable in all circumstances for unfair practices. Before liability can arise, the unfair practice must take place "*in relation to a consumer transaction*" (emphasis added). If a manufacturer or promoter provides an advertisement, brochure or labeling which is addressed to the consumer, it may be argued that the unfair practice *relates* to a "consumer transaction".[48] However, if a manufacturer makes a misrepresentation in his sale to the retailer, but does not address that misrepresentation directly to the consumer (for instance, he tells the retailer that a piece of furniture is made of solid pine when this is not so and this statement is not reproduced in any brochure or advertisement or labeling provided by the manufacturer that is addressed to the consumer) then, it may be more difficult to argue that the unfair practice *relates* to a consumer transaction.[49] Nonetheless, this limitation does not deter from the main point that in some circumstances, manufacturers and promoters can be held liable to consumers even though they do not have a contract with the consumer. But it must be stressed that this liability under the *CPFTA* is only in respect of "unfair practices" and not in respect other matters such as defective or unsatisfactory products or services *per se*.

However, before moving on, one further point must be addressed. One of the courts in which an action under the *CPFTA* may be commenced (and perhaps the most likely one) is the Small Claims Tribunal.[50] However, under section 5(1)(a) *Small Claims Tribunals Act*,[51] the Small Claims Tribunal has jurisdiction only to hear claims relating to a "dispute arising from any *contract* for the sale of goods or the provision of services". This is also reiterated in section 7(1) of the *CPFTA*. Hence if there is no contract between the parties, the Small Claims Tribunal would not have the jurisdiction to hear the dispute.[52]

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a difference on the facts above. However, in some situations it could. For instance, if one service or good is not covered under the *CPFTA* while the other is, then that could make a difference. Take the case of a person who employs an agent to sell his house. The agent makes a misrepresentation about the house to the buyer who is a consumer. The sale of residential properties is excluded under the First Schedule to the *CPFTA*. However, the agent could arguably be considered to be providing a service to the buyer as a result of "an arrangement" he had with the seller. Thus aside from other rights under the law, the buyer may be able to institute an action against the agent under the *CPFTA*, though of course there is a $20,000 cap on the amount that can be recovered if any (see *infra*, text at note 193). As already alluded to, the fact there may not be any consideration between the agent and the buyer should not make any difference for as stated earlier, *inter alia* even the consumer who have gotten goods as a gift is in a position to institute an action if an unfair practice has taken place (see definition of "consumer transaction" in section 2(1) and note 57).

48 See for instance, the British Columbia case of *Robson v. Chrysler Canada Ltd.* [2001] B.C.T.C. 40 where the court held that the local distributor who advertised and promoted the products in question could be considered to be involved in a "consumer transaction".

49 In fact, if a broad interpretation is taken and it is held that the misrepresentation is "*in relation to a consumer transaction*" in such an instance, this would render the reference to that phrase in section 4 nugatory. Section 4 may as well just have stated "It is an unfair practice for a supplier to . . ." do certain things without reference to that phrase. See also *Robson v. Chrysler Canada Ltd.* [2001] B.C.T.C. 40 where the court held that a foreign manufacturer who did not solicit, advertise or promote the products in question could not be considered to be involved in a "consumer transaction".

50 Section 7(1).

51 Cap. 308, 1998 Rev. Ed. Sing.

52 As stated earlier (*supra*, note 42), while section 7(3) *deems* actions under the *CPFTA* to be founded in contract, this is only for the *limited* purpose of determining whether the action exceeds the District Court limit or the Magistrate's Court limit within the meaning of the *Subordinate Courts Act*. Thus

IV. Meaning of Consumer

Section 2(1) defines "consumer" to mean an individual who otherwise than exclusively in the course of business, receives or has the right to receive goods or services from a supplier or has a legal obligation to compensate a supplier for goods or services that have been or are to be supplied to another individual.

As such only individuals are included. The term "individual" is not defined in the *CPFTA* but it likely to exclude companies and other incorporated corporations such as statutory boards.[53] However, this does not mean that a business can never be a consumer. An individual who is involved in business, such as a sole proprietor or a partner may also be considered as a consumer in so far the goods or services are not received "exclusively in the course of business". Section 2(2) provides that an individual who holds himself out as acting exclusively in the course of business shall be treated as acting exclusively in the course of business. Thus if a sole proprietor buys a mobile phone by representing that it is for both a business and non-business use, it is likely he would be considered to be a consumer under the *CPFTA*.[54] On the other hand, if he buys it by representing that it is exclusively for a business use then it is unlikely that he would be considered a consumer. However, it is not clear if the definition in section 2(2) is meant to be exhaustive. For instance if a sole proprietor such as a lawyer, buys a computer from a shop solely for business use *without holding out anything*, does it automatically mean that he is not buying exclusively in the course of business and hence he is a consumer? The answer is probably in the negative.[55]

It may also be noted that, read in conjunction with the definition of the term "consumer transaction"[56] in section 2(1), the term "receives or has the right to receive" seems not to be restricted to purchasers. Thus for instance, if a person hires a good

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there still needs to be an actual contract between the parties before an action can be commenced at the Small Claims Tribunal.

53 See for instance the definition of the word "individual" in D. Thompson ed., *Oxford Dictionary of Current English* (Oxford: Oxford University Press, 1998) wherein the word "individual" is defined as a "single human being".

54 However, the remedies available under the *CPFTA* may have to be apportioned to distinguish between business and non-business uses; see sections 7(6) and 7(7). In this regard, while damages may be apportioned, it is difficult to see how the other orders under section 7(4) relating to restitution, specific performance, repairs and variation of the contract can be apportioned as a matter of practice.

55 In any case, even if this view is not correct, it must be pointed out that under section 7(6), the consumer cannot get any relief in respect of goods or services in so far as they are intended for a business use. In this regard, section 7(8) provides that goods or services intended for business use shall include—

(a) goods or services (as the case may be) that the consumer intends to re-sell in the course of his business; and

(b) goods that the consumer intends to use up or transform, in the course of his business, in a process of production or manufacturing or in repairing or treating other goods or fixtures, and "business use" and "non-business use" shall be construed accordingly.

In the above example of a computer, clearly it does not fall under section 7(8)a or b, but since the definition is not exhaustive in so far as it uses the word "includes", it is likely that using the computer in the business would amount to a business use.

56 See *supra*, text at note 46.

such as a car or gets a free gift,[57] he is still treated as a consumer in so far as he "receives or has the right to receive".

In addition it may be noted that the definition of the term consumer includes the person who has the legal obligation to compensate a supplier for goods or services that have been or are to be supplied to another individual. Thus an individual can still be considered a consumer even if he does not use the goods personally. Thus if X buys a good meant for Y, X can still be considered a consumer. In the above example, Y too possibly could be considered a consumer in so far as he "receives" the goods from[58] the supplier.[59]

V. Unfair Practices

Section 4 states that it is an unfair practice for a supplier, in relation to a consumer transaction to:

(a) do or say anything or fail to do or say anything, if as a result a consumer might be reasonably be deceived or misled,
(b) make a false claim,
(c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer
  (i) is not in a position to protect his or her own interests or
  (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or proposed transaction or any matter related to the transaction or
(d) without limiting the generality of paragraphs (a) to (c), do anything specified in the Second Schedule.

A. *Section 4(a)*

Section 52 of the Australian *Trade Practices Act* provides that: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". In this regard, several Australian cases[60] have held

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[57] The term "gift" in the definition of "consumer transaction" read with the term "receives" in the definition of "consumer" as opposed to the term "right to receive", also suggests that there does not have to be a contract between the parties. Take the following example: X receives a letter from Z shop promising him a free gift. X goes to Z shop to collect the free gift and he incurs traveling expenses in the process. Once there and having received the gift, he finds that the free gift is really worthless unless he buys another product. In such situation, arguably in theory X may be able to sue Z shop for having wasted his expenses unnecessarily as a result of an unfair practice.

[58] It would appear from the definition of the term "consumer" in section 2 that for Y to be considered a consumer he must have directly received the goods from the supplier. If Y receives the goods from X instead of the supplier, this requirement may not be met.

[59] Section 6(2) of the original draft *Consumer Protection (Fair Trading) Bill* provided: "For avoidance of doubt, where the consumer transaction involves an agreement between a supplier and a consumer (referred to in this subsection as the first consumer) in which the supplier is to supply goods or services to another consumer specified in the agreement, only the first consumer may commence an action under subsection (1)". However notably, this section has been omitted in the current *CPFTA*.

[60] *Per* Gibbs C.H. in *Parkdale v. PUXU* (1982) 42 A.L.R. 1 at 6 and *per* Northrop J. in *Annand & Thompson v. T.P.C.* (1979) 25 A.L.R. 91 at 111. See also the New Zealand case of *Marcol Manufacturers Ltd. v. Commerce Commission* [1991] 2 N.Z.L.R. 502.

that whether the conduct has been misleading or deceptive has to be tested against the standard of a reasonable man even though the term "reasonable" does not appear in the Australian statute. *A fortiori*, since the Singapore statute specifically refers to reasonableness, clearly the test is objective.

In addition Australian cases have held that intention to mislead is not a necessary ingredient. For instance, in *Parkdale v. P.U.X.U.*,[61] Gibbs C.J. stated:

> There is nothing in the section that would confine it to conduct which was engaged in as a result of a failure to take reasonable care. A corporation which has acted honestly and reasonably may therefore nonetheless be rendered liable .... The liability imposed by s 52, ... is thus quite unrelated to fault.[62]

Similarly, in *Global Sportsman v. Mirror*,[63] the court stated,

> Whether or not s 52(1) is contravened does not depend upon the corporation's intention or its belief concerning the accuracy of such statement, but upon whether the statement in fact contains or conveys a meaning which is false, that is to say whether the statement contains or conveys a misrepresentation.

This also appears to be the position in Canada[64] and New Zealand.[65] Thus, it is likely that Singapore courts would also adopt this stand in relation to conduct which is misleading. In fact this position in Canada, Australia and New Zealand, is not only in respect of civil liability but also criminal liability. In Singapore there is only civil liability and no direct criminal liability[66] for the breach of any of the provisions of the *CPFTA*. Thus *a fortiori*, the lack or presence of intention should be irrelevant. This view is further fortified by the fact that in Singapore, some of the specific provisions under Second Schedule[67] require to knowledge or intention in order to give rise to liability. This suggests that where there is no express reference to knowledge or intention in the section or where the words themselves do not by implication raise the need for intention or knowledge, which is clearly the case with section 4(a) in so far as it deals with misleading conduct, knowledge or intention should be irrelevant.

