



LANDSCAPE FOR CONSUMER RECOURSE IN SOUTH AFRICA'S FINANCIAL SERVICES SECTOR

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Research by ECIAfrica



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GLOSSARY

ADR	Alternative dispute resolution
ASIC	Australian Securities and Investment Commission
CAFCOM	Consumer Affairs Committee
CBA	Credit Bureau Association
CCRD	Consumer and Corporate Regulation Division (of the dti)
CEO	Chief Executive Officer
CIO	Credit Information Ombud
DfID	The UK government's Department for International Development
dti	Department of Trade and Industry
FAIS	Financial Advisory and Intermediary Services
FSB	Financial Services Board
FSOS	Financial Services Ombud Schemes
FSA	Financial Services Authority
FTA	Furniture Traders' Association
ISO	International Standards Organisation
LOA	Life Officers' Association
MD	Managing Director
MFRC	Micro Finance Regulatory Council
MFSA	Micro Finance South Africa
NCA	National Credit Act
NCR	National Credit Regulator
NGO	Non-governmental Organisation
OBS	Ombud for Banking Services
OCP	Office of Consumer Protection
OECD	Organisation for Economic Co-operation and Development
OLTI	Ombud for Long-term Insurance
OSTI	Ombud for Short-term Insurance
PFA	Pension Funds Adjudicator
SAIA	South African Insurance Association
SARB	South African Reserve Bank

ABOUT THIS PUBLICATION

Consumer protection and education are important in all financial service markets, but particularly in South Africa, where the policy, legal and regulatory environments are being changed in an effort to improve access to financial services.

As access to financial services increases, less literate, more vulnerable consumers are likely to enter the market and will need adequate protection. Consumers need to know where to get advice, where to complain, and on what basis they can complain. This is not only important for the functioning of the market, but necessary to develop the trust in the financial sector to draw more people in. Knowing that they can get help when someone has cheated them, or if they feel aggrieved, is part of establishing trust among consumers.

The objective of this study is to investigate the landscape for recourse in South Africa's financial services sector, to examine the effectiveness of consumer recourse mechanisms for poorer consumers, and make recommendations for structural changes that would likely lead to financial service markets working better for lower-income consumers.

The assignment included an understanding of the mechanisms for consumer recourse and their appropriateness, and the possible influence of changes in the landscape as a result of the National Credit Act, 2005, the Financial Services Ombud Schemes Act, 2004 and the Consumer Protection Bill. It also included four desk-based international case studies, qualitative research on consumers accessing recourse, and extensive interviews with a range of relevant parties.

This report is an abridged version of a longer study conducted by ECIAfrica for FinMark Trust. The full report is available on the FinMark Trust website, www.finmarktrust.org.za.

INTRODUCTION

Consumer rights are protected by regulating behaviour in the market to ensure these rights are not infringed, and by providing avenues for the resolution of problems when this regulatory process fails. There are two broad mechanisms: those that aim to affect behaviour and have a **regulatory purpose**; and those that provide **redress to consumers** for harm suffered, a compensatory purpose. This classification is important as it provides insight into the role of the different stakeholders in the consumer recourse landscape of South Africa's financial services sector.

CONSUMER RIGHTS

Consumers need to be aware of their rights, or at least have enough understanding to question something that seems unreasonable or unfair. Awareness of consumer rights in the financial services sector is a function of financial literacy.

In December 2003, the Department of Trade and Industry (the dti) commissioned Markinor to conduct a survey among South African consumers¹ to determine the extent to which they were aware of their rights; their experiences with unfair business practices; awareness about consumer rights organisations and experiences in trying to access redress; the general attitude to consumer rights issues; and the requirements for a consumer rights system. The survey included a representative sample across different demographic groups and geographical regions. According to this survey, the level of awareness of consumer rights is low, with 55% of respondents unable to think of, or mention, any consumer right without being prompted, and with some confusion and misconceptions among those who were able to mention something. Consumers were also unable to clearly provide instances of when their rights had been violated. Box 1 details the eight generally accepted consumer rights, as outlined in the United Nations Guidelines for Consumer Protection².

BOX 1: EIGHT BASIC CONSUMER RIGHTS

Right to satisfaction of basic needs: All consumers have the right to basic goods and services such as adequate food, drinking water, shelter, clothing, health care and education.

Right to safety: Consumers have the right to protect themselves against unsafe goods and services. Unsafe goods can lead to the destruction of property, injury and even death.

Right to be informed: Consumers are entitled to complete information on price, quantity and ingredients from providers of goods and services.

Right to choose: Consumers have the right to choose from a variety of quality goods and services sold at competitive prices.

Right to be heard: Consumers have the right to be heard on issues, policies, plans, programmes and decisions which concern them.

Right to redress: Consumers have the right to redress for their grievances about substandard, unsafe or unduly expensive goods and services, unfair claims and other unfair consumer practices.

Right to consumer education: Consumers have the right to education that will empower them to make informed and confident choices of goods and services.

Right to a healthy and sustainable environment: Consumers have the right to live and work in an environment which does not threaten their health and life, and which does not pose any danger to present and future generations.

Source: www.capegateway.gov.za

¹ *National Consumer Survey*, Consumer and Corporate Regulation Division, the Department of Trade and Industry, December 2003, www.thedti.co.za.

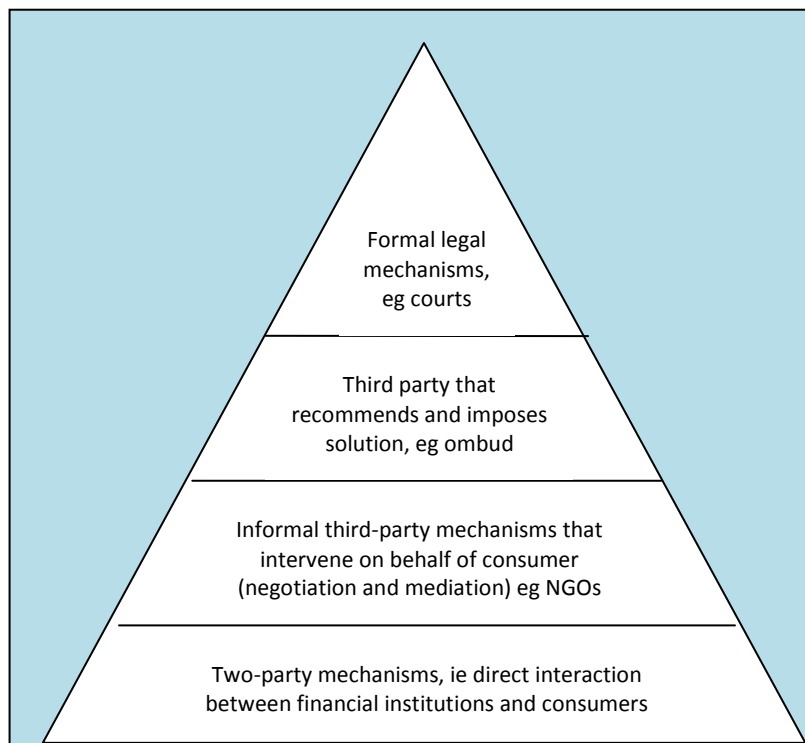
² UN Guidelines for Consumer Protection (as expanded in 1999), Department of Social Affairs, UN, New York, 2003.

A second level of awareness relates to the various channels through which to access recourse; to whether consumers know where to go if they are in some way aggrieved; and whether they are likely to escalate a complaint if they are not satisfied with the result at the first interface.

CONSUMER RECOURSE

Recourse channels

FIGURE 1: PYRAMID OF RECOURSE CHANNELS



Iain Ramsey describes channels of recourse in terms of a pyramid structure (see Figure 1). “At the bottom, where the largest number of disputes are resolved, are the two-party mechanisms in which consumers and businesses communicate directly with each other without the intervention of a third party. Further up the pyramid are third-party informal mechanisms such as negotiation and mediation, where consumers and businesses request the assistance of a neutral party to help them achieve a satisfactory outcome. In South Africa this is provided through consumer advisors, legal aid and non-

governmental organisations (NGOs). Further up again are mechanisms, including ombud schemes, in which a neutral third party assesses the facts and arguments of both sides and recommends or imposes a solution. At the top of the pyramid, where only a fraction of consumer disputes end up, are formal legal mechanisms such as courts and government enforcement authorities.”³

In South Africa, there are several channels for accessing recourse, which converge and overlap across different levels in this pyramid and which cover both regulatory and dispute resolution purposes.

