

# **SAFEGUARDING CONSUMERS' INTERESTS AGAINST MISLEADING AND DECEPTIVE BUSINESS CONDUCT IN TANZANIA**

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## **Abstract**

In recent years, legislative enactments intended to shield consumers have proliferated in many countries, including the developing ones. Such proliferation signifies the importance of protecting consumers against unfair, misleading and deceptive business practices, as well as other market risks. This article examines, among others, the safeguards which consumers enjoy against misleading and deceptive business conduct in Tanzania.

**Key Words:** Consumer Protection, Consumer, Suppliers, Misleading and Deceptive Business Practices.

## **1. INTRODUCTION**

This article provides, among other things, information which will assist businesses and consumers to understand their rights and responsibilities in Tanzania under the Fair Competition Act (hereinafter referred to as "the FCA"). Apart from adding to the existing knowledge about consumer protection, the article will also assist legal practitioners, when consulted by clients for legal advice. Ultimately, businesses will shun unfair and misleading or deceptive business practices, thus, acting in line with the

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requirements of the relevant legal provisions, particularly under the FCA.

Historically, prior to the enactment of legislation aimed at protecting consumers interests in many countries, "the theories of freedom of contract and *caveat emptor* – "let the buyer beware" – controlled the merchant-consumer relationship."<sup>2</sup> In the context of such a relationship, "the consumer would bargain with the merchant for the purpose of goods and the parties could set the terms for payment and performance by contract or leave the specific provisions of their transaction to the law merchant or commercial systems of rules, customs and usages."<sup>3</sup> However, this relationship was not all rosy since "consumers' recourse options were limited to suing merchants either for breach of contract or, more commonly, for the common-law tort of deceit (today's fraud)."<sup>4</sup> Moreover, it is further noted that "fraud claims presented challenges for consumers who were often unable to

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2 See, for instance, Morgan, R.B. & Miller, L.C., 'Unfair and Deceptive Trade Practices and Consumer Protection: A History and State Law Distinctions' in *Unfair And Deceptive Trade Practices Statutes And Damages: How To Prevent And Defend Disruptive Challenges To Your Client's Business Practices* FDCC Annual Meeting

Fairmont Banff Springs Hotel Banff, Alberta, Canada July 25 – August 1, 2015, *FDCC Insights A Journal for Civil Defense and Corporate Counsel*, December 2015, (Chapter One).

3 See: Hussein, A.I., 'Freedom Of Contract and Consumers In English, American, Sudanese and Islamic Laws', at pg.1 (available from [https://www.researchgate.net/publication/260158094\\_Freedom\\_Of\\_Contract\\_And\\_Consumers\\_In\\_England\\_America\\_Sudan\\_And\\_Islamic\\_Law](https://www.researchgate.net/publication/260158094_Freedom_Of_Contract_And_Consumers_In_England_America_Sudan_And_Islamic_Law) (as accessed on 26/1/2019).

4 See Morgan & Miller (n1).

prove an objective and deliberate false statement or who had insufficient damages to warrant the expense of a lawsuit."<sup>5</sup>

The rise of the Industrial Revolution in the 18<sup>th</sup> and 19<sup>th</sup> centuries and continued economic boom in the early- and mid-twentieth century, further complicated the state of things. Technological development at the time, led to mass production of cheap products and innovations, "creating the need for a means to remedy breaches in the merchant- consumer relationship."<sup>6</sup> At this period, population growth around manufacturing centres led to the growth of an industrial society characterized by mass consumption of goods produced by unfamiliar individuals or factories located, sometimes far away from the place where such goods are consumed. A capitalistic oriented economy was slowly, but surely, replacing the traditional society and the mercantile economy with important legal doctrines such as freedom of contract, sanctity of contract and maxims such as *caveat emptor* operating at their full swing. The economic philosophy of the day also favoured the *laissez faire* (let him act, let him do) policy, which, furthermore, lent support to the doctrines of *caveat emptor* and freedom of contract.

Basically, the *laissez faire* era was an era of non-interventionism premised on the socio-economic liberal ideas of utilitarianism and economic self-regulating market theories, advocated by people such as Jeremy Bentham, John Stuart Mills and Adam Smith.<sup>7</sup> The legal machinery of the day also supported the trends. For

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> For more details on freedom of contracts, see , Wilson, N.S. 'Freedom of Contract and Adhesion Contracts' (1965) 14(1) *International & Comparative Law Quarterly*, 172- 193.

instance, in the case of *Printing and Numerical Registering Co v. Sampson*<sup>8</sup> Sir George Jessel MR was of the firm view that:

...if there is one thing which more than another public policy requires it, is that, men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Such a strict principle, however, was relegated in the 20<sup>th</sup> century with the adoption of "specific legal responses to various crises and emergencies that generated great public outrage and requiring [a] public response."<sup>9</sup> Specifically, in the modern era, while the doctrine of freedom of contract has not lost its relevance, it has been highly constrained, especially where consumers are its subject. Its close associate, the doctrine of *caveat emptor*, has lost not only its grip, but also its relevance. This turn of events is partly due to the increasing prominence given to policies that favour protection of consumers.

The dissenting judgement of Lord Denning in *George Mitchell Ltd v. Finney Lock Seeds Ltd*,<sup>10</sup> which was upheld by the House of

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8 (1875) 19 Eq 462, at 465.

9 See Waller, Spencer Weber and Brady, Jillian G. and Acosta, R.J. and Fair, Jennifer, 'Consumer Protection in the United States: An Overview' (January 12, 2011). *European Journal of Consumer Law*, May 2011. Available at SSRN: <https://ssrn.com/abstract=1000226> (as accessed on 26/1/2019).

10 [1983] QB 284, 297.

Lords,<sup>11</sup> speaks volumes regarding how courts abandoned, relegated or put limitations on the doctrine of freedom of contract in the modern era.

## 2. CONSUMER PROTECTION: A LEGISLATIVE HISTORICAL ANECDOTE

Although the judicial approach towards protecting weaker parties in a contract relied on expounding the common law principles as part and parcel of advancing the law, it is a fact that one of the weaknesses of relying on judicial activism to develop the law is its slow pace. On the other hand, the common law principles, being principles of general application, were also being applied by courts "without any distinction between sale and other contracts or, *a fortiori*, between consumer and commercial contracts."<sup>12</sup>

Furthermore, demands for regulatory interventions to ameliorate deplorable conditions arising from the burgeoning economy with its mass production, led to "the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers."<sup>13</sup> From case laws, as seen herein above, there is a host and a broad array of private rights of actions where consumers attempted to sue for damages, injunctions, attorney fees, and litigation costs if they can show harm from the illegal practice.<sup>14</sup>

However, while court's role in protecting consumers as weaker parties in various bargains cannot be overemphasized or ignored,

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11 *George Mitchell Ltd v. Finney Lock Seeds Ltd* [1983]2 AC 803. (See Lord Diplock's speech.)

12 See Hussein (n2) at 13.

13 See Waller, *et al*(n8) at 1.

14 See *ibid.*, (n8) at 1.

more efforts to address the consumer's plight through legislative enactment are also an important approach worth noting. This is essentially so, because, sole dependence on the courts to develop the law may sometimes be an obstacle since, it may take a slow pace compared to the transformations taking place in the business environment and the entire marketplace, and which, frequently, catch consumers unaware.