However, in relation to the word "deceived", there is some suggestion in Australia that that may involve some element of fault. For instance in *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.,*[68] Lockhart J. stated:

> "misleading" and "deceptive", are plainly not synonymous .... "Mislead" does not necessarily involve an element of intent and it is a word of wider reach than "deceive". However, it is difficult, in my opinion, to read the word "deceive" in s 52 other than as involving some degree of moral turpitude as it does in ordinary

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61 (1982) 41 A.L.R 1 at 5.

62 The court also stated (*ibid.* at 9) that the section should be "widely interpreted without being read down by the heading". Thus similarly, it is suggested that the argument that if there is no fault, that would not amount to an "unfair" practice as provided for in the heading, should not be accepted.

63 (1984) 55 A.L.R. 25 at 30.

64 See for instance, *Findlay v. Couldwell and Beywood Motors* (1976) 5 W.W.R. 340 at 345 and *Mikulus v. Milo European Cars Specialists Ltd.* (1993) C.P.R. (3d) 1 at 10. See also "Statutory Regulation of Unfair Business Practices in Saskatchewan: Possibilities and Pitfalls", 62 Sask. L. Rev. 45.

65 See for instance, *Marcol Manufacturers Ltd. v. Commerce Commission* [1991] 2 N.Z.L.R. 502 at 508.

66 See *infra*, text at note 209.

67 The specific provisions referred to are contained in parts 4, 5, 13, 17 and 18 of the Second Schedule.

68 (1989) 79 A.L.R. 83 at 92.

> English usage. Trickery, craft and guile . . . are typically at the heart of this second element of the statutory provision directed to the protection of the public from unfair trading practices.

This can be contrasted with the position in Canada where cases have held that an action can be deceptive even without any intent to deceive on the part of the supplier.[69] As stated by Ruttan J. in the British Columbia Supreme Court decision of *Findlay v. Couldwell and Beywood Motors*:[70]

> . . . a deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading and it may be inadvertent yet still sufficient to void the transaction under the statute, which is directed to the welfare of the consumer, not the punishment of the vendor.

Of the two views, it is suggested that the position in Canada is to be preferred. The emphasis in section 4(a), too, seems to be on the effect on a reasonable consumer rather than on the intent of the supplier. However, even if the Australian view as stated above is adopted, it may not really make much of a practical difference. This is so because even if deception cannot be established because of a lack of intention, the conduct is likely to be misleading nonetheless and hence the supplier may still be liable.

Another issue that may arise in relation to section 4(a) is whether silence can lead to a breach of that section and if so in what circumstances. In this regard, in Australia, it has been held[71] that section 52 of the Australian *Trade Practices Act* can be breached by a failure to disclose information in certain circumstances, even though section 52 does not expressly provide for this. In contrast, in Singapore, section 4(a) expressly refers to a failure to "do or say" something. Hence quite clearly in Singapore, silence on the part of the supplier can result in a breach.

Australian cases have also held that in determining whether silence can give rise to liability under section 52, much will depend on the facts of the actual case[72] and that the duty under section 52 is not confined to situations where silence can amount to a misrepresentation under common law.[73] Though the courts have stated this, many of the cases decided seem to fall somewhat within common law perimeters.[74] In

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69 *Director of Trade Practices v. Van City Construction Ltd*, 1999 B.C.T.C. LEXIS 1918; *Findlay v. Couldwell and Beywood Motors* [1976] W.W.R. 340.

70 [1976] 5 W.W.R. 340 at 345.

71 See for instance, *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83.

72 *Ibid.* at 95.

73 See for instance, *per* Bowen C.J. in *Rhone-Poulenc Agrochimie v. U.I.C. Chemical Services Pty. Ltd.*, (1986) 68 A.L.R. 77 at 84.

74 See for instance *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83 (half truth: representing that the seating capacity of a restaurant was of a certain amount but not disclosing that that amount was not approved of by the authorities), *Hoover (Australia) Pty. Ltd. v. Email Ltd.* (1991) 104 A.L.R. 269 (half truth: representing that a 2 kg weight has been used, but not disclosing the actual make up of the weight which made a lot of difference on the facts of the case) and *Wildsmith v. Dainford Ltd*. (failing to correct a true representation about a floor plan which subsequently became false). These cases can be contrasted with *Bradford House Pty. Ltd. v. Leroy Fashion Group Ltd.* (1983) 46 A.L.R. 305. In this case, the tenant alleged that the landlord failed to disclose that the property in question could not sustain certain strains. However, the court held the landlord was not liable as the landlord had done nothing to create the impression that the premises could sustain strains. It was the tenant's own assumption. The court in this case also stressed on the "caveat emptor" principle. In this regard, see also

addition, resembling the position in common law,[75] Australian cases have also held that silence can amount to misrepresentation only so far as the supplier knows of the information to begin with. For instance in *Spedley Securities Ltd. (in liq) v. Bank of New Zealand*,[76] Cole J. in relation to the duty under section 52 of the Australian *Trade Practices Act* stated "One cannot fail to inform of matter of which one was not aware". This also appears to be the position in New Zealand.[77]

This can be contrasted to the position in Canada. In the British Columbia decision of *Rushak v. Henneken,*[78] the Court of Appeal held that the defendant car dealer had committed an unfair practice, by failing to disclose that the car in question *could* be afflicted by rust beneath its undercoating, even though on the facts, the dealer was genuinely unaware of the fact that the car was rusted. While the dealer honestly did not know that the car was rusted, the court held he ought to have suspected that there might be rust given his experience and as such his description of the car as a "good vehicle", "one of the best of its kind" and "very nice" when the customer inquired about the rust condition, was misleading. The court also observed that the statute "imposes a high standard of candour, especially on suppliers who choose to commend their wares". Such an obligation in certain circumstances to disclose matters that the supplier is honestly unaware of seems to impose a positive duty on the part of the supplier to ascertain the actual facts. Such a duty appears to be very onerous especially when one considers that there may be so many relevant facts that the supplier may not be aware of but which may be of interest to the consumer. As observed by Simon Brown L.J. (in relation to common law) in *Economides v. Commercial Assurance Co. Plc.*[79] imposing a duty on party to disclose facts which he knows or to which he "willfully shut his eyes" is "very different thing from imputing knowledge of a fact to someone who is in truth ignorant of it". In light of these considerations, perhaps the Australian and New Zealand position is to be preferred.

Another issue that may arise is whether, laudatory remarks in the form of "puffs" if untrue, can give rise to liability. The *CPFTA* provides no clue but given that the test under section 4(a) is objective and since a reasonable person is unlikely to place reliance on matters such as exaggerated sales talk, it might be that such matters would not give rise to liability. This is also the position in Australia.[80] Thus for

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Singapore Parliamentary Debates, Vol. 76, No. 24 at 22 where it was stated that it was not the intention of the *CPFTA* to do away with the caveat emptor principle. Thus it is suggested that section 4(a) should not be interpreted to mean that the supplier has an *unqualified* duty to disclose any negative aspect of the good or service he is supplying. If the rule were otherwise, there may be no end to what has to be disclosed and this could impose an overly onerous duty on the supplier.

75 *Blackburn Low & Co v. Vigors* (1887) 12 App. Cas. 531; *Economides v. Commercial Assurance Co. Plc.* [1998] Q.B. 587.

76 (1991) A.T.P.R. 41 at 53.

77 See for instance, the New Zealand case of *Des Forges v. Wright* [1996] 2 N.Z.L.R. 758 where the court stated liability cannot be imposed for "an omission which is wholly unconscious".

78 (1991) 84 D.L.R. (4th) 87.

79 [1998] Q.B. 587 at 602.

80 In contrast, in Canada it has been suggested that puffery can lead to someone being mislead, see *Rushak v. Henneken* (*supra*); *Ashley v. 583455 Saskatchewan Ltd.*, online: Canadian Legal Information Institute <http:// www.canlii.org/sk/cas/skpc/2002/2002skpc130.html>. But this could be possibly because of reference to the fact that an "exaggeration" can amount to an unfair practice under the Canadian statutes. See for instance, section 3 of the *British Columbia Trade Practices Act* and section 6(o) of the *Saskatchewan Consumer Protection Act*.

instance in *Collier Const. v. Foskett*,[81] statements like it is the "best deal" and in *Riley McKay Pty. Ltd. v. Bannerman,*[82] statements like "fascinating, "priceless" and "unique" were held to be mere puffs that did not give rise to liability under section 52 of the Australian *Trade Practices Act*.

Another issue that may arise is whether liability could arise under section 4(a) for false opinions and statements of future intention. Again the *CPFTA* is silent, but it may be that, as in common law, generally opinions and statements of future intentions would not give rise to liability. This also represents the position in Australia. For instance in *Global Sportsman v. Mirror*,[83] the Federal Court of Australia stated,

> The non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor's intention lacked any, or any adequate foundation. Similarly, that a prediction proves inaccurate does not of itself establish that the maker of the prediction did not believe that it would eventuate or that the belief lacked any, or any adequate, foundation. Likewise, the incorrectness of an opinion (assuming that can be established) does not itself establish that the opinion was not held by the person who expressed it or that it lacked any, or any adequate foundation . . . . The applicants argued that, nevertheless, the statement of an incorrect opinion is misleading or deceptive or likely to mislead or deceive merely because it misinforms or is likely to misinform. An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing.

However, in Australia, it has been held that there are exceptions to this general rule. For instance, it has been stated that if an opinion or intention is different from what was stated or if the maker did not believe the statement or was recklessly indifferent to what was being stated, then there could be liability.[84] Thus in Australia, as in common law,[85] there could be situations in which statements of opinions or statements of future intentions could give rise to liability and it is likely that this position would be adopted in Singapore as well.

In addition in Australia, similar to the position in common law,[86] it has been held that in so far as the statement is misleading or deceptive, the fact that the maker gave the other party an opportunity to verify the truth and this was not taken up, does not prevent an action from being brought.[87] Likewise it has been held that, similar to the position in common law,[88] the fact that the misleading or deceptive statement was only one of the reasons for entering into the contract, and not the sole reason, does not absolve the supplier of liability.[89] These stands too are likely to be adopted in Singapore.

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81 (1990) 97 A.L.R. 460.

82 (1977) 15 A.L.R. 561. See also *Brown v. Jam Factory* (1981) 35 A.L.R. 79 at 87.