Alternative dispute resolution

Alternative dispute resolution (ADR) refers to a variety of methods for resolving disputes between parties without traditional legal representation or litigation (see Box 2). Instead, ADR involves a third party – a neutral individual – who works with both parties to the dispute to resolve their differences. ADR is conducted in a more businesslike manner and is less adversarial than litigation. Each party tells their side of the story to the third party in a setting that is usually generally less formal than a court proceeding (although arbitration tends to be more formal than negotiation or mediation).

³ OECD Report, 2006 describing the OECD workshop proceedings of April 2005

BOX 2: ALTERNATIVE DISPUTE RESOLUTION: SAVING TIME AND MONEY

ADR can save both parties time and money:

- ADR can start the process of working out disagreements and differences without waiting for the often-overburdened civil courts to hear the case; and
- Unlike court trials, dispute resolution methods can reduce or eliminate the need for costly “discovery” where each party’s counsel tries to gain information held by the other party.

Negotiation is probably the simplest way of resolving a dispute, with conflicting parties talking to each other to find a solution that satisfies them both. There is no third party involved and the solution has to be acceptable to both parties. Negotiation is not particularly effective where there are differences in negotiating power, as is mostly the case in financial services disputes.

Arbitration is a kind of “private trial” and requires both parties to submit the dispute to one or more impartial persons, with the goal of a final, binding decision. The arbitrator(s) may be lawyers or business professionals with expertise in the field. They decide the issues to be resolved, the possible awards, and how the process will proceed. Arbitration can be slightly less formal than a court process, but is still based on the law and the facts of the case. Decisions reached by the arbitrators are usually final and not reviewed further by the courts.

Mediation involves a neutral person helping two or more parties reach a voluntary settlement. The mediator’s role is to advise the parties and offer suggestions on how to resolve the differences. Both parties have an active role and ultimately decide the final outcome of the dispute with the assistance of the mediator. The solution is based on a trade-off or a settlement agreed to by the parties in terms of what they are prepared to accept.

<http://research.lawyers.com/Alternative-Dispute-Resolution.html> and Kleyn and Viljoen

CONTEXT FOR CONSUMER RECOURSE IN SOUTH AFRICA

Consumer recourse needs to be analysed within the context of the South African financial market and in the context of a lack of consumer awareness and consumer activism.

Financial literacy and awareness

The Financial Sector Charter aims to drive transformation in the supply of financial services to a broader market. While access to financial services is growing, consumer education has not kept pace. In the context of consumer recourse, there are many vulnerable consumers who may not be aware of their rights or aware of the various consumer recourse channels.

According to research by ECIAfrica in 2004⁴, consumer education initiatives tend to be uncoordinated, leading to gaps in some areas and lack of efficiencies in others. Financial literacy is directly related to consumers’ awareness of their rights and responsibilities and the channels for raising disputes. It is widely recognised that levels of awareness of recourse channels in the financial services sector are low. According to FinScope™ South Africa 2006⁵ data, 89% of the population had either not heard of the term “ombud” or did not understand what an ombud was. Levels of awareness vary, depending on the product target market. Levels are low among people who use Mzansi accounts, stokvels, burial societies, savings books and ATM cards, but are higher among higher-end users of products such as car, household and disability insurance and cheque accounts.

⁴ FinMark Trust, *Financial Literacy Scoping Study*, ECIAfrica Consulting, 2004

⁵ FinScope™ is a national representative survey into the use of, and access to, financial services. <http://www.finscope.co.za>.

Legal and regulatory environment

The legal and regulatory environment of consumer recourse in the financial services is in the process of changing. The two main influences for consumer protection legislation are the **National Credit Act, 2005 (NCA)** and the **Consumer Protection Bill**.

The NCA's objective is to improve access to credit by ensuring proper and reliable credit information; addressing regulatory distortion and arbitrage; eliminating costs in the judicial system associated with enforcement of reckless credit; reducing the number of reckless and irrecoverable loans; and ensuring more sustainable lending over time. However, it is ultimately legislation aimed at strengthening the position of the borrower, not the lender. As such, it also provides mechanisms aimed at consumer redress.

Of particular significance are measures aimed at reducing over-indebtedness and reckless lending. These include rights and processes aimed at rendering reckless loans (loans granted with disregard to a consumer's ability to pay and his/her appreciation of the risks and obligations) irrecoverable, as well as rights and processes to have loans restructured in the case of over-indebtedness. The institutions used for this are Magistrates' Courts and debt counsellors. In many countries debt counsellors form part of civil society (eg NGOs), however, the NCA deals with debt counsellors as a regulated office with a statutory function in South Africa.

The intention of the NCA is for consumers to be able to approach debt counsellors for formal debt counselling. The debt counsellor will be able to make recommendations to the court on declarations of reckless lending and restructuring orders (or combinations thereof).

The procedures for achieving these objectives in Magistrates' Courts are to be introduced in further legislation, regulations or rules. Legislation clarifying the use of payment distribution agents (for administering payments to creditors) and an appropriate fee structure for debt counselling services are awaited. Debt counselling is not intended to replace debt administration under the provisions of the Magistrates' Courts Act at this stage.

Debt administration is capped in respect of jurisdictional amount, while debt counselling is not. Debt counselling is aimed primarily at the restructuring of credit agreements specifically rather than focusing on all of the obligations of an indebted consumer. Debt administration, as a legislated function, falls under the Department of Justice, not the dti. It seems essential that, over time, debt counselling and debt administration functions should become a single function, since both mechanisms are solutions for people who cannot pay debt.

The NCA also provides for the **National Consumer Tribunal** as an adjudicative vehicle after consumers and credit providers have failed to resolve their disputes. The Tribunal is intended to become the Tribunal for all other non-credit complaints under the Consumer Protection Bill.

The NCA lays down that the consumer and credit provider, before either may apply to the Tribunal, must attempt to resolve that matter between themselves. If this fails, the matter must first be referred to the relevant ombud, or if the credit provider is not a financial institution to a consumer court or an alternative dispute resolution agent. Matters heard in the Tribunal can be taken on appeal and review to the High Court.

The NCA aims to “decriminalise” credit provider conduct through hearing matters in the Tribunal instead of judicial courts. There are a few offences in the Act but non-compliance constitutes prohibited conduct. Where prohibited conduct occurs, the regulator can apply to the Tribunal for an appropriate sanction, which may include having the credit provider deregistered. Normal debt enforcement (getting an order to pay debt and warrants to execute against assets) remains with the courts. Other issues relating to the enforcement of consumer rights will be heard in the Tribunal.

The second big change is the **Consumer Protection Bill**, currently in its third draft. The bill aims to:

- Promote a fair, accessible and sustainable marketplace for consumer products and services;
- Promote responsible consumer behaviour;
- Promote a consistent enforcement framework for consumer transactions and agreements;
- Prohibit certain unfair marketing and business practices;
- Provide for improved standards of consumer information;
- Provide for harmonisation of laws relating to consumer transactions and agreements; and
- Provide for the establishment of the National Consumer Commission.

It is hoped that the Bill will advance consumer protection through providing the dti with a stronger legal framework to enforce consumer protection. The Bill also aims at greater co-ordination between initiatives through the Consumer Commission as a channel for referrals to recourse mechanisms. For this co-ordination effort to succeed, sustained awareness raising and co-ordination at a high level between the dti and other mechanisms such as the ombuds is needed. Until the Bill is passed and introduced into Parliament, the Consumer Affairs (Harmful Practices) Act, 1988 governs this space.

INTERNATIONAL EXPERIENCE

INTERNATIONAL ORGANISATIONS

Globally, much has been done to introduce suitable recourse mechanisms. The UN's Guidelines for Consumer Protection encourage governments to "establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers." The guidelines also promote the dissemination of information and education to enable consumers to make informed choices.