Basically, it is an understandable fact, that, information flow to consumers is asymmetrical, and they are, for that reason, less informed. This is a historical fact. As far as 1914, for instance, Walter Lippman, the social critic, pointed to that sort of information asymmetry noting that, "consumers in America no longer had time, information, or equipment to candle every egg, test the milk,...inquire into shoddy [or] find out whether the newspapers were lying."<sup>15</sup>

Lippman's criticism was out of the realisation that transformations in business organization, in production techniques, and in sales practices were creating unprecedented market conditions which required new laws designed to protect the consuming public.<sup>16</sup>As such, in countries such as the United States (US) and the United Kingdom (UK), being one of the countries where tremendous industrial and business transformations with impact to the welfare of consumers took place, the need for legal safeguards in form of legislation exemplified the necessary interventions to rectify the unfair market conditions.

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15 See Silber, N., 'From The Jungle to The Matrix: The Future of Consumer Protection in the Light of Its Past' in Winn, J.K., (ed) *Consumer Protection in the 'Age of Information Economy'*; Routledge, London and New York ( 2016) , Ch. 1 ,at p.15.

16 *Ibid.*

In the US, for instance, the creation of the Food & Drug Administration through the enactment of *the Pure Food and Drug Act, 1906*<sup>17</sup> was part of such earliest comprehensive effort to protect consumers through legislative enactment.<sup>18</sup> This Act ensured food inspection and regulation of food safety in the United States. It was initially concerned with ensuring products were labeled correctly. To further bolster consumer concerns, in 1914, the US Congress enacted the Federal Trade Commission Act (“FTC Act”).<sup>19</sup> This Act prohibited all unfair methods of competition in or affecting commerce, including unfair or deceptive acts or practices.<sup>20</sup> The FTC has a twofold mission: protection of consumers and promotion of competition.<sup>21</sup> Specifically, it protects consumers by carrying out investigations, prosecuting those who violate the law, developing rules meant to guarantee a vibrant marketplace, as well as educating consumers and businesses concerning their rights and responsibilities.<sup>22</sup>

It is worth noting, however, that, the more and vibrant consumer protection movement began in the 1960s. In this article, it may not be possible to give a detailed summary of such developments and the legislative measures that followed in many countries. However, one may take a few instances in the developed (industrialized) and developing (industrializing) countries.

In the US, for instance, with the promotion of a Consumer Bill of Rights by President Kennedy, the “Great Society” program of the

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17 34 Stat. 768, Chapter 391.

18 See Waller, et al (n8) at 1.

19 15 U.S.C.

20 See Morgan & Miller (n1).

21 *Ibid.*

22 *Ibid.*

Johnson Administration,<sup>23</sup> and the efforts to highlight the existence of unsafe products and the need for greater government regulation, which efforts were promoted by notable people such as Ralph Nader and other consumer advocates, gave the consumer protection movement a new impetus and a big boost, not only in that country, but also in other parts of the world.<sup>24</sup>

In Europe, taking the United Kingdom, as an example, Ramsay notes a similar increased legislative developments in the area of consumer law and policy in late 1960s and the early 1970s, marked with significant growth of public regulation of consumer markets. The creation of the Office of Fair Trading in 1973, for instance, characterized such particular regulatory efforts.<sup>25</sup> It was also the same period when new legislative enactments, such as the Supply of Goods (Implied Terms) Act (1973), following a report by the UK's Law Commission in 1969, took place.<sup>26</sup> The Unfair Contract Terms Act 1977 ("UCTA"), which applies both to consumer contracts and to contracts between businesses, was enacted in 1977. This Act was amended in 2001<sup>27</sup> to accommodate the EU Directives on Unfair Terms in Consumer Contracts.<sup>28</sup>

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23 This was a domestic agenda of President Lyndon Johnson in 1964-1965 whose main goals of ending poverty, reducing crime, abolishing inequality and improving the environment.

24 See Morgan & Miller (n1).

25 See Ramsay, I., 'Globalization, the Third Way and Consumer Law' in Winn, J.K., (ed) *Consumer Protection in the 'Age of Information Economy'*; Rutledge, London and New York (2016), Ch. 3, page62.

26 The Law Commissions' 1969, *Report: Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893* (Law Com No 24; Scot Law Com No 12).

27 See The Unfair Terms in Consumer Contracts (Amendment) Regulations 2001, SI 2001 No 1186

28 Council Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (OJ L171, 7.7.99).



India, is an example of a developing country from which we can also glean a bit of historical information regarding the movement for consumer protection and legislative efforts to protect consumers' interest. Its legal system follows the common law system of justice administration, and, for that reason, it will be noted that, like many other common law countries, its consumer protection legislative developments were in some way influenced by developments in the UK, since the British were its former colonial masters.

According to Prasad, consumer protection in India is a deep rooted issue which dates as far back to 3200 B.C owing to the fact that the Indian society cherished human values and ethical practices as of great significance.<sup>29</sup> Prasad notes, however, that, the modern approaches to consumer protection in that country, developed following the British colonization of India and the formation of a "unified nationwide modern legal system".<sup>30</sup>

Under the British colonial rule, several important legislative enactments were introduced in that country which provided for specific legal protection to consumers. Such enactments include the *Indian Contract Law* of 1872, the *Sale of Goods Act* of 1930, the *Indian Penal Code* of 1860,<sup>31</sup> the *Drugs and Cosmetics Act* of 1940, the *Usurious Loans Act* of 1918, and the *Agriculture Procedure (Grading and Marketing Act)* of 1937.

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29 See, Prasad, R.A 'Historical Evolution of Consumer Protection and Law in India: A Birds' Eye View' (2008) 11 (3) *Journal of Texas Consumer Law*, at pp. 132-136.

30 *Ibid*, at p. 134.

31 It is worth noting here, that, the Indian Contract Law of 1872, the Sale of Goods Act of 1930 and the Indian Penal Code of 1860 were also transplanted for application by the British in our jurisdiction, since Tanganyika was as well, a British Colony.

Essentially, the *Indian Sale of Goods Act* of 1930 was the only exclusive consumer legislation until 1986 when a more specific legislation, the *Indian Consumer Protection Act* of 1986, was enacted, and specifically designed to supplement the remedies already provided under the Sale of Goods Act of 1930. Other post-independence legislative developments relevant to consumer protection in that country include the *Essential Commodities Act* of 1955, the *Prevention of Food Adulteration Act* of 1954 and the *Standard of Weights and Measures Act* of 1976. Prasad notes, that, these enactments have a strong inclination towards protection of consumers as a weaker person in a bargain. In particular, some of such laws create offences that do not require a consumer to prove *mens rea* rather, their provisions create offences of a strict liability nature, not depending on any particular intent or knowledge of the offender.<sup>32</sup>

In recent years, legislative enactments intended to shield consumers have proliferated in many other countries, both developed and developing. Such a proliferation signifies the importance of protecting consumers against unfair, deceptive, misleading business practices, as well as many other market risks. Taking into consideration the fact that consumer protection is an age-old practice,<sup>33</sup> the proliferation of modern enactments intended to protect consumers in many countries, mirrors the prominence which consumer protection has been given in the society in the modern times compared to the past. To be precise, consumer protection in the modern time, stands at the centre of

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32 See Prasad, (n28), at p. 134.

33 *Ibid*, at p. 134.

the law between the private end-user of goods and services and suppliers of such goods.<sup>34</sup>

The overall intention of consumer protection, therefore, has been anchored on the need to shield consumers, as end-users of products or services, from the potential effects which they might suffer, either under a contract which, in the eyes of the law, is devoid of the so-called simple justice between man and man, or, from other market-related mischief.<sup>35</sup> Misleading or deceptive business practices are part of the mischief which consumers are likely to encounter in the marketplace, especially when they come into contact with unscrupulous suppliers. Such suppliers have the tendency of piling lies on consumers about the usefulness or quality of their products, and, in so doing, they put unnecessary pressure in order to sell to consumers. The combined effects of such practices include occasioning untold losses to consumers and high costs to the economy.<sup>36</sup>

It is against such background, therefore, that, a need arises to address the situation so as to ensure that the existing legal and regulatory environment plays its rightful role in ensuring safety,

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34 Van Eeden, notes that, the concept of consumer protection, is sometimes restricted to “protection for private citizens, collectively and individually, whenever they appear on the demand side of the market as buyers, orderers, or users of goods and services.”(See Van Eeden, EP ‘The Regulation of Trade Practices: A Comparative Study’ (Unpublished) Ph.DPh.D Thesis, University of South Africa, 1984 at p.43.