83 (1984) 55 A.L.R. 25 at 31.

84 *Stack v. Coast Securities* (1983) 46 A.L.R. 451 at 454.

85 See for instance, *Smith v. Land and House Property Corpn.* (1884) 28 Ch.D. 7.

86 *Redgrave v. Hurd* (1881) 20 Ch.D. 1.

87 *Sutton v. A.J. Thompson Pty. Ltd. (in liq)* (1987) 73 A.L.R. 233.

88 *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459.

89 *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83. See further, *infra* note 176.

Having examined some general points relating section 4(a), it may be good to examine some specific examples. There could be a whole range of statements or actions which may result in the consumer being misled or deceived and it is intended only to highlight one particular aspect.

It is very common to find advertisements which state a particular fact, but state in small print "conditions apply". Would the fact that the words "conditions apply" or the fact that other words to a similar effect are added, mean that the statement is not misleading or deceptive? For instance, if an advertisement relating to a tour states "200% refund if tour is cancelled, conditions apply" and a consumer books a tour which is later cancelled, can the tour company state that the conditions stated (which are not revealed in the advertisement) are not satisfied and hence the consumer cannot get the 200% refund? In this regard, Australian and New Zealand cases have held uniformly that unless the conditions are clearly and visibly stated or brought to the attention of the consumer, the statement made may be misleading or deceptive.[90] Another similar issue that could arise is whether, if the supplier makes a statement, but the contract contains a clause which qualifies that statement; is that misleading or deceptive? For instance, if a consumer books a tour and he is told that he would be staying in a particular hotel or would be taken to a particular place, but there is a clause in the contract which allows the tour company to make any variations it deems fit, would that result in liability if variations are made? It is suggested that like in the case of using the term "conditions apply" liability can arise depending on whether the clause in the contract is clearly brought to the attention of the customer. In this regard, it may be noted that part 19 of the Second Schedule specifically states that using "small print" to conceal material fact from the consumer can amount to an unfair practice.[91] In addition it may also be noted that, section 17 of the *CPFTA* specifically states that parol or extrinsic evidence may be raised notwithstanding sections 93 and 94 of the *Evidence Act*.[92] Further it may also be noted that section 18 of the *CPFTA* provides that any ambiguity in any document would be construed against the supplier.[93]

B. *Section 4(b)*

Section 4(b) of the *CPFTA* raises liability for "false claims". Section 53 of the Australian *Trade Practices Act* refers to *inter alia*, "false representations". In this regard, Australian cases have again held that the knowledge of the supplier as to whether the claim is true or false is not relevant,[94] rather the question is whether claim made is contrary to fact. It is likely that this stand would also be followed in Singapore.

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90 *Nationwide News Pty. Ltd. v. Australian Competition and Consumer Commission* (1996) 142 A.L.R. 212; *Hutchence v. South Seas Bubble Co. Pty. Ltd.* (1986) 64 A.L.R. 330; *Chief Executive Officer Australian Competition & Consumer Commission v. Medical Benefits Fund of Australia Ltd.* [2002] F.C.A. 1097; *Commerce Commission v. Leisure* [2002] D.C.R. 69; *Commerce Commission v. Cut Price* [2002] D.C.R. 135.

91 See *infra*, text at note 157.

92 Cap. 97, 1997 Rev. Ed. Sing.

93 *Infra*, note 134.

94 See for instance, *Given v. C.V. Holland (Holdings) Pty. Ltd.* (1977) 15 A.L.R. 439.

On first blush, it is difficult to imagine situations where the statements made may amount to false claims under section 4(b) but which at the same would not amount to misleading statements or conduct under section 4(a). Since the term "misleading" is wider[95] (as it can cover omissions as well), the necessity of section 4(b), may not be immediately apparent. However, perhaps section 4(b) can cover situations where the claim is false, but a reasonable[96] person would not have been misled by it. Thus for instance, if a sales person tells an aged consumer that a very obviously old looking mobile phone without packaging and without any instruction manual is brand new, possibly, it may be easier to make out a claim under section 4(b) as compared to section 4(a).

C. *Section 4(c)*

Section 4(c) of the *CPFTA* provides that it is an unfair practice for a supplier to take advantage of a consumer if he knows or should reasonably be expected to know that the consumer

(i) is not in a position to protect his or her own interests or
(ii) is not reasonably able to understand the character, nature, language or effect of the transaction or proposed transaction or any matter related to the transaction.

In Australia, section 51AB of the Australian *Trade Practices Act* provides that a corporation must not engage in "conduct that is, in all the circumstances, unconscionable". Section 51AB(2) provides that in determining whether a corporation has engaged in such conduct the court shall have regard to factors such as:

(a) the relative strengths of the bargaining positions of the corporation and the consumer,[97]
(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation,
(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services,
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against the consumer and
(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

In Singapore, there is no provision similar to point (a). However, it will be noted that section 4(c)(ii) refers to situations where the consumer is unable to understand the character, nature, language or effect of a transaction. Thus section 4(c)(i) is

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95 See also *Gardam v. Geo Wills & Co.* (1988) 82 A.L.R. 415 at 426.

96 In contrast section 4(a) expressly refers to reasonableness; see *supra*, text at note 58.

97 In this regard, it has been suggested that it might be easier to make out a breach of this section than it would be to establish a breach under the common law concept of "unconscionability" as developed in Australia, as the latter unlike the former, requires proof of some form of "special disability": *D.A.I. v. Telstra Corporation Ltd.* (2000) 171 A.L.R. 348.

likely to cover situations when the consumer is able to understand, but is not in a position to protect his or her own interest. The most likely scenario as to why a consumer is unable to protect his or her own interest is the lack of bargaining power. Thus it is suggested that section 4(c)(i) could encompass point (a). Point (b) is not covered under section 4(c). However, it may be covered under part 11 of the Second Schedule. Nonetheless, it would seem much more difficult to satisfy the requirements under part 11 compared to that under point (b).[98] Point (c) is covered under section 4(c)(ii). Point (d) is not covered under section 4(c). However, it is covered under part 12 of the Second Schedule. Point (e) is not covered in Singapore. Thus on the whole section 51AB of the Australian *Trade Practices Act* seems wider than section 4(c). This is in addition to the fact that the term "unconscionable" is not used in any part of section 4(c). Hence it may not be appropriate to apply Australian cases[99] in interpreting section 4(c) without bearing these differences in mind. In addition, it may be that in order to maintain the sanctity of contracts entered into, the Singapore courts may interpret the provision restrictively and may apply it only in very clear cut cases. One such case could be the Saskatchewan decision of *Cameron v. Saskatchewan Ltd.*[100] In this case, an 84-year-old widow received a telephone call from the defendant company stating that they had a gift for her. A salesman appeared and offered her a "gift" and then insisted on showing her a vacuum cleaner which the defendant's company was selling. The plaintiff protested, but the salesman was persistent. Later, the salesman brought in another one of his colleagues who continued to pressurize the plaintiff to buy the vacuum cleaner. This went on for about two hours and finally the plaintiff succumbed and signed the contract. Subsequently after consulting her son and daughter in law, the plaintiff decided to cancel the contract and brought an action in the Saskatchewan Small Claims Court. The Court found that the plaintiff was totally reliant on her son and daughter on financial matters and she belonged to an "era quite different from the one which prevails today". The court applying a provision identical to section 4(c) held that the plaintiff was not in a position to protect her own interests and hence allowed the plaintiff to rescind the contract.[101]

D. *Section 4(d)*

In addition to the general provisions contained in section 4(a) to (c), section 4(d) provides that the practices listed in the Second Schedule amount to unfair practices. Before looking at the specific unfair practices listed in the Second Schedule, some general comments would first be made.

The bulk of the specific unfair practices (15 out of 20) relate to false representations. Out of these, some of the representations (5 out of 15) in order to be actionable

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98 See *infra*, text at note 145.

99 See for instance, *D.A.I. v. Telstra Corporation Ltd.* (2000) 171 A.L.R. 348.

100 Online: Canadian Legal Information Institute <http://www.canlii.org/sk/cas/skpc/2002/2002skpc135.html>.

101 In Saskatchewan, the consumer under the *Direct Sellers Act* (Cap. D-28, 1996, Statutes of Saskatchewan) also has the right to avoid certain "direct sales contracts" (similar to section 11 of the *CPFTA*, discussed below). However, as the time limit provided for such cancellation had expired she could not make use of the right conferred by that statute.

expressly require the establishment of knowledge, the implication being the other representations which do not specify knowledge, do not require knowledge to be established.[102] Out of these, one particular provision requires actual knowledge whereas the rest require actual knowledge or imputed knowledge though the reason for this difference in degree of knowledge is not immediately clear.

Section 4(d) provides that "without limiting the generality of paragraphs (a) to (c)" doing anything specified in the Second Schedule amounts an unfair practice. Section 4(a) and 4(b) are extremely wide and as stated earlier[103] knowledge or intention to make a false or misleading claim is likely to be irrelevant for the purposes of these sections.[104] Thus, the question might arise whether if a specific representation under the Second Schedule which requires knowledge is breached, can the consumer instead establish an unfair practice under section 4(a) or (b) without having to prove such knowledge? Since section 4(d) does not limit "the generality of paragraphs (a) to (c)", it seems this would be possible. However, if that were allowed, it would render the reference to knowledge in those specific representations under the Second Schedule otiose. Aside from this anomaly, in principle there also appears to be little justification as to why some representations should require knowledge while others not. After all, in respect of all unfair practices, if they are innocently made and reasonable in the circumstances there is a possibility of a defence under section 5(3)a.[105] Thus perhaps it might have been better if the reference to knowledge was altogether left out in relation to the specific representations under the Second Schedule. For instance, part 4 of the Second Schedule provides that representing that goods have a particular history or use, amounts to an unfair practice if the supplier knows this is not so. In contrast, under section 13(a) of the New Zealand *Fair Trading Act*, there is no requirement to prove knowledge in respect of a representation relating to the particular history or use of goods.[106]

It may also be noted that in relation to representations, in Australia, under the *Trade Practices Act* and in respect of similar types of specific representations, it has been held that the representations need not be in writing and need not be verbal. For instance in *Given v. Pryor,*[107] Franki J. applied the following passage on misrepresentation from Halsbury's Laws of England, to the *Trade Practices Act*:

> The usual permanent symbols by which a representation is conveyed are words or figures written or printed or produced by any other equivalent means, but plans and drawings, maps, pictures and photographs and the like, may serve the same purpose and quite as effectually. Speech is the most ordinary method for the communication of a statement not in writing, but gestures and demeanour may supplement spoken language, or even stand in its place.