The International Standards Organisation (ISO) is also developing standards for internal and external complaints handling (see Box 3). These build off existing best practice⁶ and focus on the principles of:

- Transparency;
- Ease of access;
- Affordable/free services;
- Speed;
- Effectiveness;
- Fairness/equity;
- Sufficient resourcing in terms of money and skills; and
- Independence/impartiality (in the case of third parties).

BOX 3: DRAFT STANDARDS FOR EXTERNAL DISPUTE RESOLUTION

ISO is developing standards for external dispute resolution mechanisms that promote: **Consent to participate**: participation of complainants in the dispute resolution offered by an organisation should be voluntary, based on full knowledge and understanding of the process and possible outcomes. **Accessibility**: a dispute resolution should be easy to find and use. **Suitability**: the type of dispute resolution method and the potential remedies should suit the nature of the dispute. **Fairness**: engage in the dispute resolution with the intent of fairly and honestly resolving the dispute. **Competence**: organisation personnel, providers and dispute resolvers should have the personal attributes, skills, training and experience necessary to discharge their responsibilities in a satisfactory manner. **Timeliness**: dispute resolution should be delivered as expeditiously as feasible given the nature of the dispute and the process used. **Confidentiality**: personally identifiable information and trade secrets should be confidential and protected; unless disclosure is required by law or consent for disclosure is obtained from the person/party concerned. **Transparency**: sufficient information about the dispute resolution process, the provider and its performance should be disclosed to complainants, organisations and the public. **Legality**: dispute resolution should be operated in accordance with applicable law and the agreement of the parties. **Capacity**: sufficient resources should be committed to dispute resolution, and managed effectively. **Continual improvement**: increased effectiveness and efficiency of the dispute resolution process should be a permanent objective.

In addition, the Organisation for Economic Co-operation and Development (OECD), has established a Committee on Consumer Policy that has been investigating and influencing consumer policy and mechanisms in OECD countries for years. This culminated in an international workshop on Consumer Dispute Resolution and Redress in the Global Marketplace in April 2005.

⁶ Consumer Dispute Resolution and Redress in the Global Marketplace, OECD, 2006.

LESSONS FROM CASE STUDIES

Case studies of consumer protection mechanisms were also conducted for Canada, Australia, United Kingdom and Malaysia⁷. Through these it is apparent that **awareness** of a consumer's right to redress, **access** to complaints mechanisms (both external and internal), and **efficiency** in the complaints processes were essential for alternative dispute resolution systems to operate to the best advantage of consumers. In these countries regulations, consumer organisations, informal consumer protection and dispute resolution mechanisms are in place to safeguard consumer interests.

Canada, the United Kingdom, Malaysia and Australia have set up the **Consumer Gateway**, **Consumer Direct**, **The Link** and **Consumer Online** respectively – online consumer reference and referral centres. They provide consumers with easy access to information and education to make them more aware of their rights. These websites and info-centres help consumers find resources and assistance on a wide range of consumer issues and provide background information about products and services, hints on what to look out for when transacting, and who to call when something goes wrong. The centres also tell consumers how to complain if they want to resolve a dispute with a service provider, with online complaints forms and contact details of various ADR mechanisms.

It is important to note that these centres are not involved directly in dispute resolution or enforcement but ensure that the consumer is well informed and pointed in the right direction. However, a single entry point improves access and the effectiveness because it:

- Eliminates confusion (South African consumers do not know who to call for what problem);
- Simplifies and standardises processes; and
- Introduces co-ordination and accountability on the part of the schemes.

Apart from resources being made available to consumers, the UK, Canada and Australia have co-ordinated education strategies that form an important part of consumer protection. Their general approach to consumer education includes:

- The areas where consumers are most at risk of financial detriment through lack of knowledge;
- Provision of information and advice to help consumers to consider the financial requirements and make informed choices;
- Education of consumers on financial fraud and misleading conduct, and how to avoid it;
- Education of consumers about their rights, including their options for resolving complaints; and
- Improvement of financial literacy and numeracy.

An important lesson that can be drawn from the Australian case study is the successful integration of consumer education into consumer protection, through the efforts of the Australian Securities and Investment Commission (ASIC). ASIC published a paper called *Consumer Education Strategy for 2001-4*, which identified dispute resolution and consumer rights as important for informed participation in the financial system.

International case studies show that it is the umbrella schemes and bodies such as ASIC and the Financial Services Authority (FSA) in the UK as well as ombud schemes that are the custodians of consumer education. They embark on active, sustained consumer awareness and education

⁷ The full version of these case studies are in the main report available on the FinMark Trust website at www.finmark.co.za.

campaigns to make themselves more visible. These campaigns focus on information dissemination as to what the recourse schemes do, how they operate, where they can be found, who they can help, what complaints they handle and their contact details.

Stemming from the single entry point concept is a referral system through which complaints are channelled appropriately. Internal systems need to be manned by trained, knowledgeable customer-focused staff. A partnership between the schemes is essential for co-ordination and contribution to policy. In the UK and Australia this is also achieved through the FSA and ASIC.

Critical to achieving efficiency is standards or benchmarks for all schemes, such as those in Australia and other OECD countries.

The international case studies suggest that successful dispute resolution is linked to the attitude towards complaints and their resolution. In some countries, complaints are seen as valuable to business and industry and serve as an early warning system to identify deficiencies. There is a feedback loop between the complaints-handling units or bodies and business, leading to continued enhancement of products and services. Furthermore, there is greater confidence in the complaints handling schemes' ability and commitment to resolve complaints. This has closed the gap between the industry players, consumers and complaint-handling bodies. The issue is no longer who has jurisdiction but what needs to be done for the consumer.

Access is key to any satisfactory complaints handling and resolution scheme/process. Access is directly related to awareness; therefore in situations where awareness is low, access will also be low.

Access is possible when procedures are appropriate to consumers' needs. Another barrier to access is physical location. In addition to these information centres most ombud offices in Australia, the UK and Canada have a common toll free number and physical address.

A customer care culture also affects access. Promotion of professional internal dispute resolution mechanisms has been cited by OECD as the preferred first avenue to redress as it is less formal and saves on time. Successful companies recognise that effective complaints handling needs to be woven into the fabric of the firm to sustain success and growth

CONSUMER RECOURSE LANDSCAPE IN SOUTH AFRICA

Financial services include credit, short-term and long-term insurance, savings, transactions services, medical aid schemes, collective investments and remittance transfer services; and the following types of service providers: banks, credit bureaus, retail institutions, insurance firms, microfinance institutions, medical aid schemes and brokers.

The consumer recourse landscape in South Africa's financial services sector is multi-faceted. There are several different channels that can be used to access recourse. These converge and overlap across different levels and cover both regulatory and dispute resolution purposes.

- **Internal dispute resolution mechanisms** within financial institution;
- **Industry associations** that handle consumer complaints because of a lack of an alternative mechanism;
- **Voluntary/recognised ombuds**⁸. Five voluntary ombud schemes have been recognised by the Financial Services Ombud Scheme (FSOS) Council and one application is pending. Four fall within the scope of this study, namely the ombuds for banking, credit information, short term insurance and long term insurance;
- **Statutory ombuds/adjudicators**⁹. There are three statutorily appointed consumer protectors in the financial sector, namely the Pension Funds Adjudicator (PFA), the Registrar of the Council for Medical Schemes (CMS) and the Financial Advisory and Intermediary Services (FAIS) ombud. The FAIS ombud has jurisdiction on matters concerning collective investments;
- **Sector regulators** that handle consumer complaints related to contraventions in law and unlicensed providers;
- **Department of Trade and Industry** (Office of Consumer Protection) and **Provincial Consumer Affairs Offices**;
- **Judicial channels** (eg courts); and
- **Civil society** – NGOs, debt counsellors, private and non-profit lawyers that support, make use of and surround some/all other channels.

While debt counsellors are not strictly a recourse channel, they are important given the high levels of over-indebtedness. In restructuring debt obligations for consumers, debt counsellors are likely to identify cases of reckless lending and other market conduct issues that should be addressed.

Figure 2 (page 14) gives an overview of the stakeholders in the consumer recourse landscape the financial services sector. While these channels do not all primarily focus on recourse, they play a role.

Figure 3 (page 15) shows the options a consumer can choose when faced with a dispute, depending on the product, the provider and the severity of the dispute. Should they deal with an ombud they could do so either directly or through a referral from another party such as an NGO or a regulator. In all instances, the first port of call is the financial institution with which the dispute exists.