35 See De Gama, M. M, ‘Contract of Sale’ in Collier-Reed & Lehmann, *Basic Principles of Business Law*. LexisNexis, Butterworths, Durban, (2006) at p.138.

36 See, *Misleading and Aggressive Commercial Practices: New Private Rights For Consumers- Guidance on the Consumer Protection (Amendment) Regulations 2018* (UK), (available online from [www.gov.uk/government/publications/misleading-and-aggressive-selling-new-rights-for-consumers](http://www.gov.uk/government/publications/misleading-and-aggressive-selling-new-rights-for-consumers) (as accessed on 10/01/2019).

transparency, fairness and certainty of consumer transactions.<sup>37</sup> The need to do so is further necessitated by the fact that, in this fast changing socioeconomic and technological environment, monitoring the prevailing conduct of business is paramount. Such a necessity arises, not only from the fact that there is a duty to protect consumers against business practices that may turn out to be unfair and misleading, but also due to the need to afford consumers the opportunity to understand, safeguard, assert, and to fairly enjoy their rights and discharge their obligations in the marketplace.

### **3. THE PROTECTIONS ENJOYED BY CONSUMERS**

The kinds of protections which consumers enjoy under the law are generally varied. They are not just entitled to protection from misleading or deceptive business conducts but rather from a wide range of other risk factors. For instance, consumers are entitled to protection against unsafe, defective or substandard goods and services offered to them through contractual relations with their suppliers. They are, as well, entitled to protection against "fraudulent trading practices; insufficient information or economic exploitation through lack of competition or excessive prices."<sup>38</sup> In general, consumers are entitled to the enjoyment of their rights to respectful treatment and dignity within the business environment, this being one of the measures that contribute to equity and social justice.

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<sup>37</sup> See, Nangela D.J, *E-commerce and E-contract Law: A Comparative View on Problems and Possible Solutions Under the Law in South Africa and Tanzania*, Reach Publishers, Cape Town, South Africa (2018) at 70.

<sup>38</sup> See Harvey, B. W., *The Law of Consumer Protection and Fair Trading*, 2ed (1982) at p.v.

The concept of consumer protection, as considered in this article, "entails the safeguards, legal or otherwise, which are put in place to shield the interests of a class of people who are in an economically weak bargaining position."<sup>39</sup> Initiatives on consumer protection are, generally, addressed towards alleviating the inequalities that are inherent in the consumer-supplier relationship in terms of bargaining power, information asymmetry or knowledge power and resources.<sup>40</sup>

Because the state has interests in its people, consumer protection has always been attracting state interventions in the determination of market processes, an intervention which chiefly comes through imposing regulatory measures, which, apart from providing an operational framework for the market processes, do also provide for the correction of undesirable market effects with a view to improving consumers' position.<sup>41</sup> State intervention for the benefit of consumers is, therefore, premised on the need to bring sanity in the marketplace and economic efficiency by curbing abusive conduct, protecting individual rights in the pursuit of considerate treatment and dignity as well as contributing to equity and social justice.<sup>42</sup>

In essence, the object for such safeguards is "to discourage abuse of the superior bargaining power by suppliers of goods and

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39 See Trebilcock, M.J., 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359. See also E.P., Van Eeden, 'The Regulation of Trade Practices: A Comparative Book' (unpublished Ph.D.Ph.D thesis), University of South Africa, 1984) 43.

40 See UNCTAD, *Manual on Consumer Protection*, (Advance Copy), United Nations, Nairobi (2016), at pg.2.

41 See Cseres, K.J. *Competition and Consumer Protection* Kluwer Law International, The Hague, Netherlands, (2005) at page 151.

42 *Ibid.*

services, thereby serving as a safety measure against unfairness between suppliers and consumers."<sup>43</sup> With the increasing societal transformation due to globalization together with information and communication technology (ICT) revolution,<sup>44</sup> consumer protection has attracted more attention than before.<sup>45</sup> The rationale for such a view is not far-fetched.

Firstly, globalization, as a worldwide phenomenon, "has had an influence on consumer law and policy"<sup>46</sup> by way of revitalizing the classical freedom of contract principles within the framework of a market economy.<sup>47</sup> Apart from invigorating ideas regarding the role of government in a globalized economy, under such a revitalized classical freedom of contract, globalization has continued to influence the intensity and scale of cross-border interactions and transactions. To quote Ramsay's general thesis, globalization has led to "a widening, deepening, and speeding up of worldwide interconnectedness in all aspects of contemporary life."<sup>48</sup> In that way, it

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43 See Huffmann, J., 'Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops' (unpublished LLM dissertation, University of Cape Town, 2004) 3–4.

44 The term globalization has varied definitions. It has, for instance been defined as "the emerging of an international network, belonging to an economical and social system." See: Cuterela, S., 'Globalization: Definition, Processes and Concepts' (available online from [http://www.revistadestatistica.ro/suplimente/2012/4/srrs4\\_2012a22.pdf](http://www.revistadestatistica.ro/suplimente/2012/4/srrs4_2012a22.pdf) (as accessed on 10/1/2019)).

45 See Cuijpers, C. 'The influence of ICT on consumer protection; empowerment or impairment of the consumer?' TILT Law & Technology Working Paper No. 015/2009 September 2009, Version: 1.0 (available from <http://ssrn.com/abstract=1515790> ( as accessed on 22/1/2019)).

46 See Ramsay, I., 'Globalization, the Third Way and Consumer Law' in Winn, J.K., (ed) *Consumer Protection in the 'Age of Information Economy'*; Routledge, London and New York ( 2016 ), Ch. 3 . page.59.

47 See generally, Mooney R.J., 'The New Conceptualism in Contract Law,' Oregon Law Review (1995) pp. 1131–1207.

48 See Ramsay, (n24) at pg.60.

has fueled other vital processes such as market integration, thus facilitating the opening up of doors for the possible supply of goods and services from diverse suppliers and/or manufacturers to consumers.<sup>49</sup>

Given such an environment of a variety of sources, vigilance for the sake of unsuspecting consumers is a necessity. This is partly so because, those who are bent to exploit loopholes that may be existing within the regulatory framework, will definitely want to seize any available opportunity for supply of all sorts of goods, even shoddy and unsafe products to consumers at the expense of the latter.

Secondly, the ongoing technological innovations, especially in the area of ICTs, have continued to tremendously revolutionize the way businesses interact with consumers. The rise of new business models such as e-commerce, e-contracting, as well as mobile commerce (*m-commerce*), are all part of innovation worth noting, partly due to the fact that, these new innovations, have produced mixed results: both positive and negative.

On the part of consumers, for instance, the positive side of the new phenomenon of transacting business, such as e-commerce and m-commerce, relates to the increased variety of choices of either goods or services that a consumer can access at once as well as increased speed at which goods or services can be delivered to consumers. Moreover, whereas ordinarily 'in private law, the consumer is traditionally perceived as being a weak party in relation to the producer' there is a turning of the tables when one considers the digital arena.<sup>50</sup>

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49See, Nangela (n36) at 253.