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[102] See also the Australian case of *Gardam v. Geo Wills & Co.* (1988) 82 A.L.R. 415 at 426 where the court held that it is "well settled" that a representation can be false even if it is innocent.

[103] See *supra*, text at note 63.

[104] Other than the situation when the word "deceived" in section 4(a) is interpreted as requiring proof of intention to deceive following some Australian as opposed to Canadian cases; see above.

[105] See *infra*, text at note 159.

[106] See also section 3(f) and (g) of the *British Columbia Trade Practices Act* which does not require proof of knowledge in respect of a similar unfair practice.

[107] (1979) 24 A.L.R. 442 at 446.

Further, similar rules in relations to opinions, statements of future intention and puffs should apply as discussed earlier[108] in relation to misleading or deceiving conduct. As for silence, the specific provisions in the Second Schedule do no expressly refer to it unlike section 4(a) which refers to the failure to "do or say anything". Nonetheless, the position in Australia which is that there can be a representation by silence in certain circumstances even in the section does not expressly refer to it, as discussed earlier[109] may apply. Also as discussed earlier,[110] liability is likely to arise even if the representation is not the sole inducing factor which induces the party into entering into the transaction.

Another issue that could arise in relation to these specific representations is whether representations must originate from the supplier or can originate from some one else. For instance, if a manufacturer has information on a label which is misleading, can the retailer, from whom the consumer buys the product be taken as "representing" that the statements in the label are true? The issue has been considered in several Australian cases. In *Wilkinson v. Katies,*[111] the defendant operated retails outlets selling ladies clothing. The defendant got another party to manufacture skirts. The labels attached by the manufacturers stated a wrong composition of the materials used to manufacture the skirts. However, the labels did not state who the manufacturers were. In addition, the defendants attached their own label "Katies" to the skirts. The Federal Court of Australia held that the retailer would be taken to be making the representation himself unless the "the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity".[112] Thus on the facts of the case, the defendants were found to have breached their statutory obligations. However, the court left open the question what the position would have been if the "Katies" label had not been attached or if the manufacture's name or identity had been provided. But in relation to the query of what the position would have been if the "Katies" label had not been attached, in the subsequent case of *Gardam v. Geo Wills & Co.,*[113] French J. was of the view that "in the absence of an express disclaimer, it is difficult to imagine how the display by the retailer with no clue as to the identity of its author, would not amount to a representation by that retailer".

Though the matter is not settled even in Australia, in the event that that retailer[114] is held liable,[115] such liability is not entirely inequitable. In fact, this is the position under the *Sale of Goods Act*[116] too. Under the *Sale of Goods Act*, a retailer may be held liable for breaching implied conditions relating to the sale of goods even though the true the fault lies with the manufacturer.[117] In any case, the retailer who

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[108] See *supra*, text at note 82.

[109] See *supra*, text at note 73.

[110] See *supra*, text at note 87.

[111] (1986) 67 A.L.R. 137.

[112] *Wilkinson v. Katies* (1986) 67 A.L.R. 137 at 143. See also *Gardam v. Geo Wills & Co.* (1988) 82 A.L.R. 415.

[113] (1988) 82 A.L.R. 415.

[114] The consumer may also be able to sue the manufacturer directly as suggested earlier (see above), but there may be practical difficulties if the manufacturer is not based in Singapore, which is a likely scenario in the context of Singapore.

[115] Of course, if the retailer expressly makes a representation about the product, such as through an advertisement he produces, the position would be clearer and there is likely to be liability.

[116] Cap. 393, 1999 Rev. Ed. Sing.

[117] See for instance, *Godley v. Perry* [1960] 1 W.L.R. 9.

is held liable to the consumer under the *CPFTA* may be able to sue the manufacturer in turn under the *Sales of Goods Act* in certain circumstances[118] or the contract with the manufacturer may provide for an indemnity to cover such liabilities. Such an approach is also in line with the fact that the lack of knowledge is irrelevant[119] for the purposes of the *CPFTA*.

Similar to the issue discussed above, the issue could also arise whether the manufacturer could be taken to be "representing" anything at all to the consumer in the absence of some advertisement or labeling. For instance, if the manufacturer falsely tells a retailer that a piece of furniture is made of solid wood but nothing is stated in the labeling to this effect and the manufacturer does not carry out any advertisement to this effect, but the retailer informs the consumer that the furniture is made out of solid wood, can the consumer sue the manufacturer? In the absence of some advertisement or labeling it is difficult to see how the manufacture can be taken to be making a representation and in any case, the supplier is only liable for unfair practices that take place *in relation* to a "consumer transaction" and in such a situation as stated earlier,[120] it is likely that this requirement will not be met.

E. *The Second Schedule*

The specific unfair practices listed in the Second Schedule will now be considered. However, at the outset it must be mentioned that it is possible for there to be an overlap between the specific unfair practices.

(1) Representing that goods or services have sponsorship, approval or performance characteristics, accessories, ingredients, components, qualities, uses or benefits that they do not have (for instance, falsely representing that every microwave has been tested by the Standards Association of Australia[121] or falsely representing that a company is affiliated to a well known travel organization[122] or falsely representing that goods are made of "solid pine" when in fact they are made of "laminated pine veneer"[123] or falsely representing that a computer has a certain cache memory[124] or falsely representing that a toothpaste can inhibit dental plague[125] or displaying a false mileage on an odometer[126] or producing a packaging which misrepresents the actual size of the product inside by half[127]).

(2) Representing that goods or services are of a particular standard, quality, grade, style, model, origin or method of manufacture if they are not (for instance, falsely

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[118] For instance, where the false representation also results in a breach of section 13(1) of the *Sale of Goods Act* as between the manufacturer and the retailer, the retailer may be able to sue the manufacturer. See also *Dodd and Dodd v. Wilson and McWilliam* [1946] 2 All E.R. 691; *Kasler and Cohen v. Slavouski* [1928] 1 K.B. 78.

[119] Subject to the specific parts in the Second Schedule which require knowledge, section 5(3)a (see *infra*, text at note 157) and *supra* note 104.

[120] See *supra*, text at note 48.

[121] *Hartnell v. Sharp Corporation of Australia Pty. Ltd.* (1975) 5 A.L.R. 493.

[122] *Patterson v. Hartman*, 2001 A.R. LEXIS 729.

[123] *Doolan v. Waltons Ltd.* (1981) 39 A.L.R. 408.

[124] *Commerce Commission v. Edge Computer Ltd.* [1997] D.C.R. 310.

[125] *Colgate Palmolive Pty. Ltd. v. Rexona Pty. Ltd.* (1981) 37 A.L.R. 391.

[126] *Given v. C.V. Holland (Holdings) Pty. Ltd.* (1977) 15 A.L.R. 439.

[127] *Commerce Commission v. Sweetline Distributors Ltd.* (1993) 5 T.C.L.R. 374.

representing that the goods are made in New Zealand[128] or falsely representing the materials used to make a piece of clothing[129]).

In this context, there have been several Australian cases dealing with the issue of when a product can be considered to have a place of "origin" in Australia. It would follow from these cases[130] that products can be considered to have a place of "origin" in a country if a substantial part of the process took place in that country. The "substantial part of the process" refers to the process of manufacturing and not to the cost.[131] It has also been suggested that where the design was made could be a relevant factor at least for certain products such as electronic goods.[132]

(3) Representing that the goods are new or unused if they are not or if they have deteriorated or been altered, reconditioned or reclaimed (for instance, falsely representing a used mobile phone to be new).

In *Annand & Thompson Pty. Ltd. v. Trade Practices Commission,*[133] the Australian Federal Court held that what was meant by the term "new" would turn on the facts of each case. The case concerned the sale of cars made in 1975 but sold in 1977 as "new". Franki J. in this case was of the view that the term "new" generally when applied to a car could mean one or more of the following things depending on the circumstances:

(a) that the vehicle has not been previously sold by retail, that is, that is not a second hand vehicle,
(b) that the vehicle is a current and not a superseded model,
(c) that the vehicle has not suffered significant deterioration or been used to any significant extent,
(d) that the vehicle is of recent origin and
(e) that the vehicle is one which has suffered a measure of damage but this damage has been quite effectively repaired or any damaged part replaced and the vehicle is otherwise new in every respect.

Thus if the consumer interprets the term "new" is a particular way and his interpretation is reasonable in the circumstances, and the goods are not "new" as interpreted, there could be liability. In this connection, it may also be noted that section 18 of the *CPFTA* provides that any ambiguity in any document relating to a consumer transaction would be construed against the supplier.[134]

(4) Representing that goods have been used to an extent different from the fact or that they have a particular history or use if the supplier knows it is not so (for instance, a second hand car dealer representing that a car has only 2 previous owners when he knows that is not true).

(5) Representing that goods or services are available or are available for a particular reason, for a particular price, in particular quantities or at a particular time

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128 *Marcol Manufactures v. Commerce Commission* [1991] 1 N.Z.L.R. 502.
129 *Wilkinson v. Katies Fashions (Aust) Pty. Ltd.* (1986) 67 A.L.R. 137.
130 See for instance, *Korcyznski v. Wes Lofts (Aust) Pty. Ltd.* (1985) 62 A.L.R. 225.
131 *Thorp v. C.A. Imports Pty. Ltd.* (1990) A.T.P.R. 40-996.
132 *Netcomm (Aust.) Pty. Ltd. v. Datapex Pty. Ltd.* (1988) 81 A.L.R. 101.
133 (1979) 25 A.L.R. 91.
134 Section 18 provides that the ambiguity can relate to "all or any part of the transaction or contract" that is evidenced in writing. The use of the word "transaction or contract" suggests that even non-contractual documents (such as perhaps brochures) could fall under the ambit of this provision.

if the supplier knows or can reasonably be expected to know it is not so, unless the representation clearly states any limitation.

This provision could cover bait advertising. For instance, a supplier in order to attract consumers could advertise that a particular product is available or available at a particular low price when he knows that is not true. When the customer turns up, the supplier would then state that the products advertised have been sold but that there are other products available, usually at a higher price.[135] This provision could also cover other situations such as when a supplier advertises that very limited quantities of goods are available when he knows or ought reasonably to know that that is not true.