⁸ *Voluntary ombud schemes* refer to schemes that have voluntarily developed through an industry initiative and that are registered under the Financial Services Ombud Schemes Act.

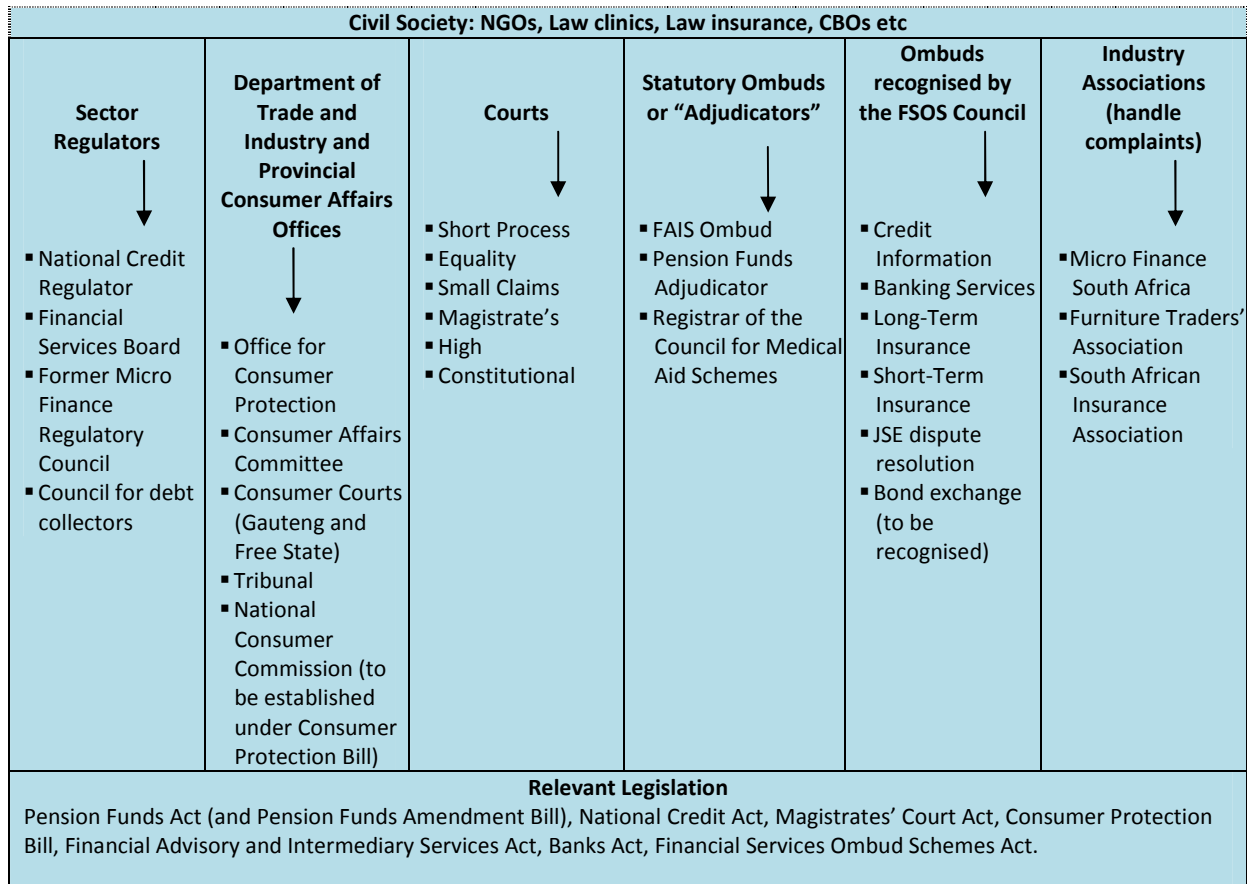
⁹ *Statutory ombuds* refer to those ombuds who derive their powers directly from the provisions of a statute and whose powers are set out in such statute.

FIGURE 2: CONSUMER RECOURSE LANDSCAPE

Aggrieved Consumer



Financial Services Provider



INTERNAL DISPUTE RESOLUTION MECHANISMS

Different institutions were interviewed to determine how consumer complaints were dealt with at the first interface for raising a complaint.

Complaints handling for banking institutions

The consumers' first contact should be with the branch or unit with which they have a complaint. The service provider is best equipped to resolve a complaint as the people involved and the relevant documentation is easily accessible. If the consumer is not satisfied with the response, he or she can then contact the bank's central complaints department. If the consumer is still not satisfied the bank should refer the consumer to the Ombud for Banking Services (OBS) and/or the FAIS ombud, depending on the nature of the complaint.

FIGURE 3: AVENUES FOR CONSUMER RECOURSE IN SOUTH AFRICA’S FINANCIAL SERVICES SECTOR



Aggrieved Consumer



Financial institution or service provider

THEN

- The press (although no formal process or definite outcome)
- An NGO or
- The dti help desk or
- A sector regulator (NCR or FSB or Council for Debt Collectors) or
- Legal proceedings in court

OR one of the mechanisms below:

Banking services including credit	Credit information / history	Short-term insurance	Long-term insurance	Private or bargaining council pension funds	Government pension funds	Advisory or intermediary services eg brokers, administrator	Collective investments	Medical schemes
↓	↓	↓	↓	↓	↓	↓	↓	↓
Banking ombud	Credit information ombud	Ombud for short-term insurance	Ombud for long-term insurance	Pension Funds Adjudicator	Public Protector	FAIS Ombud (FAIS Act)	FAIS Ombud	Registrar of Council for Medical Schemes
(TOR approved by FSOS Council and NCA)	(TOR approved by FSOS Council and NCA)	(TOR approved by FSOS Council)	(TOR approved by FSOS Council)	(Pension Funds Act)			(FAIS and FSOS Acts)	(Medical Schemes Act)

Complaints handling for life assurance firms

The Life Offices Association (LOA) has a code for complaints handling (*LOA Code of Conduct – Code of Good Practice on Complaints Resolution*). The aim of this code is to ensure that LOA members follow a proper process to resolve complaints made by consumers at company level before these are referred externally. Each life assurance firms has its own administrative process for handling complaints. This code sets out basic minimum steps to be followed.

Complaints handling for credit bureaus

In the event of a dispute between a consumer and a credit bureau, which is a member of an association of credit bureaus, about the accuracy of information on file, the credit bureau must request the association to investigate and rule on the matter. In the case of a dispute between a consumer and a credit bureau that is not a member of an association, the Consumer Affairs Committee or any provincial consumer affairs office may be approached for redress. In cases where a complaint is not resolved the credit bureau will refer the client to the credit information ombud.

Credit Bureaus mainly deal with complaints from clients unhappy with their credit reports, and this normally happens after they have been denied credit. Education campaigns under way aim at empowering consumers to make sure the contents of their credit reports are correct and up to date.

INDUSTRY ASSOCIATIONS

Industry associations should not, strictly speaking, form part of the consumer recourse landscape as they lack independence to address complaints. However, in the absence of a non-bank credit ombud, Micro Finance South Africa (MFSa) and the Furniture Traders' Association (FTA) were interviewed.

MFSa recognises the importance of ADR and has engaged with ombuds to expand its mandate to include consumer credit. In the interim, MFSa provides an informal mechanism to address any complaints lodged with its office. Volumes are inconsequential (it handles about three complaints a month), but this has not been a focus of the MFSa's work and it has not promoted or raised awareness on complaints handling. The FTA, on the other hand, expressed the opinion that the industry would prefer to handle complaints internally at an institutional level to minimise costs.

Micro Finance South Africa

MFSa is the association for microlenders in South Africa. Its primary function is to promote the industry, conduct research and development and to provide consumer education. It is a Section 21 company funded through membership contributions. The MFSa membership is representative of about 40% of the microlending industry (includes most small lenders, not the larger ones).

MFSa has a toll-free number for complaints handling. In general, customers are asked to first take up the problem with the microlender. If a more appropriate ADR mechanism exists, the consumer is referred (eg the Credit Information Ombud (CIO) or OBS). If the customer has taken up the matter with the microlender and it has not been resolved, the MFSa will take up the matter with the lender. If the problem is of a recurring nature, the MFSa will refer the complainant to the NCR.