50 See Cuijpers, (n44) at 4.

In this digital age, as "online shopping has become a serious competitor for the offline warehouses, technology offers consumers amazing possibilities to enhance their bargaining position."<sup>51</sup> The e-consumers, can, for instance, swiftly search the web for the lowest prices, as they are no longer restricted by local boundaries. Besides, they can as well and easily participate in "collective-buying activities, and they can set up powerful grudge websites against a company."<sup>52</sup>

On the other hand, the negative side of these newly technology-mediated innovations, reveals itself through the dangers associated with the online transactions. Under such an environment, online consumers are increasingly being exposed to new or greater risks. For some reasons, such as contractual anonymity, technological inscrutability and legal and economic imbalances, the task of consumer protection is increasingly becoming difficult.<sup>53</sup> There are yet other problematic issues including those arising from, the use of terms and conditions written in a foreign-language, applicability of unfamiliar applicable laws, increasing privacy infringements, and advance payment, all of which makes "the net result of these differences from physical commerce [to be] fuzzy."<sup>54</sup>

As such, since online consumers are more exposed to greater risks, they may at some point be seen to be at a weaker position compared to off-line consumers, although at times online

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51 *Ibid.*

52 *Ibid.* See further, Clarisse, G., *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology*, Kluwer Law International, 2001.

53 See Van Eeden, (n38) at pp.48-49).

54 See Cuijpers, (n44) at 4.



consumers also hold a stronger position owing to the fact that, the interconnected nature of the Internet and the swift dissemination of information through the modern media technologies, such as the social media, give them the power to create a common position in the form of product boycotts against suppliers.<sup>55</sup>

Within the context of globalisation, market liberalisation and technological innovations, therefore, there has been an outcry regarding the adequacy, reliability and effectiveness of existing consumer protection legal frameworks in many developing countries in safeguarding consumers against unfair and misleading business practices, especially in the online environment.<sup>56</sup> Questions also arise regarding the general traditional view of the consumer being a fundamentally weak party, and hence the traditional consumer protection legislation. A combination of all these factors, justify considerations regarding whether important issues in the current environment, such as justice and fairness, have been adequately taken care of by those entrusted to protect consumers' interest.

Observably, Mooney has suggested, in what he terms "Easter tides" that, currently, there is a tendency now to put more emphasis on freedom of contract and market force economics rather than justice and fairness.<sup>57</sup> As such, there is a need to be more vigilant and arrest the collateral effects that may be associated with globalization and its emphasis on the free market at the expense of the whole issue of justice and fairness to consumers. This is imperative since the ever changing

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55 *Ibid.*

56 See, Nangela (n36), pp. 70-76.

57 See Mooney (n46) at 1133.

technological business landscape may be greatly compromised at the expense and detriment of unsuspecting consumers.

#### **4. PROHIBITION OF MISLEADING OR DECEPTIVE BUSINESS PRACTICES UNDER THE TANZANIAN LAW**

As noted earlier herein, efforts to regulate conduct that harm the welfare or interests of consumers have a checkered history, globally and from one country to another. Due to the growing waves of demand for consumer protection in the past centuries, consumers have developed expectations about how businesses should conduct themselves wherever they are in dealing with consumers. Such expectations have been consolidated into legal codes or legislation to safeguard consumers' rights.

In Tanzania, however, consumer protection law is not contained within a single statutory scheme. It rather expands from scattered pieces of legislation, specifically those aimed at regulating a certain type of business, practice, or industry, to overlapping mandates of various institutions dealing with the plight of consumers, weak enforcement mechanism with regard to consumer complaints, as well as consumer awareness constraints. From an overall perspective, this scenario posits a major weakness in the existing consumer protection regulatory environment in Tanzania. Thus, the current regime is unfavourable to consumers for it increases their levels of risk exposure to unscrupulous suppliers of goods and services, be they local or foreign, seeking to accumulate profits at all costs.<sup>58</sup>

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58 See, LHRC Report, *Human Right and Business in Tanzania* 2012.

One of the relevant consumer protection laws regulating unfair and misleading business practices in Tanzania, is the Fair Competition Act, 2003, Cap.285 (the FCA). The Act applies to consumers alongside other sector-based legislation such as the *Energy, Water and Utilities Regulations Act, 2001*,<sup>59</sup> *Tanzania Communications Regulatory Act, 2003*,<sup>60</sup> *The Surface and Marine Transport Act 2001*<sup>61</sup> and the *Civil Aviations Act 2001*. Other relevant laws are the *Tanzania Food and Drugs Act* and its regulations,<sup>62</sup> the *Tanzania Bureau of Standards Act*,<sup>63</sup> the *Tobacco Products (Regulation) Act*,<sup>64</sup> and its 2014 Regulations,<sup>65</sup> the Penal Code, Cap.16, the Tanzanian Law of Contract Act<sup>66</sup> or the Sale of Goods Act,<sup>67</sup> to mention but a few of them.

#### **4.1 Provisions Regarding Misleading or Deceptive Conduct**

The doctrine of misleading or deceptive conduct in Tanzania is best exemplified by section 15 (1) of the FCA which provides that: "*No person shall, in trade, engage in conduct that is misleading or*

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59 Cap.414, R.E 2002].

60 Cap. 172.

61 This Act was repealed and replaced by two different Acts. The first Act is the *Tanzania Shipping Agencies Act, 2017* which regulates the maritime transport industry in Mainland Tanzania and the second Act is the *Land Transport Regulatory Authority Act No. 3 of 2019* (the LATRA Act) which came into force on 29 April 2019 via the *Land Transport Regulatory Authority Act (Date of Commencement) Notice No. 358 of 2019*, to regulate surface transportation.

62 Cap.219. This Act was amended in 2019 and renamed to Tanzania Medicines and Medical Devices Act to ensure that it only provides regulatory oversights on medicines, medical devices and diagnostics only.

63 This Act was amended in 2019. Currently, under Section 130 of the Standards Act No. 2 of 2009, food and cosmetic products which were before under the regulatory oversight of the Tanzania Food and Drugs Authority (TFDA), were placed under the regulatory oversight of the Tanzania Bureau of Standards (TBS), effective 1 July 2019.

64 Cap.121.

65 Government Notice No.478 of 2014.

66 Cap. 345 [R.E.2002].

67 Cap.214 [R.E.2002].

*deceptive or is likely to mislead or deceive.* "This section creates a distinct type of statutory prohibition with a broad reach-effects.<sup>68</sup> In this regards, section 15 (1) of the Act is a general provision extending to all forms of misleading or deceptive conduct in business and is not restricted to such conduct as would constitute misrepresentation at common law.<sup>69</sup> It is argued, for instance, that, with a provision of that nature, rights under it may be pursued alongside an action in tort, such as negligent misstatement, or other actions such as a rescission of or, a breach of contract.<sup>70</sup>

The generality of section 15 (1) of this Act is emphasized under subsection (2) which is to the effect that, what is contained under Part III of the Act, concerning misleading and deceptive conduct, may not, by any implication whatsoever, be limited. This means that the list of what may constitute a misleading or deceptive conduct is open-ended. For the sake of clarity, subsection (2) of section 15 of the Act provides, that, "[n]othing in this Part shall be taken as limiting by implication the generality of subsection (1)."

As stated herein, above, section 15 (1) of the FCA, makes it unlawful, on the part of businesses, to make statements in trade or commerce that are misleading or deceptive; or are likely to

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68 See *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, [92] (Lockhart J), (as regards section 52 of the Australian Trade Practices Act, 1974).