(6) Representing that a service, part, repair or replacement is needed or desirable if that is not so, or that a service has been provided, a part installed, a repair has been made or a replacement has been provided, if that is not so (for instance, a dentist representing that a certain operation has to be done when in fact there is no real need for it[136] or a car repair shop representing that a repair has been done when in fact it has not been).

(7) Representing that a price benefit or advantage exists respecting goods or services where a price benefit or advantage does not exist (for instance falsely representing that all items are being sold at a "50%" discount or increasing the before-sale price so that there is no real reduction in price or by falsely representing that it would be cheaper if the goods were purchased though the company's website than it would be to purchase them through normal physical channels[137]).

In this connection, it has been held in New Zealand that if the display price of goods is different from what is keyed in at the check out counter, there could be a breach of this provision.[138] It has also been held that price benefit does not have to relate to the goods or services themselves but can relate to ancillary matters such Goods and Services Tax[139] or financing.[140] Australian cases have also held that liability can arise in respect of comparative advertising if the advertisement in pointing out a price benefit does not compare "like with like".[141]

(8) Charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has expressly agreed to the higher price in advance (for instance, a plumber stating that he charges a flat fee of $40 to clear any blocked pipe, but when the job is done, demanding $80 for having cleared one such pipe).

(9) Representing that a transaction involving goods or services involves or does not involve rights, remedies or obligations where that representation is deceptive or

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135 See for instance, *Readon v. Morley Ford Pty. Ltd.* (1980) 33 A.L.R. 417.

136 However, allowances have to be made for variations in professional judgement; see *Dawson v. Motor Tyre Service Pty. Ltd.* (1981) A.P.T.R. 40-223.

137 *ACCC v. Hughes* (2002) A.T.P.R. 41-863.

138 *Foodtown Supermarkets Ltd. v. Commerce Commission* [1991] 1 N.Z.L.R. 466.

139 *Gutherie v. Metro Ford Pty. Ltd.* (1977) A.T.P.R. 40-030; *Australian Competition & Consumer Commission v. Signature Security Group Pty. Ltd.* [2003] FCA 3. See also the New Zealand case of *Sound Plus Ltd. v. Commerce Commission* [1991] N.Z.L.R. 329 (stating goods are sold "duty free" when there was no such duty to begin with).

140 *Commerce Commission v. Noel Leeming Ltd*. [1996] D.C.R. 311.

141 *State Government Insurance Commission v. J.M. Insurance Pty. Ltd.* (1984) A.T.P.R. 40-465; *Country Road Clothing Pty. Ltd. v. Najee Nominees Pty. Ltd.* (1991) A.T.P.R. 41-106.

misleading (for instance, informing the consumer that if he does not like the product the supplier would give him his money back when in fact the contract states otherwise or representing that the warranty period is for one year when it is in fact for nine months[142]).

(10) Representing that a person has or does not have the authority to negotiate the final terms of a transaction if the representation is different from the fact (for instance, a supplier stating that the terms of the contract are fixed by his trade association and cannot be negotiated or that the terms negotiated by an employee cannot be accepted as the employee had no authority to so negotiate, when in fact that is not the case).

(11) Taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.[143]

As stated earlier,[144] section 51AB of the Australian *Trade Practices Act* provides that a corporation must not engage in "conduct that is, in all the circumstances, unconscionable". In determining whether conduct is "unconscionable", section 51AB(2) of the *Trade Practices Act*, provides that the court may have regard to certain factors. One of the factors[145] is whether the conditions imposed are "reasonably necessary" for the protection of the interests of the supplier. Whether the terms of the agreement are "harsh, oppressive or excessively one-sided" is not expressly listed as one of the factors. It would seem that terms which are not "reasonably necessary" to protect the interests of the supplier may nonetheless not be "harsh, oppressive or excessively one-sided" and hence it could be that it would be more difficult to avoid a contract under part 11 of the Second Schedule than it would be under section 51AB of the Australian *Trade Practices Act*. Thus it is suggested that Australian cases on this point must be approached with some caution.

In retrospect it may also be observed that, rather than to have adopted the position under the *Saskatchewan Consumer Protection Act* whereby the various aspects of "unconscionability"[146] are listed under different parts or sections, perhaps it might have been better to have all the factors listed under, one section as is the case in Australia under section 51AB of the Australian *Trade Practices Act*.[147] Further, the factors listed in the Australian *Trade Practices Act*[148] are not exhaustive, while those under the *Saskatchewan Consumer Protection Act* and correspondingly the *CPFTA* are.

(12) Taking advantage of a consumer by exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services (for instance, a person is lured to attend a sales talk or presentation and during the talk or presentation he is pressurized into entering into a contract[149]).

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142 *Ballard v. Sperry Rand Australia Ltd.* (1975) 6 A.L.R. 696.

143 The term "unconscionable" was not used in the original draft *Consumer Protection (Fair Trading) Bill*, but appears in the current *CPFTA*.

144 See *supra*, text at note 96.

145 *Ibid.*

146 Section 4(c), parts 11, 12 and 20 (see below) of the Second Schedule.

147 See also s. 4(3) of the Alberta *Fair Trading Act*.

148 *Ibid*.

149 But much would turn on the facts; see for instance, the Canadian case of *Patterson v. Hartman*, 2001 A.R. LEXIS 729.

(13) Representing in relation to a voucher that another supplier will provide goods or services at a discounted or reduced price if the supplier making the representation knows or ought to know that the other supplier will not do so (for instance, falsely stating that if the consumer buys the supplier's products, the consumer would be entitled under a voucher he would get for a 10% discount on purchases he makes from another supplier).

(14) Making a representation that appears in an objective form such as an editorial, documentary or scientific report when the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion (for instance, commissioning a newspaper advertisement or sponsoring a radio programme[150] which looks like an objective report showing how good a product or service is).

(15) Representing that a particular person has offered or agreed to acquire goods or services if they have not (for instance, falsely stating that a celebrity has agreed to buy a particular service such as that he has booked a particular tour or wedding package).

(16) Representing the availability of facilities for repair of goods or of spare parts for goods if that is not the case (for instance, falsely stating to a consumer who is tourist that there are authorized agents in the country from which the tourist has come where repairs can be done).

(17) Offering gifts, prizes or other free items[151] in connection with the supply of goods or services if the supplier knows or ought to know that the items will not be provided or provided as offered (for instance, increasing the price of the goods bought in order to qualify for a "free" gift[152] or offering goods at one price with a "free" gift and at another lower price without a "free" gift[153]).

(18) Representing that goods or services are available at a discounted price for a stated period of time if the supplier knows or ought to know that the goods or services will continue to be so available for a substantially longer period (for instance falsely stating that the sale is only for three days when the supplier knows it is for a much longer period).

(19) Representing that goods or services are available at a discounted price for a particular reason that is different from the fact (for instance, falsely offering a product at a discount as part of a festive sale when the true reason for the discount is the fact the expiry date for the product is nearing or offering a product as part of a "closing down sale" when the business has no intention of closing down).

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[150] However, it is only the supplier who may be liable. The publisher of the advertisement (such as the newspaper company) or the broadcaster of the programme (such as the radio station) may not be liable as a result of section 16.

[151] It would appear that the phrase "gifts, prizes or other free items" is more apt to cover "goods" rather than "services". Nonetheless, it is suggested that the phrase should be read widely to include gift of or prize involving services such as free facials.

[152] *Commerce Commission v. Adair* (1995) 5 N.Z.B.L.C. 103. See also the Australian case of *Nationwide News Pty. Ltd. v. Australian Competition and Consumer Commission* (1996) 142 A.L.R. 212.

[153] *Toyota of Visalia, Inc. v. Department of Motor Vehicles* (1984) 202 Cal. Rptr. 190.

(20) Using small print to conceal a material fact[154] from the consumer or to mislead a consumer as to a material fact, in connection with the supply of goods or services.[155]

The word "conceal" has not been defined in the *CPFTA*. However, the *Oxford Dictionary of Current English*[156] defines it to mean to "keep secret" or "hide". This suggests that there must be some element of intention. In addition the phrase "using small print . . . to mislead" also suggests that there must be some element of intention.

Usually the supplier would be aware of what is stated in the small print. However, there could also be situations where the supplier just uses standard terms without being aware of the details, but subsequently discovers and tries to rely on terms stated in small print. In such a situation, it is unlikely that part 20 would be applicable. As stated earlier[157] in relation to representations under the Second Schedule which refer to knowledge, perhaps it might have been better if part 20 too had been phrased in such a way such that the indirect reference to knowledge was omitted.

VI. Defence

Section 5(3)a of the *CPFTA* provides that in determining whether a supplier has engaged in any unfair practice, the reasonableness of his actions in the circumstances should be considered.[158] This could serve as a defence. The onus of establishing this defence is likely to be on the supplier.[159] In *Thorp v. C.A. Imports Pty. Ltd.,*[160] the defendants manufactured toy koalas which they labeled as "Made in Australia" even though part of the manufacturing was done in Korea. The defendants had adopted the advice of the Department of Trade that if more than 50% of the manufacturing costs were incurred in Australia, the product could be described as being "Made in Australia". In the circumstances, it was held that the reliance of the defendants on the advice given by the Department of Trade was reasonable and hence the defence[161] was made out. Another Australian case in which a similar issue arose was *Adams v. ETA Foods Ltd.*[162] In this case, the defendant engaged in selling beef pies. But it was found that some of the beef pies were made of sheep meat. The defendant had got the supplies of "beef meat" from a third party supplier. The court held that the defendant's reliance was reasonable as they were innocent and had dealt with the supplier who was reputable. In addition they had dealt with that supplier for a long

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154 This is defined in s. 2(1) to mean any information that a supplier knows or ought reasonably to know would affect the decision of a consumer to enter into a consumer transaction.

155 See for instance the New Zealand case of *Commerce Commission v. Leisure Rentals Ltd.* [2002] D.C.R. 69.

156 *Supra* note 53.

157 See *supra*, text at note 105.

158 It would appear that in some jurisdictions, this is a defence in respect of a criminal prosecution and not in respect of civil liability. See for instance, s. 85(1) of Australia's *Trade Practices Act*.

159 *Thorp v. C.A. Imports Pty. Ltd.* (1990) A.T.P.R. 40-996.

160 *Ibid*. On the other hand, see also *Cardin Laurant Ltd. v. Commerce Commission* [1991] 3 N.Z.L.R. 563, *Doolan v. Waltons Ltd.* (1982) 44 A.L.R. 106 and *Wilkinson v. Katies* (1986) 67 A.L.R. 137 where such a defence failed.