Furniture Traders' Association

The FTA is a membership-based Section 21 company for furniture and appliance manufacturers and retailers. Its primary function is analysing and negotiating on legislation (eg Consumer Protection Bill and NCA). The FTA does also fulfil the role of handling consumer complaints for the industry.

The FTA is funded through membership fees. Membership consists of furniture retailers, but not the smaller niche furniture stores that have emerged in recent years (eg independent Indonesian furniture stores). The "big four" furniture retailers (JD Group, Ellerines, Lewis Group and Shoprite-OK) are part of the association, among others. The annual budget of the FTA is approximately R1-million. It has one office in Randburg. Complainants must take up the complaint with the furniture retailer before the FTA becomes involved. Initial contact with the complainant is made by telephone, hereafter they are required to submit a complaint and supporting documentation by fax.

VOLUNTARY/RECOGNISED OMBUDS AND THE FSOS COUNCIL

The Financial Services Ombud Schemes Council

The FSOS Council was established under the FSOS Act. According to policymakers, the council and other provisions of the FSOS Act were introduced as a compromise to a super-ombud in an attempt to simplify, standardise and co-ordinate the alternative dispute resolution landscape in South Africa.

The council must:

- Consider and grant, or refuse, an application for recognition of voluntary ombud schemes;
- Monitor compliance with this Act by a recognised scheme;
- Promote co-operation and co-ordination of the activities of an ombud of a recognised scheme, the Adjudicator, the Ombud for Financial Services Providers and the statutory Ombud, including informing and educating clients about available resolution forums;
- After consultation with the relevant ombud, develop and promote best practices for complaint resolution by the recognised scheme in question;
- Ensure that the independence and impartiality of an ombud are not affected when the council performs its functions; and
- Perform such other functions as the minister, after consultation with the board, may direct in order to achieve the objects of this Act.

The council may:

- Issue guidelines to inform clients of the jurisdiction of different ombuds and of the procedures for the submission of a complaint; and
- If necessary, require an independent assessment of the compliance with this Act by any recognised scheme, and may recover the cost from the scheme.

The entrenched independence of recognised schemes is likely to hinder the council's co-ordination functions. The council can promote co-operation between ombuds (eg try to promote a single entry point for consumers), but it cannot demand this. The council has some power over voluntary schemes, but it can only make recommendations for changing the operations of statutory ombuds. To change the mandate, procedures or powers of an ombud established by legislation, eg the PFA, that law, eg the Pension Funds Act or regulations hereunder, need to be changed.

The overall impression is that the council has sufficient powers to deal with existing schemes in terms of their current obligations and conditions of registration. However, it is hampered in moving the industry forward and cannot dictate to them, perhaps due to being so new, not having operational capacity, or out of choice. It could move forward through the Minister prescribing regulations or amending legislation to give it greater powers, or by enhancing its operational capacity and developing a stronger vision and strategy for addressing the challenges faced in this landscape.

The FSOS Council has recognised five ombud schemes, four of which are relevant:

- Ombud for Banking Services (OBS);
- Ombud for Short-term insurance (OSTI) ;
- Ombud for Long-term insurance (OLTI); and
- Credit Information Ombud (CIO).

Ombud for banking services

The OBS provides individual and small business¹⁰ bank customers with a fair and effective dispute resolution process, free of charge. It is a Section 21 (non-profit) company, with a board comprising four independent directors not associated with the banking industry, three directors that represent the banks and an independent chairperson. The board is responsible for appointing the ombud.

The OBS is funded through member contributions. Contributions by the largest four banks are based on comparative use of the OBS by the bank customers while the smaller banks contribute R7 000 a year. The total annual budget is in the region of R10-million.

The OBS has one central call centre that addresses complaints nationally, based in Johannesburg. A customer needs first to raise a complaint with the bank concerned. If the complaint is not satisfactorily addressed or the bank has not responded within 20 days, the client can complain to the OBS. Banks are not required to refer dissatisfied clients to the OBS.

In addition, a single share-call number for financial service ombuds has been created. This eliminates confusion about jurisdiction and ensures that complainants are directed to the correct ombud. Unfortunately, not all of the financial services ombuds are participating in the initiative at present.

Ombud for short-term insurance

The OSTI is a voluntary ombud scheme, registered as a Section 21 non-profit company and recognised under the FSOS Act. The ombud provides informal, speedy dispute resolution to policyholders whose claims have been rejected or partly admitted, free of charge. Non-claims complaints related to short-term insurance are not within the jurisdiction of the OSTI. The OSTI's funding structure is based on a fee per complaint handled. Its annual budget is around R10-million.

All complaints are handled through a centralised call centre in Johannesburg. The office also caters for the rare walk-in policyholder who wishes to raise a complaint. Complainants must first lodge a written complaint to the insurer. The form can be faxed, emailed, hand delivered or posted. Most complaints handled by OSTI are from policyholders from the low-income market and often stem from misunderstandings and a lack of financial literacy.

OSTI is the only recognised scheme not participating in the single share-call number initiative.

Ombud for long-term insurance

The OLTI is a recognised ombud scheme in accordance with the FSOS Act. As at December 2006, 45 subscribing members (97% of the industry based on asset value) were participating in the scheme.

OLTI is based in Cape Town and operates using a central call centre. Complaints can also be lodged on-line on the OSTI website. All complaints must be in writing. In addition to handling complaints against subscribing members, the FSOS Act provides for recognised schemes to provide compulsory

¹⁰ Companies, corporations, partnerships and trusts may lodge a complaint if the person making the complaint is authorised to do so and the annual turnover of the business or group of businesses is R5 000 000 or less per year.

feedback to the industry and regulator on systemic issues identified. Box 4 describes the process that the OLTI has put in place in line with this requirement.

BOX 4: FEEDBACK TO THE LIFE OFFICES' INDUSTRY AND FINANCIAL SERVICES BOARD ON SYSTEMIC ISSUES

OLTI has proposed the following process in line with the Australian model for reporting of systemic matters:

- Discuss the problem with the insurer with a view to finding a mutually acceptable solution;
- Resolve current and future complaints in accordance with the proposed solution;
- Secure an undertaking from the insurer that it will resolve all current and future matters, regardless of whether they develop into complaints to the office, in accordance with the proposed solution;
- Report the systemic issue, without naming the insurer concerned, to the Ombud's Committee and the Registrar; and
- If no agreement on the solution can be reached between the office and the insurer concerned or if the agreed solution is not implemented by the insurer concerned, report the matter, naming the insurer concerned, to the Ombud's Committee and to the Registrar.

Source: Annual Report, 2006.

Credit information ombud

The office of the CIO resolves complaints from consumers and businesses (credit receivers) related to credit information provided by financial institutions and other stakeholders (credit grantors) and hosted on credit bureaus. The office also educates the public about the credit information industry.

The CIO is funded through contributions from the users of credit bureaus and credit bureaus. This is based on the level of use of the bureau. Clients that use the credit bureaus the most, pay the most toward the costs of the CIO. The annual budget is between R2 and R3-million. It is an independent body that reports to the CIO Council/Board and not the credit bureau industry. The council is made up of four constituencies, namely consumer bodies, the credit granting industry, credit bureau industry and business representatives.

The offices of the CIO are in Johannesburg and services are provided through a call centre, with limited capacity to handle walk-in consumers. The complaints form is available on the CIO website. All calls are recorded and therefore the call centre agent can capture the complaint over the phone; however, supporting documentation needs to be posted, dropped off, faxed or emailed.

Under the NCA, credit applicants whose loan applications are rejected based on information hosted on a credit bureau will have to receive contact details of the credit bureau and the CIO from the credit grantor. This is likely to raise awareness and increase volumes of calls to the CIO.

STATUTORY OMBUDS/ADJUDICATORS

Pension Funds Adjudicator

The PFA is a statutory body, created through a requirement in the Pension Funds Act, 1956 to handle consumer complaints related to pension funds. The minister of finance, after consultation with the policy board, is responsible for appointing someone to the office of Adjudicator.

The PFA handles complaints related to pension funds as stipulated in the Act. This excludes parastatal and state pension funds and funds established through industry bargaining councils. If a government employee has a complaint about a state fund they must send it to the Public Protector.