69 Section 15 of the FCA is similar to section 52 of the Australian Trade Practices Act 1974 (Cth) (TPA). Principally, when the FCA was being enacted a lot in terms of 'legal transplanted', was obtained from the Australian law and practice. For more on section 52 of the Australian Act, see: Chew, C., "The scope and limitations of the doctrine of misleading or deceptive conduct in the context of guarantees: some perspectives and uncertainties" (2006) 3 *Macquarie Journal of Business Law* 79-98. See also Peter Gillies, 'Non-Disclosure: Trade Practices Act, s 52' (2004) 78 *Australian Law Journal* 653, 654-655.

70 See Chew (n68) at page 81.

mislead or deceive. Such statements or conducts are prohibited. The section, establishes a general standard of conduct to determine commercial conduct has three elements (a) conduct by persons (including juridical persons) (b) in trade, which is (c) misleading or deceptive or is likely to mislead or deceive. These three elements are essential in establishing or bringing an action against a trader on the ground of engaging in a conduct that is misleading or deceptive or is likely to mislead or deceive.

It is also worth nothing, that, section 15 of the FCA is a provision similar to section 52 of the Australian Trade Practices, 1974.<sup>71</sup> The way the Australian courts have construed this provision, therefore, lends assistance to the Commission or the Courts, regarding how the can apply section 15 of the FCA. In particular, the judgment of the Australian Court in the case of *Rhone-Poulenc v. UIM Chemical Services*<sup>72</sup> may be quite helpful.

In that case, when examining the applicability of section 52 of the Australian Trade Practices Act, 1974, Lockhart, J in was of the view that:

Section ... should be interpreted according to the natural, ordinary meaning of the language. Whether it has been contravened depends upon analysis of the conduct of the alleged contravener in light of all the relevant circumstances constituted by acts, omissions, statements or silence.

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71 Act No. 51 of 1974. This Act has been repealed and replaced by the Competition and Consumer Protection Act

72 (1986) 12 FCR 447.

Even so, Chew argues that, the above statement may require some adjustment when one takes into account what the court stated in the case of *Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd*,<sup>73</sup> i.e., that, the "heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests."<sup>74</sup>

All in all, as stated by Brennan J, in the case of *Concrete Constructions (N.S.W.) Pty Ltd v. Nelson*<sup>75</sup> section 52 (which as stated earlier is in *parimateria* to section 15 of the FCA) was to be construed in the light of its heading, which was in relation to the protection of consumers. As such, the conduct it makes illegal is limited to conduct which misleads or deceives or is likely to mislead or deceive an individual, in his or her capacity as a consumer.

In the Nelson's case, (supra), Brennan J was of a further view that, not section 52 should not only be confined to the protection of the interests of consumers only since it can also be relied upon and be enforceable by way of civil proceedings, by persons other than consumers - for example, trade competitors - may protect their own interests by taking proceedings, the joint operation of s.52 and the enforcement provisions which confer protective rights on persons other than consumers.<sup>76</sup> Consequently, since section 15 of the FCA is similar in exact wording and consequences as section 52 of the Australian Trade Practices Act, 1974, a similar enforcement approach may be adopted by the Fair Competition

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73 (1982) 149 CLR 191, at 199.

74 See Chew (n68) at page 81.

75 (1990) 169 CLR 594.

76 (1990) 169 CLR 594.

Commission when enforcing section 15 of the FCA. In particular, civil proceedings should be filed in court whenever there is a breach of that provision.

However, it is perhaps necessary to state that, what needs to be done as of now if the FCC is to enforce section 15 and the rest of provisions relating to consumer protection under the Act, is to speed up the proposed amendments of the FCA, in particular section 60 of the FCA, which provides for sanctions. Doing so is necessary in order to provide reasonable sanctions which will be meted out when provisions that affects consumer interests are violated. Currently, the penalties provided for under section 60 of the FCA are too high and seem to have been crafted to cater for competition- related offences under section 8 to 10 of the FCA, leaving out the rest of provisions meant to protect consumer interests.

#### **4.2 Defining Misleading or Deceptive Conduct**

Although the FCA applies to consumer protection as the main legal instrument, it has not defined what amounts to "misleading" or "deceptive" business practices. Nonetheless, the Act has provisions under Part III, which prohibit these practices. In the absence of a definition regarding a 'misleading or deceptive' conduct, one has to construe it in line with the relevant provisions of the Act. Instead of inventing the wheel, however, since section 15 of the FCA is similar to section 52 of the Trade Practices Act, 1974 of Australia (which, was one of the legislation which influenced the enactment of Tanzanian law (the FCA)), a close look at how courts in Australia have construed section 52 of the Australian Trade Practices Act, 1974, will be very helpful.

For instance, the Australian Court, in the case of *Puxu Pty Ltd v. Parkdale Custom Built Furniture Pty Ltd*,<sup>77</sup> interpreted the term 'misleading' 'as conduct which is inconsistent with the truth or which leads or is likely to lead the person to whom it is directed astray and into error or to cause that person to err.'<sup>78</sup> On the other hand, the term 'deceptive' was said to be carrying a 'connotation of craft or overreaching'.<sup>79</sup> In view of this, whether a particular conduct is misleading or deceptive becomes a question of fact which needs to be assessed in the context of the evidence as to the alleged conduct and the circumstances surrounding the entire allegation. In *Re Credit Tribunal (SA); Ex parte GMAC*,<sup>80</sup> the court was of the firm view that:

Misleading' is a word which is capable of expressing various shades of meaning, sometimes signifying that which is subjectively misleading and at other times that which is objectively misleading. Its meaning, therefore, is apt to be influenced, indeed decisively influenced, by the context in which it is found....

From the above case, a misleading or deceptive conduct in business, thus, may be in varied forms and meaning. For instance, 'using a well-known person's image in conjunction with a

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77 (1979) ATPR 40-135.

78 See Chew (n68) at page 81 (citing- also; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 69 ALR 83 [92] (Lockhard J); *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216). See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000)104 FCR 564.

79 See Chew (n68) at page 81 (citing *Puxu Pty Company Ltd v Parkdale Custom Built Furniture Pty Ltd* (1979) ATPR 40-135.)

80 (1977) 137CLR 545 at 561.



marketing campaign without permission may be considered misleading and deceptive. This is especially the case when that person is widely known to be an endorser of products.<sup>81</sup>

Moreover, a 'misleading or deceptive conduct may relate to advertisements, promotions, quotes, statements and representations that create a misleading impression among the majority of consumers about the price, value or quality of consumer goods or services.'<sup>82</sup> Similarly, a misleading or deceptive conduct may involve dissemination of false information regarding the characteristics of a product (like its benefits or composition), its price or the manner in which the price is calculated. It might, as well,

include false claims made by traders, for example, that, the trader is a member of a well-respected and trusted trade association (when it is not the case), misleading product descriptions, such as false claims on the actual mileage of a second hand car, or being deliberately vague about the actual price of a good or service or hiding additional costs and charges from consumers.<sup>83</sup>

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81 See Addsons, *Gambling Regulations*, Dec. 2004, page 8 (available from [http://www.addisonslawyers.com.au/knowledge/assetdoc/cfa04cea7b019760/13550\\_48\\_1%20Gambling%20Law%20&%20Regulation%20December%202014.pdf](http://www.addisonslawyers.com.au/knowledge/assetdoc/cfa04cea7b019760/13550_48_1%20Gambling%20Law%20&%20Regulation%20December%202014.pdf) (as accessed on 29/2/2020)). See also *Talmax Pty Ltd v Telstra Corp Ltd* (Kieren Perkins case) [1997] 2 Qd R 444; (1996) 36 IPR 46; (1996) ATPR 41-535; BC9605158.