161 Under the Australian *Trade Practices Act*, this defence falls under section 85(1). Section 85(1) though not identical, is quite similar to section 5(3)(a) and hence Australian cases are likely to be of relevance.

162 (1987) 78 A.L.R. 611.

time without any problems and further, there was no efficient equipment available at that time to carry out such tests.

However, it has been held by Australian cases[163] that where a supplier is being sued, it would not be a defence for him to state that the unfair practices were undertaken by his employee provided the employee was acting within the scope of his express or implied authority. This is also reinforced by section 5(3)b of the *CPFTA*. Australian cases[164] have also held that it is not a defence that the consumer failed to take care of his own interests such as by failing to carry out checks.

VII. Civil Remedies

Section 6(1) of the *CPFTA* provides that a consumer who has entered a consumer transaction involving an unfair practice may commence an action against the supplier in a court of competent jurisdiction. This includes the Small Claims Tribunal subject to the provisions of the *Small Claims Tribunal Act*,[165] the District Court[166] and the Magistrate Court.[167]

When an action is instituted without prejudice to any other powers of the court to grant relief,[168] a court (other than the Small Claims Tribunal) may in any proceeding where the court finds that a supplier has engaged in an unfair practice may:[169]

(a) order restitution of any money, property or other consideration,[170]

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163 See for instance, *Walpan Pty. Ltd. v. Wallace* (1985) A.T.P.R. 40-470.

164 *Kewside Pty. Ltd. v. Warman International Ltd.* (1990) A.T.P.R. 46-059; *Argy v. Blunts & Lane Cove Real Estate Pty. Ltd.* (1990) 94 A.L.R. 719. The position in common law is similar; see *Redgrave v. Hurd* (1991) 20 Ch.D. 1.

165 Section 7(1). However, under section 5(1) of the *Small Claims Tribunals Act*, the Tribunal has jurisdiction only to hear any dispute relating to "contract for sale of goods or the provision of services". Thus matters like time-share contracts, hire-purchase contracts and leases would not fall within the purview of the Small Claims Tribunal. This is also reiterated in section 7(2) of the *CPFTA*. See also note 52.

166 Section 7(3).

167 *Ibid*.

168 See s. 31 of the *Subordinate Courts Act* (Cap. 321, 1999 Rev. Ed. Sing.) and s. 18 of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.).

169 Section 7(4).

170 This may have the practical effect of rescinding the contract. However, it is not clear, if the traditional bars to rescission such a lapse of time, would still apply. For instance, if X a consumer buys a vacuum cleaner from a supplier who has engaged in an unfair practice, can X who has since realized the unfair practice continue to use the vacuum cleaner till nearer the one-year time bar (see *infra*, text at note 218) and then decide to seek restitution? There are Canadian cases going both ways. For instance, the Canadian case of *Alberta (Director of Trade Practices) v. Edanver Consulting Ltd.* [1993] 6 W.W.R. 718 seems to suggest that the traditional bars should not apply, while *Hills v. Ross Wemp Motors Ltd.* (1984) 47 O.R. (2d.) 445, suggests otherwise. See also *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83, where the Federal Court of Australia held that in granting rescission, the court is not restricted by common law principles and that it is not necessary that status quo ante be exactly restored (see for instance, the Alberta Provincial Court decision of *Chen v. Campbell, Douglas & Randall Associates, Inc.* 2002 AB.C Lexis 2645, where the court ordered restitution even though the consumer received some services under the contract in question), but that it must still be "just and fair" in the circumstances to grant rescission. With regard to restitution it may also be noted that if there is no money, property or other consideration given as yet (for instance a consumer has bought a product and is yet to pay for it, but wants to rescind the contract because of an unfair practice), the court cannot rescind the contract through an order of restitution pursuant to that section. *Cf.* s. 13(2)(iii) of the *Alberta Fair Trading Act* which expressly refers to such a remedy in addition to that of restitution of money.

(b) award damages,[171]
(c) make an order of specific performance,[172]
(d) direct the supplier to repair goods or provide parts for the goods[173] or
(e) vary the contract between the consumer and the supplier.[174]

Reliefs (d) and (e) are particularly significant as the *Sale of Goods Act* does not provide for such remedies. In relation to relief (b) it may also be noted that only a consumer who "suffers a loss as a result of an unfair practice" has a right to institute an action. This suggests that the unfair practice must have "caused" the loss,[175] though it would appear that the unfair practice need not be the sole cause of the loss.[176] It would also appear that in order to establish causation, the consumer must have placed reliance on it[177] and the onus of proving this lies on the consumer.[178] But this raises the question, whether in relation to the other remedies, the consumer needs to prove that he relied on the unfair practice before he can seek those remedies? If he does not have to prove reliance, there is a possibility of abuse. A consumer who buys a product which he does not subsequently like can think of some unfair practice (which did not influence him) to rescind the contract through an order of restitution. This important point seems not to have been addressed.[179]

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[171] As stated, the Singapore *CPFTA* is based on the *Saskatchewan Consumer Protection Act*. Section 16(1)b of the Saskatchewan *Consumer Protection Act*, gives the court the power to award damages, including punitive or exemplary damages. The reference to punitive or exemplary damages has been omitted in Singapore. As such it is likely that such damages will not be recoverable here. Interestingly, there is some authority in Australia to the effect that damages for mental distress are recoverable under s. 82 of the Australian *Trade Practices Act* even though there is no express reference to this in the section itself; see *Brabazon v. Western Mail Ltd.* (1985) 58 A.L.R. 712, *Flamingo Park Pty. Ltd. v. Dolly Dolly Creation Pty. Ltd.* (1986) 65 A.L.R. 500 at 525. But the facts in the cases above in any event seem to fall within recognized exceptions in common law under which damages will be granted for mental distress. In respect of the position in common law; see the recent English House of Lords decision of *Farley v. Skinner* [2001] 3 W.L.R. 899.

[172] It is not clear if common law considerations (such as adequacy of damages) are relevant under the *CPFTA*, but see *infra* note 235 in this connection.

[173] It is not clear if the fact of whether it is reasonable from the supplier's viewpoint to repair or have parts, would be taken into account by the court. It may also be noted that the repair relates to "goods" and not "services". Thus poor workmanship provided by a supplier to a consumer under a renovation contract cannot be subject to a "repair" order. *Cf.* s. 35(1)b of the *Small Claims Tribunals Act*.

[174] This is something entirely new and there are absolutely no guidelines as to the limits, if any; but for an illustration, see the Australian case of *Mister Figgins Pty. Ltd. v. Centrepoint Freeholds Pty. Ltd.* (1981) 36 A.L.R. 23.

[175] See for instance, *Cox & Coxon Ltd. v. Leipst* [1999] 2 N.Z.L.R. 15.

[176] *Elna Australia Pty. Ltd. v. International Computers Pty. Ltd.* (1987) 75 A.L.R. 271. While it is clear that it does not have to be the sole cause, it is not clear whether it has to be a substantial cause. Lockhart J. in *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83 at 96 (citing Wilson J. in *Gould v. Vaggelas* (*infra* note 122)) seems to suggest this need not be so, but see *Elna Australia Pty. Ltd. v. International Computers Pty. Ltd.* seems to suggest otherwise.

[177] *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83.

[178] *Gould v. Vaggelas* (1985) 157 C.L.R. 215.

[179] Section 13 of the *Sale of Goods Act* provides that where there is a "contract for the sale of goods *by* description" (emphasis added), there is an implied condition that the goods will correspond with the description. In *Harlingdon & Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.* [1991] 1 Q.B. 564, the English Court of Appeal held that for section 13 to apply, the description must have influenced the buyer to make the purchase. However, in relation to the *CPFTA* this is unlikely to be the case. Section 6(1) merely states "a consumer who has entered a consumer transaction *involving* an unfair practice may commence an action in a court of competent jurisdiction against the supplier" (emphasis

Further, in relation to relief (b), in determining the amount of damages, it is not clear whether the tort or contract measure of damages would apply in determining such losses. The tort measure of damages would aim to place the plaintiff in a position that he would have been had the tort not been committed.[180] The contract measure of damages would aim to put the plaintiff in a position he would have been had the contract been properly performed.[181] The fact that many of the provisions of the *CPFTA* deal with false representations may suggest that the tort measure should apply. On the other hand, parts 11, 12 and 20 of the Second Schedule which do not deal with misrepresentations may suggest that the contract measure should apply.[182] However, parts 11, 12 and 20 do not deal with breach of contract as such. Rather they relate to "unfair practices" and hence the tortious measure may be more appropriate. In addition, Australian[183] and New Zealand[184] cases have held that the correct measure to be adopted is generally the tort measure.

In relation to the Small Claims Tribunal, it is provided that it shall make orders pursuant to the provisions of the *Small Claims Tribunals Act*.[185] The relevant section in the *Small Claims Tribunals Act* is section 35. While matters such as (a), (b) and (d) referred to above may be covered under the section 35[186] to some extent, the others do not appear to be. For instance, it is likely that the Small Claims Tribunal cannot make an order of specific performance *per se*. This may be a little unfortunate as the most likely venue where a dispute pertaining to the *CPFTA* will be resolved is the Small Claims Tribunal and yet the tribunal does not have all the other powers as listed above.

It must also be mentioned that it is provided[187] that before making any order the court shall take into consideration whether the consumer has taken reasonable steps to minimize his loss[188] and has tried to resolve the dispute with the supplier before commencing the action.[189] If this is not done, this may have an adverse effect on the remedies available to the consumer. For instance, possibly the damages the consumer may be able to obtain may be reduced. This provision reasonably balances the interests of suppliers.

It must also be mentioned that there is a limitation as to the amount that can be claimed. Section 6(3)(a) provides that the "amount of claim" shall not exceed

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added) and not, "a consumer who has entered a consumer transaction *as a result of* an unfair practice may commence an action in a court of competent jurisdiction against the supplier".

180 *Livingstone v. Rawyards Coal Co.* (1880) App. Cas. 25.

181 *Robinson v. Harman* (1848) 1 Ex. 850.

182 See also section 7(3), though it must be stressed that the purpose of such classification is only for the "purposes of determining whether an action under section 6(1) exceeds the District Court or Magistrate's Court within the meaning of the Subordinate Courts Act".

183 *Gates v. City Mutual Life Assurance Society Ltd.* (1986) 63 A.L.R. 600; *Neilsen v. Hempston Holdings Pty. Ltd.* (1986) 65 A.L.R. 302.