The PFA's Johannesburg office handles complaints from Gauteng, Limpopo, North West and Mpumalanga and its Cape Town office handles the other five provinces. Complaints must be in writing in a prescribed format. A complaint can be submitted in any of the 11 official languages. If outside of the PFA jurisdiction, consumers are referred to alternate channels. More than 40% of claims submitted are referred or returned to consumers for reformulation.

The operations of the PFA are funded from levies paid by all members of registered pension funds. The PFA budget has increased from R16 million to R18 million between 2005 and 2006. At present there is a severe backlog of cases in the PFA office and long turnaround times for case resolution.

Financial Advisory and Intermediary Services Ombud

The FAIS Ombud office was launched in September 2004 to consider complaints by clients against financial service providers in terms of the FAIS Act. The FSOS Act, 2004 extended the jurisdiction of the FAIS ombud through enabling the ombud's office to handle cases against financial institutions (as defined in the Act) where no other ombud has jurisdiction, and to take a decision where uncertainty over jurisdiction exists.

The FAIS ombud is based in Pretoria and handles complaints on-line and through a call centre. Complaints should be lodged with the financial service provider prior to lodging a complaint with the ombud. If the response is unsatisfactory, complaints can be lodged with the ombud.

The FAIS Ombud Office is funded through levies from the industry channelled through the FSB. The annual budget for the FAIS ombud over the past two years has been in the region of R9-million.

Council for Medical Schemes

The CMS is a statutory body established under the Medical Schemes Act, 1988. The CMS regulates the entire medical schemes industry in South Africa, including registration of medical schemes and regulating the schemes that are registered.

The CMS is also tasked with complaints adjudication. It is funded through National Treasury and levies from the industry. Its offices are based in Pretoria. Complaints must be in writing. Complainants can get help by phone through a call centre or a personal consultation.

SECTOR REGULATORS

There are four primary sector regulators, namely the:

- National Credit Regulator (NCR);
- Financial Services Board (FSB);
- South African Reserve Bank (SARB); and
- Council for Debt Collectors.

These sector regulators primarily play a regulatory role, ensuring that financial services providers are licensed and that they abide by the legislation and regulations for the industry. Through regulators competently fulfilling this role, consumers are protected against abuse, malpractices and unnecessary risks from financial service providers. At the same time ombuds should play a dispute

resolution role that enables consumers to access recourse and redress. In other words, sector regulators and ombuds should play complementary roles in protecting consumers.

In general, sector regulators deal with complaints related to contraventions of the law and not issues such as customer service. For example, if a financial service provider is not registered, the sector regulator would deal with the complaint since it is the regulator's role to license/register financial institutions.

Both the FSB and the NCR rely on ADR mechanisms to address complaints where possible, through referring consumers to relevant ombuds when it makes sense to do so. Only if no referral is possible and it falls within its mandate, would a sector regulator address a complaint.

The NCR also has an **Investigations Department** and a **Complaints-Handling Department**, which are similar to the former Micro Finance Regulatory Council (MFRC) structures.

The National Consumer Tribunal will be based in Pretoria. However, cases can be heard by a single member of the Tribunal who is able to travel. Therefore, theoretically cases can be heard in any part of the country. It is expected that the Tribunal will be used to set precedents on aspects where there is uncertainty in the legislation or where different parties may wish to push the frontiers of consumer protection or protect the bastions of acceptable procedures and ways of doing business. It is likely to become a precedent-setting institution rather than a high-volume/high-turnover claims resolution mechanism. One of the challenges will be to demonstrate independence and avoid being seen as simply an ally of consumers or of the NCR.

DEPARTMENT OF TRADE AND INDUSTRY AND PROVINCIAL CONSUMER AFFAIRS OFFICES

The dti is the primary government ministry with a consumer protection mandate. The Consumer Affairs (Harmful Practices) Act, 1988 provides the legal framework for this function. However, this will change with the Consumer Protection Bill enactment, which will repeal the existing Act.

The dti has been instrumental in changing the legislative environment for consumer protection in the past few years. This process took place through the Consumer Law Review Project, leading to the NCA and the development of the Consumer Protection Bill. These legislative changes are positive for consumer protection and for the consumer recourse landscape.

The dti operates under concurrent jurisdiction, providing provinces with autonomy to decide on strategic priorities for the province. Therefore, one province may regard consumer protection as a higher priority than another, and would dedicate more resources to recourse. Provincial efforts require the development of provincial legislation and structures for dealing with recourse, often guided by legislation and structures at national level. These form part of the provincial Departments of Economic Affairs. There are varying standards and levels of activity within the nine provinces.

From interviews and interaction with the dti, it appears that there is a need for a more systematic way to report and share information between the economic affairs offices in the provinces and the national dti office. During this research, it was difficult to determine what was happening nationwide. This means the dti probably faces similar challenges in supporting the provincial offices.

Consumer Courts

Consumer Courts have been established under provincial legislation such as the Consumer Affairs Act (Unfair Business Practices) (Gauteng), 1996. They are administrative courts as opposed to judicial courts defined in the constitution. This research confirmed the existence of Consumer Courts in Gauteng, Free State, Eastern Cape, Mpumalanga and Limpopo.

The Gauteng Consumer Court is an example of an operational consumer court. At present, the caseload is low, making it efficient for consumers who know about it. The powers of these courts are broad in terms of being able to declare a business practice unlawful. A flexible process (mediation) can be followed, but the court can also follow a more formal process. While these courts could fulfil a powerful role in the consumer recourse landscape, many provinces have not prioritised this. Even in provinces that have courts, they are not well known. For consumer courts to be successful they need to be operational throughout the country and embark on an awareness campaign.

JUDICIAL CHANNELS

From a consumer viewpoint, taking a matter to court would be the last resort and in most instances, this route would not be followed. Courts are typically used by service providers to collect on default payments and consumers would sometimes appear as defendants (if they appear at all). These institutions, nevertheless, are an important component of the recourse landscape. The following courts are of interest in this context:

- High Courts;
- Magistrates' Courts;
- Small Claims Courts; and
- Short Process Courts (allowed for in empowering legislation but do not exist in practice).

The High Court divisions have jurisdiction over defined geographical areas in which they are situated. The decisions of the high courts are binding on Magistrate's Courts within their areas of jurisdiction. The High Courts have jurisdiction over all matters in their geographical area, but they usually only hear civil matters involving more than R100 000 and serious criminal cases.

Magistrates Courts are lower courts that deal with most matters. They are divided into regional courts and district courts. There are more than 400 Magistrates Courts in South Africa. They do not have jurisdiction to deal with civil matters dealing with more than R100 000.

Small Claims Courts have jurisdiction to hear any civil matter involving less than R7 000. In June 2004, there were 152 small claims courts throughout the country.

BOX 5: SMALL CLAIMS COURT

Sophia approached the Small Claims Court after a colleague offered to pay her Jet account and disappeared with the money. The police referred her to the Small Claims Court. She was happy with process. "I told them what happened and they wrote down what happened and they said I should ask the police to take me to her and if she hasn't paid me by the 18th I must come back. I am not sure what might happen when I go there (to the lady owing money). There might be something that I didn't expect when I get there and the day is moving and my duties are waiting for me since this is my day off. But I thought I should sacrifice this day off." Sophia felt safer with this assistance because she is an outsider from the Eastern Cape. She said if you have a problem with a person who is originally from the township while you are not, it is easy for them to harm or intimidate you because no-one will protect you.

Short process courts are special courts for speedy and inexpensive litigation in civil cases which may be established under the Short Process Courts and Mediation in Certain Civil Cases Act, 1991. It has the status of a lower court. The presiding officer may on request take any steps to ensure the speedy and cost-effective resolution of a dispute and need not adhere to rules of evidence.

Debt administration

Debt administration falls within the Department of Justice's domain and is provided for in the Magistrates' Courts Act. Debt administration has been a subject of discussion for many years without any real advances in legislation and regulation. Interviews highlighted debt administration as needing attention. Consumers, financial service providers, NGOs and law clinics all said that debt administrators are committing "daylight robbery" and tying consumers to perpetual indebtedness through taking the gross majority of monthly payments in fees and providing only a few cents to credit providers. These abuses are documented¹¹ and have received media coverage. Administrators are known for aggressive marketing, selling services to consumers who are lured by a solution suggesting they do not need to repay their debt, unaware of the costs and the full implications.