82 See 'False or misleading claims' (available from <https://www.accc.gov.au/> (as accessed on 28/1/2019)).

83 See para 13 of the United Kingdom's *Misleading and Aggressive Commercial Practices: New Private Rights for Consumers Guidance on the Consumer Protection (Amendment) Regulations 2014*. Available from [www.gov.uk/government/publications/misleading-and-aggressive-selling-new-rights-for-consumers](http://www.gov.uk/government/publications/misleading-and-aggressive-selling-new-rights-for-consumers) (as accessed on 12/3/2020).

Given such possibilities as indicated in the above quoted paragraph, a very useful summary of important principles applicable to section 52 of the Australian Trade Practices Act, 1974 was given in the Australian case of *Equity Access Pty Ltd v. Westpac Banking Corp.*<sup>84</sup> The respective principles are as follows, that:

1. "For conduct to be misleading or deceptive the conduct must convey in all the circumstances of the case a misrepresentation.
2. There will ...be no contravention ... unless [an] error or misconception results from the conduct of the [supplier] and not from other circumstances for which the [supplier] is not responsible.
3. Conduct will be *likely* to mislead or deceive, if there is a "real or nor remote chance or possibility" of misleading or deception regardless of whether it is more than 50% .... The question of whether conduct is misleading or deceptive or likely to mislead or deceive is an objective question which the court must determine for itself. Hence, evidence that persons in the relevant class have been mislead will, although admissible, not be determinative. In some cases, however, such evidence will be very persuasive.

4. Conduct of a [supplier] causing mere confusion or uncertainty in the minds of the public ... is not necessarily coextensive with misleading or deceptive conduct.... Since actual deception need not be shown, the court must consider whether a reasonably significant number of potential purchasers would be likely to be misled or deceived.
  
6. Section 52 is not confined to, conduct which is intended to mislead or deceive ... and, a [supplier who] acts honestly and reasonably may, nonetheless, engage in conduct that is likely to mislead or deceive.'

There is, however, a need to distinguish between a misleading or deceptive conduct and a false or misleading representation, although these fall under the same category of prohibited misleading practices under the law. A misleading or deceptive conduct *per se* presents a broader claim, unlike a false or misleading representation.<sup>85</sup> In *Barnes v. Forty Two International Pty Ltd*,<sup>86</sup> for instance, the court in Australia had the following to say:

In this case, the respondents' claim for misleading or deceptive conduct was based solely on the fact that the appellants had made two specific false representations. It is recognized, of course, that a claim alleging misleading or deceptive conduct can be founded on conduct other than the making of a

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<sup>85</sup> See *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940, 50,250.

<sup>86</sup> (2014) 316 ALR 408, [para 8].

misrepresentation. However, where such a claim is made, it must be distinctly pleaded, and a party will not be able to rely on the claim alleging a *false representation* to run a wider misleading or deceptive conduct claim.

In Tanzania, matters relating to false representation fall under section 16 of the FCA. Principally, this section lends support to section 15 by providing specific conducts which, if a person engages in them, will be in breach of the FCA. In particular the section provides as follows:

16. No person shall, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard quality or grade;
- (c) falsely represent that goods are new;
- (d) falsely represent that a particular person has agreed to acquire goods or services;
- (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (f) represent that he has a sponsorship, approval or affiliation, he does not have;

- (g) make a false or misleading representation with respect to the price of goods or services;
- (h) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
- (i) make a false or misleading representation concerning the place of origin of goods;
- (j) make a false or misleading representation concerning the need for any goods; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee right or remedy.

It is a fact that although 'most claims regarding misleading or deceptive conduct are pleaded by reference to alleged representations'<sup>87</sup> conduct can extend beyond representations.<sup>88</sup> Juebner argues that, 'even though the concept of conduct is broader than the concept of a representation, most misleading or deceptive conduct cases continue to be pleaded by reference to alleged representations...[because] conduct generally manifests by representing something.'<sup>89</sup>

In view of the above, it is argued that, in order to establish whether a particular alleged conduct constitutes a misleading or deceptive conduct one should identify the conduct that is intended to be

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87 See *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202 where it was held that a representation was needed. See also Christian Juebner, 'Misleading or Deceptive Conduct Claims: Practical Hints for Practitioners' A paper presented at Law Institute Victoria, 470 Bourke St. Melbourne, on 23<sup>rd</sup> March, 2018, at p.7.

88 See Juebner (n86) at 7, citing *Butcher v Lachlan Elder Realty Pty Ltd*. (2004) 218 CLR 592, at [32], [103] and [179].

89 See Juebner (n86), at page 8.

relied upon.<sup>90</sup> Such a conduct, which may be pleaded as an express or implied representation, may arise from something written/oral (statement) or a gesture or even silence when the situation would have called for explanations or clarifications to be given.<sup>91</sup>

In fact, 'it is not necessary to show any intention to mislead or to deceive or to prove that the conduct actually misled someone.'<sup>92</sup> Chew argues that, 'conduct is likely to mislead or deceive, if there is a real, or not remote, chance or possibility of the conduct having that effect regardless of whether that chance is more or less than 50 per cent.'<sup>93</sup> Principally, what needs to be identified is 'the essence of what the conduct represents.'<sup>94</sup> Consequently, 'where an express representation is pleaded it usually alleges the words spoken or written (or their substance).'<sup>95</sup>

On the other hand, an implied representation, refers to 'the representation (or message) conveyed by conduct.'<sup>96</sup> The following example from Juebner helps to mark the distinction:

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90 *Ibid.*

91 *Ibid.*, at page 7. See, for instance, *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342 at [388].

92 See Chew, (n68) 82 (citing: *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd* (1980) 33 ALR 349; 49. FLR 455; ATPR 40-188.

93 See Chew, (n68) at page 82 (citing , *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367; 42 FLR 331; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; 55 ALR 25; ATPR 40-463, 45,343; *Tomlinex Pty Ltd Candoura Pty Ltd* (1994) ATPR 41-302, 42,023; *Central Equity Limited v Central Corporation Pty Limited* (1995) ATPR 41-443, 40,998.)

94 See Juebner (n86), at 8.

95 *Ibid.*

96 *Ibid.*

Party A enters into an agreement with Party B pursuant to which Party B will manufacture shoes for Party A. The agreement contains a term that Party B will charge Party A for the shoes at “factory cost plus reasonable cost of sampling, testing, agent and Hong Kong office fees”. There was no express term in the agreement and no express representation made in the negotiations to the effect that Party B had, or would put in place, systems capable of calculating prices in that manner. However, by negotiating and agreeing such a term, Part B impliedly represented that it had systems capable of calculating prices in that manner.<sup>97</sup>

As noted in the discussion above, section 52 of the Australian Trade Practices Act, 1974 is equally similar in effects with section 15 of the FCA. Intent on the part of a supplier alleged to have contravened the provision is not required. Where there is more than one person accused of engaging in misleading and deceptive conduct, then each participant’s involvement must be independently assessed and be responsible as per the facts of the case. This was emphasized in the case of *Cassidy v Saatch & Saatch Australia Pty Ltd*<sup>98</sup> and *Dowey v Carlson Hotels Pacific Pty Ltd*.<sup>99</sup>

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97 See *Madden International Ltd v Lew Footwear Holdings Pty Ltd* (2015) 50 VR 22, para[16].

98 (2004) 134 FCR 585.

99 [2005] QCA 199. See also Christensen, S. A; Duncan, B and Stickley, A. ‘Avoiding responsibility for misleading brochures – Is it simply a matter of disclaimer?’ (2008) 16 (1) *Australian Property Law Journal*, pp. 24-50.