184 *Cox & Coxon Ltd. v. Leipst* [1999] 2 N.Z.L.R. 15; *Harvey Corporation Ltd. v. Barker* [2002] 2 N.Z.L.R. 213.

185 Section 7(5).

186 See section 35(1)(a) and (b).

187 Section 7(9).

188 Whether there has been a failure to mitigate would depend on the circumstances of the case, see for instance, *Bateman and Another v. Slatyer and Others* (1987) 71 A.L.R. 553; *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd.* (1989) 79 A.L.R. 83.

189 For instance, seeking the help of the Consumer Association of Singapore (CASE) may constitute taking steps to resolve the dispute.

the prescribed limit[190] which is currently set at $20,000.[191] Further, section 6(3)(b) provides that the action would also be barred if "there is no claim for money" but "the remedy or relief sought in action is in respect of a subject-matter the value of which exceeds the prescribed limit". Thus if the consumer is not seeking compensation but wants some other relief the value of that has to be ascertained and that value cannot exceed the prescribed limit.[192] However, what if the consumer makes a money claim but at the same time he wants some other non-monetary relief? For instance, can a consumer, who has suffered a loss of $4,000 as a result of an unfair practice claim that amount and in addition seek some other non-monetary relief, the value of which is $18,000? It may be argued that if the phrase "amount of claim" included monetary compensation and other forms of relief,[193] it would not be necessary to provide for section 6(3)(b). Hence, section 6(3)(a) must refer to monetary claims alone. If this were so, in the example above, the consumer would not be barred from claiming $4,000 and the other non-monetary relief as well. On the other hand, it may be argued that section 6(3)(b) merely provides a clarification and does not limit what is meant by the phrase "amount of claim" in section 6(3)(a). Of the two, it is suggested that the latter is in more in accordance with the purposive approach to statutory construction.[194] If this were to be accepted, it would mean that where there is a claim for money and some other relief, the value of it all combined should not exceed the prescribed limit of $20,000.[195]

VIII. Right to Cancel Certain Types of Contracts

Section 11 allows the Minister to make regulations prescribing that a consumer who, in relation to a consumer transaction, has entered into a contract falling within any class of contracts specified in the regulations, may cancel the contract within a cancellation period specified in the regulations. Notably, it would appear that the consumer has a right to cancel such contracts within the time frame stated without having to prove any form of unfair practice. Under the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2003* which were enacted pursuant to section 11 of the *CPFTA*, the two types of contracts currently covered are the time-share contract and the direct sales contract. Time share contracts have been considered earlier.[196] The term "direct sales contract" is defined in regulation 2 of the said regulations. It refers to contracts such as those entered into during unsolicited visits by the supplier to the residence of the consumer or solicited visits by the supplier

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190 Section 6(2). However section 6(5) provides that if the value of the claim exceeds the prescribed amount, the consumer may abandon the excess and choose to claim just the prescribed amount.

191 Section 6(6). In this regard, it may also be noted that there is no prescribed limit as to the amount that can be claimed under the Saskatchewan *Consumer Protection Act*, the Australian *Trade Practices Act* or the New Zealand *Fair Trading Act*.

192 See for instance, *Mohammed Akhtar & Ors. v. Schneider* [1997] 1 S.L.R. 150.

193 *Ibid*.

194 See section 9A of the *Interpretation Act* (Cap. 1, 1999 Rev. Ed. Sing.). See also *Comfort Management Pte. Ltd. v. Public Prosecutor* [2003] 2 S.L.R. 67.

195 In this connection, it may also be noted that in relation to the Small Claims Tribunal, the limit is $10,000 and claims above that and up to the amount of $20,000 can only be heard if both parties to the claim agree in writing (see section 5(3) of the *Small Claims Tribunal Act*).

196 See *supra*, text at note 17.

to the residence of the consumer where other goods or services (not requested or reasonably expected by the consumer) are sought to be sold.

Thus if a consumer buys a time-share contract and after he comes home he realizes that he should not have entered into the contract, the consumer may cancel the contract without incurring any liability for the cancellation. However, there are some exceptions to this right to cancel.[197] For instance, any contract under which the total payments to be made by a consumer does not exceed $50 is excluded.[198] Further, it is also provided that a consumer who wishes to cancel a contract has to do so within three days (not including Saturday, Sunday or public holidays)[199]

(a) after the day on which the contract was entered into or
(b) if the consumer information notice[200] has not been brought to the attention of the consumer before or at the time when the contract is entered into, the day on which the consumer information notice is subsequently brought to the attention of the consumer.

In relation to (a) the three-day grace period from the date of the contract, seems relatively short compared to the periods granted in some other jurisdictions. For instance, both in British Columbia[201] and Saskatchewan,[202] the grace period granted is ten days. Even in Singapore, under the *Securities and Futures Act*,[203] investors in collective investment schemes are given a grace period of seven days. However, this is ameliorated to some extent by (b). If the supplier does not bring to the attention of the consumer a "consumer information notice", the 3 day period only runs from the time when the supplier does so. However, it is not clear what the supplier has to do in order for the consumer information notice to be "brought to the attention of the consumer". Would a mere inclusion of the "consumer information notice" amongst a whole bundle of other documents be considered sufficient? There is some uncertainty in this respect.

The *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2003* also provide for other details such as how the consumer should go about effecting the cancellation[204] and the effect of the cancellation.[205]

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197 Regulation 3, *Consumer Protection (Cancellation of Contracts) Regulations 2003*.

198 Regulation 3(d), *Consumer Protection (Cancellation of Contracts) Regulations 2003*.

199 Regulation 4(1), *Consumer Protection (Cancellation of Contracts) Regulations 2003*.

200 A copy of this notice is provided for in the Schedule to the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations* and it basically informs the consumer of his right to cancel the contract within the three days.

201 Section 11 of the British Columbia *Consumer Protection Act*.

202 Section 22 of the Saskatchewan, *Direct Sellers Act*. See also section 27 of the Alberta *Fair Trading Act*.

203 Written direction given pursuant to section 101 of the *Securities and Futures Act* (Cap. 289, 2002 Rev. Ed. Sing.).

204 For instance, it is provided that the consumer may give the notice of cancellation by handing it personally to or by sending it by post or facsimile to the supplier; see regulation 4(7) of the *Consumer Protection (Cancellation of Contracts) Regulations 2003*.

205 Regulations 5 and 6 of the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2003*.

However, it must be stressed that if the consumer misses the grace period provided for under the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2003* he can still pursue his remedies under the *CPFTA* if he can establish an unfair practice.[206]

IX. Other Remedies

Unlike in most other jurisdictions[207] which have consumer protection legislation, the *CPFTA* only provides for civil remedies should a breach take place. It does not provide for criminal liabilities. Criminal liabilities would have acted as a much greater deterrent and would have given the legislation the much needed teeth. Civil liabilities alone may not be effective as not everyone would be aware of their legal rights and even if they were, they may not pursue the matter due to the smallness of the claim. Further, some of the unfair practices like that listed in part 14 of the Second Schedule are unlikely to result in a consumer taking out a civil action. However, probably criminal sanctions were not introduced as the cost of compliance would further increase of the cost of doing business in Singapore. The original draft of the *Consumer Protection (Fair Trading) Bill* as such did not provide for any other remedies.

However, the *CPFTA* now provides for additional remedies, which may go someway in ameliorating the fact there are no criminal sanctions. Section 8(1) provides that where there are reasonable grounds for believing that a supplier has engaged, is engaging or is likely to engage in an unfair practice, a specified body[208] may invite the supplier to enter into a voluntary compliance agreement. The voluntary compliance agreement would include an undertaking that the supplier would not engage in a certain unfair practice.[209] It could also include a provision, under which the supplier has to reimburse the specified body for any costs or expenses incurred by it,[210] a provision requiring the supplier to compensate any consumer who has suffered loss or damage as a result of an unfair practice[211] and a provision requiring the supplier to

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206 See para. 8 of the Schedule to the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2003*. See also the Saskatchewan case of *Cameron v. 623959 Saskatchewan Ltd.*, online: Canadian Legal Information Institute <http://www.canlii.org/sk/cas/skpc/2002/2002skpc135.html>.

207 See for instance, s. 79 of the Australian *Trade Practices Act*, s. 40 of the New Zealand *Fair Trading Act* and s. 23(1) of the Saskatchewan *Consumer Protection Act*.

208 Currently, the specified bodies appointed pursuant to s. 8(10) are the Consumer Association of Singapore and the Singapore Tourist Promotion Board.

209 Section 8(2)b. The reference to "an unfair practice" in s. 8(1) coupled with the reference to "the unfair practice" in s. 8(2)b, suggests that the undertaking must relate to some specific unfair practice and cannot be couched in general terms. Thus an undertaking stating that the supplier should not engage in any or any other form of unfair practice may not fall within the ambit of s. 8(2)b.

210 See section 8(3)(b) and (7).

211 Section 8(3)a. However, this can be included only at the request of the consumer; see s. 8(5). In addition, unless provided otherwise in the voluntary compliance agreement, recovery of compensation is a bar to all further actions to recover any loss or damage to which the undertaking relates; see s. 8(9). It may also be noted that somewhat unfortunately, s. 8(3)(a) deals only with compensation where there is loss or damage. Where there is no loss or damage (which could often be the case) the consumer cannot seek some other relief such as restitution pursuant to this section. It would also appear, again somewhat unfortunately, that unlike s. 17(3) and (4) of the Saskatchewan *Consumer Protection Act*, s. 8(3) (see also s. 8(4)(b)) of the CPFTA, is meant to be exhaustive as to the kind of undertakings that can be placed in a voluntary compliance agreement.

publicize the voluntary compliance agreement.[212] There is no compulsion to enter into the voluntary compliance agreement as such. However, if the supplier is unwilling to do so, the specified body may resort to getting a declaration or an injunction, which is the other new remedy available under the *CPFTA*. This may serve as an incentive for suppliers to enter into a voluntary compliance agreement.