BOX 6: DEBT REHABILITATION SAVES LIVES

Maria was in debt crisis (with almost 15 credit accounts). After struggling for several years she went to a lawyer and a debt administrator to help her solve her debt problem. She paid the lawyer R300 for a referral to an administrator, who charged her R500 a month to sort out her debt. She later discovered that the administrators were paying her creditors five or 10 cents a month and pocketing the rest of her money. When Maria went directly to the shops/creditors and asked them whether money had been distributed she found the administrator had sometimes not paid them. "They (administrator) just kept the money." After watching a TV programme, Maria heard about an NGO who helped people in debt trouble. She phoned them and was relieved to hear that they didn't charge for their services. They helped her out of her debt problem. "I could not take it any more; I was on the verge of committing suicide... They came to my rescue. They wanted to help me. They even took me to a psychologist... and they supported me. The support that they gave me was good". Maria goes on to describe how she goes to the NGO each month in order to budget her salary and manage her debt repayments. She says that there are many people struggling as she did. She advises her friends with debt problems not to go to administrators but rather to the NGO.

CIVIL SOCIETY

Community Based Organisations (CBOs) and NGOs, including University law clinics (Rhodes University, University of the Witwatersrand and the University of South Africa have law clinics) play an important role in the consumer recourse landscape for poorer consumers.

Civil society organisations have a passion and commitment to consumer recourse and redress. They provide assistance and counselling to individuals with a variety of problems, including over-indebtedness, eviction from homes because of home loan default, inability to access insurance claims, wrongful credit listings on credit bureaus and debt administration. These institutions fulfil a strong advisory function to members of the community through understanding the case, weighing up the options and suggesting a way forward. However, there are areas for improvement.

¹¹ M Budow, *The Rise of the Debt Shark Industry*, Micro Enterprise Alliance, 1999.

ASSESSMENT OF THE CONSUMER LANDSCAPE

There are many worthy efforts from a variety of stakeholders to foster and promote a safe environment for consumers. However, many of these are being implemented in isolation of one another without benefiting from co-ordination.

ALTERNATIVE DISPUTE RESOLUTIONS SCHEMES

All the ombuds interviewed explained that some awareness-raising efforts were under way, including publicity through the media, roadshows and talks at conferences. Ombuds found themselves constrained by the lack of funds for awareness raising, therefore most said they relied on the media. There is consensus that the landscape is confusing and awareness is low. Interviews also showed that incorrect referrals are made between ombuds and that there are grey areas in jurisdiction between the ombuds. Figure 7 highlights some of the issues faced by poorer consumers when accessing appropriate dispute resolution mechanisms.

FIGURE 7: ASSESSMENT OF OMBUDS' RELEVANCE FOR POORER CUSTOMERS

Rating variable	Rating	Comment
Accessibility <ul style="list-style-type: none"> Awareness of rights and responsibilities, and awareness about where to go for recourse Modes of access 	Poor	Levels of awareness are low, but have improved slightly over the past year. There is a great need for improved awareness raising. This could be made easier through greater co-ordination between the ombuds. Ombuds also need to provide assistance in documenting or recording complaints to enable easier access by illiterate and semi-literate consumers. Perhaps financial institutions should provide fax or email facilities to clients who need to send documentation to the ombud. The use of postal services should be used in the same breath as "fax, email and on-line" submission.
Appropriateness <ul style="list-style-type: none"> Language Cost to consumer 	Good	In general, the ombud offices catered for most languages spoken in South Africa. Services were free aside from indirect costs associated with calling from cellphones, faxes and travel, which could reduce access .for poorer people.
Efficiency <ul style="list-style-type: none"> Turnaround times Cost efficiency 	Fair	Turnaround varied between ombuds due to the varying complexity of the cases. In general turnaround times and the costs of resolving a case compared favourably to the international case studies.

Low levels of use

Ombuds in South Africa are not well used by most people accessing financial services. This use should be far higher, given the high number of less educated, more vulnerable consumers who have entered and will continue to enter the financial market and who will require protection and recourse.

South Africa is an example of an economy, and therefore a financial services sector, characterised by dichotomy. While parts of the sector function in the First World, others function in the Third World, referred to as the "first and second economy". The consumer recourse landscape is no different. Ombuds typically cater to the sophisticated financial services user who has the required means to access the ombud services (fax, email, landline), who has the ability to find out about the ombud when aggrieved, and who has sufficient knowledge to ensure tenacity in the case of wrongdoing.

Lack of awareness

Part of the challenge in raising awareness about ombuds is that they rely on financial service providers and the media. There is no requirement for providers to inform consumers about ombuds aside from some provisions in codes of conduct, which may or may not be adhered to.

All seven ombuds are competing for space in the media and in branch outlets, rather than sending out a common message about one single entry point for consumer recourse in the financial services sector. There are, however, positive developments in an effort to co-ordinate and simplify this channel. Financial service ombuds have recently launched a joint share-call initiative that will assist in routing to the relevant ombud. Unfortunately one recognised scheme, and all the statutory schemes, are not participating in this at present. It is hoped that they will come on board.

Barriers to access

All ombuds require a complaint in writing in a specific format with supporting documentation. While the need for evidence is understood, it is not appropriate for many illiterate and semi-illiterate people and this could deter them. Some offices assist consumers to write up complaints over the phone, others refer consumers to legal aid for assistance and others do not make suggestions for resolving this problem. Once written, these documents need to be sent to the ombud's office via fax, email, or sometimes by post. This limits the accessibility of ombud services. According to FinScope™ 2006, only 37% of the adult population have access to a landline; 53% of the adult population have access to a cellphone, but this would not allow a free call to an ombud office. Only a small portion of the population has easy access to internet, email or a fax. Financial resources required for travel to offices that offer recourse are also an issue for consumers.

The research highlighted the importance of feedback from the dispute resolution mechanism on the progress related to the case. Consumers who did not receive feedback started to lose faith.

Overlapping and unclear jurisdiction

There are two problems relating to the jurisdiction of ombuds. The first is that jurisdiction cannot be

BOX 8: CONFUSION IN THE LANDSCAPE

Albert asks to cancel his policies at an insurer. The insurer replies that it cannot cancel the policies and states the reasons. Albert is not satisfied and lodges a complaint with the Ombud for Long-term Insurance. The Long-term Insurance Ombud refers the matter to the internal adjudicator at the insurer and advises Albert that should he not be satisfied with the results of the enquiry he can refer the matter back to the Long-term Insurance Ombud. At this point, since this matter involved an advisor, the matter should have been referred to the FAIS Ombud, but the LT Ombud referred the matter back to the institution without mentioning the FAIS Ombud. Albert then gets someone to write a letter on his behalf (as he cannot read or write) addressed to the internal adjudicator explaining why he is not satisfied with the insurer's services. The internal adjudicator reviews the complaint and still finds that there is not enough evidence or proof to justify the cancellation of the policies. Albert is still not satisfied and the matter is eventually referred to the FAIS Ombud.

determined with ease, leading to confusion. For whatever reason, jurisdiction also appears to be a sensitive subject among ombuds, who, in some cases, seem to overstep their jurisdictional boundaries. No clear process is followed when jurisdiction is unclear, even though the FAIS ombud is legally empowered to make these decisions.

Consumers could also try various channels to determine where they would receive the most favourable solution. This diminishes efficiency, since several ombuds look into the same case simultaneously.

Jurisdiction should be clearly defined in the terms of reference of each ombud. The FSOS Council could play a role in clarifying this and defining guidelines.

The second challenge relates to the lack of a systematic referral system. At present, all ombuds explained that extensive referrals are made to other ombud offices. In some cases this is done in writing by the referrer to both the consumer and the other ombud. In other cases consumers are told to call another ombud office. The risk is that the consumer gives up and the complaint is never dealt with. It would make sense for the financial services ombuds to have a shared system that logs referrals and monitors the resolution of referred cases. When consumers fall out of the system, they could then be contacted.