#### 4.2.1 *Who Should Have Been Misled under Section 15 (1) of the FCA?*

Courts in Tanzania have not had an opportunity to interpret this provision. However, established Australian court authorities which have interpreted a similar provision point to the conclusion that, determining the question regarding who must be misled, is dependent upon whether the conduct was directed to the general public or to a class of identified individuals.<sup>100</sup> Considerations, therefore, are to be given depending on the facts of each case. In my view, the test to be employed in the consideration of the matter should be the reasonable person's test. Even so, such a reasonable person must be one in the class of consumers likely to be affected by the conduct in question.<sup>101</sup>

#### 4.2.2 *The effect of non-disclosure of important information*

In essence, a non-disclosure or silence where disclosure should have been made in the ordinary course of events, may constitute a misleading or deceptive conduct.<sup>102</sup> It is argued further that, even where there is a failure to disclose a subsequent change after a statement has initially been made and which results in the statement being incorrect, can be regarded as misleading or deceptive.<sup>103</sup> However, in the Australian case of *Rhone -Poulenc*

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100 See the Australian case of *Butcher v Lanchlan Elder Reality Pty Ltd* (2004) 218 CLR 592 and *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 (discussion section 52 of Trade Practices Act, 1974).

101 See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982). See also *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45.

102 See Chew, (n68) at p 84. (citing: *Rhone -Poulenc Agrochimie S A v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477; *Lyrytzis v Westpac Banking Corporation* (1994) ATPR 41-360; *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558, 43, 715.

103 See Chew, (n68) at p 84, citing *Trade Practices Commission v Optus Communications Pty Ltd* (1996) ATPR 41-478; *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558, 43, 715; *Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd* (1997) ATPR (Digest), 46-177.)



*Agrochemie S A v. UIM Chemical Services Pty Ltd*,<sup>104</sup> it was observed that, the silence or non-disclosure of information, must be a deliberate act and not an act of carelessness or ignorance of the significance of the information to be disclosed. Chew notes further that:

In *Kimberley NZI Finance Ltd v. Torero Pty Ltd*, [(1989) 11 ATPR 46-054, 53,195], French J, although reluctant to postulate a general rule, held the view that silence could only be misleading or deceptive conduct if the circumstances gave rise to some reasonable expectation that if a relevant fact exists it would be disclosed. The question of whether a reasonable expectation of disclosure exists is to be determined in light of all the circumstances of the case, independent of general law principles.<sup>105</sup>

Disclosure of information, especially in business transactions, is a practice whose rationale is deeply rooted in the economic theory of an efficient bargain. It is argued that an efficient bargain is measured in terms of how it makes both parties better off.<sup>106</sup> However, as it was stated earlier herein, information asymmetry, *i.e.*, a situation where a supplier has information which a consumer does not have, has been an issue to consumers. It is a problem because it has the potential to alter or lessen the efficiency of a bargain since, a consumer, from whom such information is concealed, will always make uninformed decisions

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104 (1986) 12 FCR 477.

105 See Chew, (n68) at p 84.

106 See Rubin, E., 'The Internet, Consumer Protection and Practical Knowledge' in Winn, J.K., (ed) *Consumer Protection in the 'Age of Information Economy'*; Routledge, London and New York ( 2016) , pp.35-58, at p.37.

and thus his or her economic position will be worse off unlike that of the supplier.<sup>107</sup>

In this era of technological progression, disclosure of information is an issue of paramount necessity given that online products have been quite complex. In the same wave length, consumers' ability to assess the quality of online products has turned out to be more difficult.<sup>108</sup> Consequently, given the complexities which an online consumer may have to face, especially where a supplier fails to provide sufficient information regarding a particular product offered online, principles have been devised to deal with the issue of non-disclosure or conduct involving silence, where information ought to have been disclosed.

In Australia, for instance, White, J. in the case of the *Australian Securities and Investments Commission v. Active Super Pty Ltd (in liq)*,<sup>109</sup> had the following to say:

The principles relevant to this ... are settled. Many of the principles were discussed in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357, in particular, at [16]-[21] (French CJ and Kiefel J). I take the applicable principles to be as follows:

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107 *Ibid.* See further Christensen, Sharon A. and Duncan, W.D. & Stickley, A.P. 'Behavioural biases and information disclosure laws relating to residential property sales: narrowing the gap between existing laws and calls for future reforms.' (2009) 9 (2) *Queensland University of Technology Law and Justice Journal*, pp. 251-279.

108 See Rubin (n105), at p38.

109 [2015] FCA 342 at [388].

- (1) Conduct involving silence or omission may, in some circumstances, constitute misleading or deceptive conduct;
- (2) In considering whether conduct is misleading or deceptive, silence is to be assessed as a circumstance like any other;
- (3) Mere silence without more, is unlikely to constitute misleading or deceptive conduct. However, remaining silent will be misleading or deceptive if the circumstances are such as to give rise to a reasonable expectation that if some relevant fact does exist, it will be disclosed;
- (4) A reasonable expectation that a fact, if it exists, will be disclosed (*sic*) will arise when either the law or equity imposes a duty of disclosure, but is not limited to those circumstances. It is not possible to be definitive of all the circumstances in which a reasonable expectation of disclosure may arise but they may include circumstances in which a statement conveying a half-truth only is made, circumstances in which the representor has undertaken a duty to advise, circumstances in which a representation with continuing effect, although correct at the time it was made, has subsequently become incorrect, and [the] circumstances in which the representor has made an implied representation.

It is expected, therefore, that, in an event that Tanzanian courts are called upon to determine a case involving non-disclosure or insufficient disclosure of information, the above principles will be of assistance in persuading the court to rule in favour of a consumer.

## 5. REMEDIES FOR BREACH OF SECTION 15 OF THE FCA

As earlier stated above, section 15 of the FCA is a comprehensive provision of wider impact. Although it does not employ the language of any common law cause of action, it creates a norm rather than a liability and, failure to adhere to its standard has the consequences provided for in Part X of the FCA. In particular, a person who infringes the prohibition set out in section 15 of the FCA may be subject to the Fair Competition Commission's jurisdiction and, under section 58 or section 59 of the FCA, the Commission may issue a compliance order or compensatory orders against such person.<sup>110</sup>

In particular, section 58 (1) of the FCA vests powers in the Commission to issue, where it has been satisfied that a person has committed or is likely to commit an offence against the Act (other than Parts VI or VII), a compliance order under the section against that person and any person involved in the offence. The Commission's Order, which is enforceable as the Order of the High Court,<sup>111</sup> may require the particular person(s) to refrain from conduct in contravention of this Act or to take actions to comply with this Act, and shall specify the time for compliance with the order and the duration of the order.<sup>112</sup>

On the other hand, where a consumer has suffered damages as a result of relying on a misleading or deceptive conduct of any person, the Commission may be approached for the remedy of compensatory orders. Section 59 (1) of the FCA provides that:

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110 See Section 60(6) of the FCA.

111 See Section 58(9) of the FCA.

112 See Section 58(3) of the FCA.

Any person who suffers loss or damage as a result of an offence against this Act (other than under Parts VI or V11) may apply to the Commission for compensatory orders under this section against the person who committed the offence and any person involved in the offence, whether or not they have been convicted of the offence.

Section 59 (2) of the FCA, however, sets a limitation regarding the time within which a request for compensatory orders should be made. Specifically, a consumer desiring to be compensated for harm suffered due to a misleading or deceptive conduct should bring up his/her claim within three (3) years after the loss or damage was suffered or the applicant became aware of the offence, whichever is the later.