Likewise, if the supplier enters into a voluntary compliance agreement but breaches it, the specified body may also seek a declaration or injunction. Section 9(1) provides that where a supplier has engaged, is engaging or is likely to engage in an unfair practice, the District Court or High Court may, on the application of a specified body, make a declaration that the practice engaged in or about to be engaged in by the supplier is an unfair practice or grant an injunction[213] restraining the supplier from engaging in the unfair practice. If the court grants the relief sought it may make a further order requiring the supplier to advertise to the public the particulars of the declaration or injunction.[214] However, before the specified body can take out such an action under section 9, it has to have the approval of the Injunction Proposals Review Panel.[215] The *CPFTA* does not expressly specify the consequences of breaching an injunction. However, since an injunction is an order of the court, breaching it could amount to an act of contempt of a court, which could in turn result in criminal sanctions.[216] Thus indirectly there could be criminal sanctions for the breach of the provisions of the *CPFTA*.

However as a matter of practice, it is unlikely that the specified bodies (unlike fair trading offices or commissions in other jurisdictions) have the financial means,[217] time or manpower to intervene in each an every case of breach and it is likely that they will limit their intervention to cases where there is a blatant and widespread breach by a supplier.

X. Limitation Period

Section 12(1) of the *CPFTA* provides that the consumer who seeks to bring an action against the supplier under section 6 has to do so not later than one year from the later

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[212] Section 8(3)(c). If the supplier fails to observe this, the specified body may then publicize the voluntary compliance agreement on its own accord and recover costs; see s. 8(8).

[213] An interim injunction may also be applied for: see s. 9(3). Sec. 9(3)(b) of the original draft of the *Consumer Protection (Fair Trading) Bill*, provided that in granting an interim injunction, the court "shall give greater weight, importance and the balance of convenience to the protection of consumers than to the carrying on of the business of the supplier". However, notably, this provision has been removed from the current *CPFTA*; *cf.* s. 19(a) of the British Columbia *Trade Practices Act*.

[214] Section 9(1)(c). On the principles upon which the court may make such an order, see also the Australian cases of *Anand & Thompson Pty. Ltd. v. Trade Practices Commission* (1979) 25 A.L.R. 91, *Chief Executive Officer Australian Competition & Consumer Commission v. Medical Benefits Fund of Australia Ltd.* [2002] F.C.A. 1097 and *Australian Competition & Consumer Commission v. Signature Security Group Pty. Ltd.* [2003] F.C.A. 3.

[215] Section 9(4). As to the Injunction Proposals Review Panel, see s. 10. The fact that the process has to go to an Injunction Proposals Review Panel could slow things down and in fact, section 10 does not specify any time limit within which the Injunction Proposals Review Panel must give its decision.

[216] Section 8 of the *Subordinate Courts Act* (Cap. 321, 1999 Rev. Ed. Sing.).

[217] Financial means not only in relation to the cost of bringing an action but also in relation to cost of investigating whether a breach has taken place, such as the cost of scientifically analyzing whether representations like "75% cotton" or "45% pure fruit juice" are indeed true. In light of all this, there is much to be said about establishing an adequately funded fair trading office in Singapore.

of the following two dates:

(a) the date of the occurrence of the last material event on which the action is based or
(b) the earliest date on which the consumer had knowledge that the supplier had engaged in the unfair practice to which the action relates.

Knowledge includes constructive knowledge.[218] Thus for instance, if a consumer buys a good from a supplier who is having a "closing down" sale, but nine months later, the supplier is still having a "closing down" sale and X realizes that the supplier does not intend to close his business, the time limit it would appear begins to run from the nine months as that is the last material event on which the action is based or one year from the time X reasonably should have realized that an unfair practice had occurred whichever is later.

Under the original version of the draft *Consumer Protection (Fair Trading) Bill*, the time limit provided was two years. However, now, the time limit has been reduced to one year.[219] It would appear that the reason for this is to keep the *CPFTA* in line with the *Small Claims Tribunal Act* where most actions pertaining to the *CPFTA* are likely to commence. However, the one-year time limit under the *Small Claims Tribunal Act*[220] begins to run from the time the "cause of action accrued". As will be noticed, this is not identical to the test used in section 12(1) of the *CPFTA*. Thus it is foreseeable that there could be situations where the time bar provided for under the *CPFTA* has not passed, but that provided under the *Small Claims Tribunal Act* has.

XI. Exclusion of Liability

Section 13(1) of the *CPFTA* provides that it is not possible for the supplier to exclude any liability arising under the statute. Thus if there is a clause in the contract between the supplier and the consumer which states that the provisions of the *CPFTA* would not be applicable or if it states that the written contract records the entire agreement between the parties and there are no representations not reflected therein,[221] such a clause would be void and of no effect. In this connection, it may also be noted that section 17(1) of the *CPFTA* provides that parol or extrinsic evidence may be admissible to add to, vary or contradict a written contract.

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[218] Section 12(6). While the standard is objective, the use of the words "ascertainable by *him*" and "reasonable for *him*" (emphasis added) in section 12(6), arguably suggests that reasonableness ought to be judged from the viewpoint or circumstances of the particular consumer in question and not consumers generally.

[219] The time bar is shorter than that applicable in other jurisdictions; see for instance section 87 of the *Trade Practices Act*, Australia (three years), section 30 of *Consumer Protection Act*, Saskatchewan (two years).

[220] Section 5(3)b of the *Small Claims Tribunal Act*.

[221] See for instance, *Bateman v. Slatyer* (1987) 71 A.L.R. 553 and *Keizer v. Autoworld Superstore Alberta Ltd.* 2003 AB.C LEXIS 1025; *cf.* common law position; see for instance, *Sam Business Systems Ltd. v. Hedley* [2003] 1 All E.R. 465.

XII. Preservation of Other Rights

Section 15(1) provides that generally nothing in the *CPFTA* limits any other rights a consumer may have apart from *CPFTA*. Thus the rights the consumer may have under the *Sale of Goods Act*, the *Misrepresentation Act*[222] or common law are preserved.

In relation to parts 1 to 4 of the Second Schedule, there may also be a breach of sections 13 or 14 of the *Sale of Goods Act* in certain circumstances. It may also be more advantageous suing under the *Sale of Goods Act* in some situations. For instance, under section 13 of the *Sale of Goods Act* to apply, the seller does not have to be selling in the course of business whereas under the *CPFTA* the supplier has to be acting in the course of business.[223] In addition, the time bar for actions under the *Sale of Goods Act* for breach of contract is six years[224] and not one year as is the position under the *CPFTA*.

On the other hand, there are many advantages suing under the *CPFTA* as well. For instance, under the *Misrepresentation Act* a clause excluding liability for misrepresentation may be upheld if it is reasonable.[225] However, any clause excluding liability under the *CPFTA* would be automatically invalid.[226] Further, matters stated in section 4(1)(c) and parts 11 and 20 of the Act may not give rise to legal consequence in common law, but would under the *CPFTA*. In fact matters stated in some other parts such as 9, 10 and 14 of the Second Schedule too may not always give rise to legal consequences in common law, but under the *CPFTA*, they would. This is especially so when one considers that under the *CPFTA*, an unfair practice can occur even after a transaction has been completed.[227] In addition, as stated,[228] there is also the possibility that the consumer may sue the manufacturer directly in certain circumstances under the *CPFTA* even in the absence of a contract or negligence which is not the case in common law. The admissibility of parol or extrinsic evidence[229] is another very important difference and advantage. In addition the court hearing a claim relating the *CPFTA* is empowered to make an order to repair goods or provide parts for goods[230] and such a remedy is generally unavailable[231] for breaches of the *Sale of Goods Act* or the *Misrepresentation Act*. In addition, the *Sale of Goods Act* only applies to goods and not services whereas under the *CPFTA* services are included. Further under the *CPFTA* there is no provision similar[232] to section 35 of the *Sale of Goods Act* which relates to the loss of right to reject due to the acceptance[233] of the goods by the buyer. Moreover, it has been suggested repeatedly by Australian cases[234] that in interpreting the Australian *Trade Practices Act*, the court

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222 Cap. 390, 1994 Rev. Ed. Sing.
223 Section 2(1).
224 Section 6(1) of the *Limitation Act* (Cap. 163, 1996 Rev. Ed. Sing.).
225 Section 3 of the *Misrepresentation Act*.
226 See *supra*, text at note 220.
227 See *supra*, text at note 42.
228 See *supra*, text at note 45.
229 Section 17.
230 Section 7(4)d.
231 However, see section 35 of the *Small Claims Tribunal Act*.
232 Though see *supra* note 170.
233 In the context of the *Sale of Goods Act*, see for instance, *Clegg v. Olle Andersson* [2003] 1 All E.R. 721.
234 See for instance, *Frith v. Gold Coast Mineral Springs Pty. Ltd.* (1983) 47 A.L.R. 547 at 565; *Parkdale v. PUXU* (1982) 42 A.L.R. 1 at 10; *Re Rhone-Poulenc Agrochimie* (1986) 68 A.L.R. 77 at 84.

is not constrained by common law principles and should instead look to what the statute itself states. Hence arguably the *CPFTA* can extend to matters beyond what is recognized in common law in many other respects as well.

XIII. Conclusion

As highlighted in this paper, the *CPFTA* has many ambiguities, some of which could have been avoided. In addition, the *CPFTA* is not as comprehensive compared to its counterparts in other jurisdictions. The absence of direct criminal sanctions and the presence of a prescribed limit are just some such limitations. Further, certain unfair practices are not covered at all. For instance, the sending of unsolicited goods or services[235] or the charging a price that is grossly in excess of the price of similar goods or services available in the market,[236] is not regulated under the *CPFTA*.

However, despite all its shortcomings, the *CPFTA* is certainly to be welcomed and is certainly a step in the right direction.[237] The *CPFTA* clearly advances the interests of consumers, for as pointed out, in many ways it extends their rights to beyond what is currently recognized by common law. Further, it is not just consumers who benefit. In any industry, there may be businesses which engage in unfair practices in order to gain market share. With the *CPFTA* in place, at least some such unfair practices may be weeded out with the effect that businesses which promote their business without engaging in unfair practices, also stand to gain.

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[235] While sales made during unsolicited visits are covered under the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations*, sales made without there being an unsolicited visit are not covered. Thus if a company posts unsolicited goods or services to a consumer and goes on to bill them for it, the *CPFTA* would not have any application. This is not the position with some other countries; see for instance, s. 64 of the Australian *Trade Practices Act* and s. 23 of the Alberta *Fair Trading Act*.

[236] See for instance, s. 5(d) of the Alberta *Fair Trading Act*.

[237] As envisaged in Parliament, the current *CPFTA* is just a starting point; see Parliamentary Debates, Singapore, Vol. 76, No. 24 at 25. Thus hopefully improvements would be made in future.