The various legal binding orders which may be given by the Commission under section 59(3) include (a) an order requiring the respondents to pay money; (b) an order requiring the respondents to supply goods or services for specified periods or on specified terms and conditions; (c) an order declaring void, terminating or varying a contract; or (d) an order requiring the respondents to pay the costs of the applicant or of a person, appearing at the hearing on behalf of the applicant or costs of producing of documents.<sup>113</sup>

As stated earlier, there are other sector-based legislation, which cater for the consumer protection. For brevity of this article, I will only look at the Energy and Water Regulatory Authority Act,<sup>114</sup> and the regulatory body established by this law in the name of Energy

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<sup>113</sup>See Section 59 (4) of the FCA.

<sup>114</sup>EWURA Act Cap 414 of the laws of Tanzania.

and Water Utilities Regulatory Authority (EWURA).<sup>115</sup> Essentially, the Energy and Water Utilities Regulatory Authority (EWURA) is an autonomous multi-sectoral regulatory authority.<sup>116</sup> It was established to provide technical and economic regulation of the electricity, petroleum, natural gas and water sectors in Tanzania pursuant to its governing law and other relevant sector legislation.

In terms of its functions, the Act, which establishes EWURA, provides that, the authority shall, among others, cater for the licensing, tariff review, monitoring performance and standards with regard to quality, safety, health and environmental protection. It is also responsible for promoting effective competition and economic efficiency, protecting the interests of consumers and promoting the availability of regulated services to all consumers, including low income, rural and disadvantaged consumers in the regulated sectors.<sup>117</sup>

As it may be seen, EWURA's areas of providing regulatory oversight are directly impactful on the lives of common people who stands as consumers of electricity, water and other essential utility services. When providing protection to consumers and their interests, the Authority, through its consumer complaints handling mechanisms,<sup>118</sup> has dealt with a number of complaints. According to section 34 of the Act, the Authority is mandated to hear and determine any complaint against a supplier of regulated goods or services in relation to any matter connected with the supply, possible supply or purported supply of the goods or services.

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115 See section 4 of the Act.

116 See section 5 of the Act.

117 See section 6 and 7 of the Act.

118 See section 34 to 38 of the Act and the Energy and Water Utilities Regulatory Authority (Complaints Handling Procedure) Rules, GN No. 10/2013.

Consequently, EWURA has dealt with complaints relating to consumers of petroleum products, natural gas, water and sanitation as well as electricity consumption, and has issued a number binding orders, awards and rulings.

One of the rulings delivered by EWURA, and which is relevant to the them discussed in this article, i.e. misleading and deceptive practices, is related to the complaint between *Oryx Gas (T) Ltd (as the Complainant) v Mount Meru Petroleum Ltd ( as The Respondent)*.<sup>119</sup> The complaint was about the importation, marketing and selling of LPG cylinders by Mount Meru Petroleum Limited (“the Respondent”) bearing the same red colour as that of the Complainant and thus violating Rule 47 of the Petroleum (Liquefied Petroleum Gas) Rules, GN. 420/2012.

In her allegation, the Complainant alleges that the Respondent’s practice of using LPG cylinders that resemble Complainant’s cylinders may deceive, tend to deceive or had the effect of deceiving a customer with respect to its brand. According to Rule 50 of GN 420/2012, deceptive trade practices, which include violation of the requirements related to marking of cylinders, are expressly prohibited by that rule. In view of the above, the Complainant further alleges that, she had invested in its “**ORYX Gas Brand**” and some consumers have identified themselves with the said brand. As such, whenever a consumer sees a red cylinder, he or she undoubtedly believed and knew that such a cylinder belongs to ORYX. The complaint, thus, sought for restraint orders and other reliefs from the Authority.

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119 EWURA Complaint Number EWURA/33/2/187, Made by the Board of Directors of EWURA at its XX Ordinary Meeting held at Dar es Salaam on this 29<sup>th</sup> day of July 2016).

In resolving the matter, EWURA found that there had been a breach of the relevant prohibitions set by the law. The Authority noted that:

In recent days there has been an upward increase in cases related to illegal cylinder decanting and other deceptive trade practices which is partly attributed to the misuse of cylinder marking. Illegal cylinder decanting apart from being [anticompetitive], it also poses a danger to lives and property. Exhibit "C3" **is a clear manifestation of illegal decanting or deceptive trade practices.** For quite some time now it has been our resolved position that, anyone who take part in deceptive trade practices, including illegal decanting or aids or abets commission of the same, should face the wrath of the law.

In the final analysis, apart from issuing the restraining order to the Respondent, the Authority awarded costs to the complainant and required the Respondent to compensate the complainant an amount of money equal to TZS 30 million. The above complaint, stands as a representative sample of many other complaints of various nature, resolved by EWURA which have at their center the interests of consumers.

It is important to note, however, that, both suppliers and consumers' watchfulness to malpractices that may be prevalent in the market places and thus affecting their rights under the law, is an important thing if we are to successfully expose and root out unscrupulous businessmen who seek to prey on them. The



EWURA complaint discussed herein above would not have been rooted out if the complainant decided to remain docile.

## 6. CONCLUSION

From the historical past, consumers throughout the world have traversed a laborious path of injustices perpetrated by either the manufacturers or suppliers of goods and services. Various methods designed to exploit consumers' weak position or their ignorance, including reliance of the theoretical justification, such as the freedom of contract and the doctrine of *caveat emptor* have so far been relied upon by suppliers at the detriment of consumers. With the rise of consumer protection awareness, however, the tilting of balances in favour of consumers has continued to be on the increase in many jurisdictions the world over.

As a matter of fact, some countries are currently changing their legal rules to more effectively address the oppressive or abusive behaviour of unscrupulous suppliers against innocent and unsuspecting consumers. In particular, the reform agenda is geared at eliminating the so-called "fear factor", which reportedly inhibits consumers from lodging claims against their stronger counterparts (the suppliers). Legal provisions designed to protect consumers from suppliers' misconducts have thus been enacted while reliance on the old doctrines such as freedom of contract or *caveat emptor* have greatly been limited or completely discarded. In Tanzania, consumers have been constantly facing imminent risks whenever they engage with manufacturers or suppliers in the market place, a fact that calls for an immediate attention.<sup>120</sup> The

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120 See R. W. Tenga, 'Consumer Protection in Tanzania: Challenges and Prospects for the National Consumer Advocacy Council (NCAC).' (Available online at

risks include loss that may arise from suppliers' conduct which tend to be misleading and or deceptive. This being the case, the FCA was enacted to curb this vice and ensure that whoever misleads or deceives a consumer will be held responsible under the law.

The efficacy of this Act in curbing such problems, however, cannot be stated, the reason being that, its provisions dealing with misleading and deceptive conduct have not been tested in our courts. Similarly, the Fair Competition Commission has never dealt with a complaint or issued a decision regarding breach of such provisions. Perhaps, such provisions will be tested in the future, given that, there has been a long standing proposal to amend the Act, so as to give some powers to the Commission to, not only address complaints related to misleading and deceptive conduct, but also impose some form of penalties on the violators of the law.

This article has examined the concept of misleading and deceptive conduct with a view to bringing light to readers, and the general public, the manner in which the law safeguards the consumers' rights not to be misled or deceived when they interact with suppliers in the market place.

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*<http://www.scribd.com/doc/18533591/Tenga-rw-Consumer-Protection-in-Tanzania-Challenges-and-Prospect-for-Ncac-May-2007> (as accessed on 26/12/2017)). Tenga argues that, "[w]hile the suppliers of goods and services vie for the attention of buyers a competitive scenario is generated and left to their own devices suppliers employ every trick possible, positive and negative, to win the buyers' attention."*