Gap in the landscape

There is no independent ADR mechanism or ombud for complaints or problems related to non-bank credit. Non-bank credit can be defined as credit provided by institutions registered with the NCR for the purpose of supplying credit to consumers (excluding licensed banks). This could include pawnbrokers, retail stores, microlenders and even employers who provide staff loans.

A gap in terms of an institutional structure does not necessarily demonstrate a need for an ombud for non-bank credit. However, interviews with the MFSA leadership show that this sub-sector sees this as an important area for development as an industry. Many service providers are too small to have their own consumer help desk and need an affordable, industry solution. There is also an obvious need for consumer redress for clients of retailers, as TV programmes have shown. The NCR is primarily there to enforce the Act and supports the idea of industry-initiated ombuds.

In general, voluntary ombuds emerge in sub-sectors/markets that have matured and recognise the importance of consumer protection and consumer satisfaction and where there are fewer players, since it is easier to bind them into a voluntary scheme. A competitive sector with a larger number of smaller players is less likely to implement an effective voluntary scheme. This may explain why the non-bank credit market has not established an ombud, since the consumer credit market is relatively new and is made up of a few thousand small players. However, MFSA has recognised that this is a need, and has approached the banking and credit information ombuds for talks to address this gap. The retail sector seems less interested in providing for an external dispute resolution mechanism.

Feedback loop to regulators

There is no systematic feedback loop between ombuds and sector regulators on recurring issues. The absence of this information flow means regulators are missing out on valuable information about systemic issues in the industries they regulate. The FSOS Act provides for this to be improved, but so far this has not been enforced and is not taking place.

Satisfaction

A few ombuds have conducted market research (through Markinor) with consumers that they have assisted. From this research, it appears as though consumers that access ADR services are generally satisfied with the assistance they have received.

Efficiency

The idea behind providing ADR through mechanisms such as ombuds is that they are meant to be more accessible, cost efficient and flexible than legal proceedings. Figure 5 shows the approximate costs of the four voluntary ombuds and the average cost per complaint handled. This cost is born by the industry, not by the consumer. This is a rough measure of efficiency given that the complexity of cases varies according to the definition of a “complaint” used by the ombud and the nature of the industry. However, it provides a benchmark against which to compare the cost of legal proceedings.

FIGURE 5: VOLUNTARY OMBUDS COST EFFICIENCY

Ombud/ Adjudicator	Annual budget (2005/2006)	Staff	Calls/ enquiries (2005/2006)	Complaints/ cases (2005/2006)	Cost per case ¹²
Banking	R10-m	24 staff	13 536	4 493	R2 225
Credit information	R2.6-m	8 staff (inc 4 admin)	21 931	1 473	R1 765
Long-term insurance	R8.2-m	28 (14 case handlers and 14 admin)	9 234	5 001	R1 640
Short-term insurance	R10-m	22 staff (inc 13 admin staff)	Not available	7 187	R1 391

The nature of voluntary and statutory ombuds differs considerably given the statutory ombuds’ more adversarial approach to cases, the need to publish all cases and less flexibility in terms of procedures and bringing about changes in operations. As a result, the cost efficiency also differs (see Figure 6).

FIGURE 6: STATUTORY OMBUDS COST EFFICIENCY

Ombud/ Adjudicator	Annual budget 2005/2006	Staff 2005/2006	Calls/ enquiries 2005/2006	Complaints/ cases 2005/2006	Cost per case 2005/2006
FAIS Ombud	R9-10-million	1 ombud 2 assistants ombuds, 8 case managers and 6 admin staff	3 806	666	R14 061.69
Pension Funds Adjudicator	12-13 million	15 legal and 12 admin	36 066	4 901	R2 659.13

Internationally, productivity is measured according to cases resolved per day per case manager. This measure should perhaps be introduced by the FSOS Council across recognised ombud schemes. However, this measure does not encourage the provision of an accurate referral to another ombud, since it only focuses on case resolution and not on making sure that people access recourse. Performance measurement should be designed to ensure that the right objectives are achieved.

REGULATORY AND JUDICIAL CHANNELS

Unlicensed and non-member institutions

In some financial services sub-sectors, such as long-term insurance, a significant number of consumers are accessing informal services. For example, almost 57% of formal funeral policies are

¹² Basic calculation: annual budget/complaints lodged. The lower end of the budget used if a budget range was provided, since this range often reflects the expected annual increase in the coming year.

bought from or through funeral parlours. Anecdotal evidence and estimates in a FinMark study on the funeral insurance market¹³ suggest that many these could be partly or fully self-insuring. Even if the funeral parlour is not self-insuring, it may not yet be registered under FAIS as an intermediary and therefore also falls outside the net from an intermediation point of view. Therefore, a large proportion of the market is excluded from the services of the long-term insurance or FAIS ombuds.

Other unregulated financial service users (informal credit such as mashonisas, informal remittance transfers and stokvels) are also not protected by formal consumer recourse mechanisms. This needs to be resolved through developing suitable legislation and regulations that foster the growth of less formal financial products and services but that protect consumers from abuse or unsafe practices. There is also an onus on the sector regulators to ensure the licensing of financial institutions.

Access to courts

Lack of funds and capacity make it practically impossible for consumers to approach Magistrates', High and Constitutional Courts. The cases where, through the intervention of entities such as the Legal Resources Centre, legal aid, or pro bono work (which is likely to increase in the context of the Legal Services Charter), consumers receiving redress in these courts are the exception rather than the rule. However, through constitutional court litigation and precedent-setting cases in the High Courts, consumer protection can be moved forward speedily.

The costs (see Figure 4) alone demonstrate the importance of affordable and accessible alternatives for most current and future financial service users in South Africa. Banks, microlenders and financial services providers virtually never appear as defendants in civil courts.

FIGURE 4: ACCESSIBILITY OF COURTS TO CONSUMERS

Court	Description/ relevance to consumer landscape	Representation	Estimated costs for simple application	Limitations
High Court	Precedent-setting. Costs prohibitive to consumers. If consumers appear, typically as defendant. Some cases cannot be heard in Magistrates' Court and are heard in High Court.	Can use an attorney, but the practice is to use advocates to appear and settle process documents. If case is successful, can recover costs at the rates prescribed under the rules for each court, but in reality that is probably one-third of costs.	Easily R50 000 Advocate R1 000 per hour or more depending on experience, in addition to attorney's fees.	Cost and intimidating procedure.
Magistrates' Court	Costs prohibitive for consumers. If consumers appear, typically as defendant.	Not required but too arduous for most people to do without a lawyer. Typically use attorneys, not advocates.	R10 000 – R20 000 depending on the case. Attorney: min R400-R1 000 an hour.	Cost, time and intimidating procedure. Can take 2.5 years to get a court date.
Small Claims Court	Accessible to consumers and used by consumers.	No legal representation allowed.	Free except for sheriff costs.	R7 000 limit; non-monetary issues not heard; limited capacity.

The Small Claims Court is the only court at present substantially being used to access recourse and redress. However, the limitation of claims to R7 000 restricts consumers from pursuing, for instance,

¹³ Genesis Analytics, *A regulatory review of formal and informal funeral insurance markets in South Africa*, prepared for Finmark Trust, 2005

insurance claims. The inability to claim specific performance also restricts consumers from enforcing non-monetary claims against financial service providers. Small Claims Courts will continue to play an important role, particularly as the Department of Justice expands to more rural areas. However, due to limited jurisdiction and mandate, it will not have a huge bearing on the financial services sector.

No regulations and regulator for debt administrators

Debt administrators were often seen as problems and as being unscrupulous. An administrator need not have any specific qualifications and debt administrators are not regulated as an industry. There are many abuses associated with administrators (overcharging, lack of proper accounting and record keeping and failure to pay over funds). The Act requires the keeping of distribution accounts, and while there are rules governing this under the Act, there is no effective enforcement or regulatory oversight. It is an industry in serious need of regulation.

The NCA provides for debt counselling, which may reduce the number of people that go under administration. However, debt administration will continue and thousands of lives will continue to be affected by existing debt administration arrangements. There are also serious challenges facing debt counselling, such as training and ensuring counsellors are available in all magisterial districts.

Collective action lawsuits

There is limited use of collective action lawsuits due to no procedures and lack of capacity in the courts.

CIVIL SOCIETY

Civil society organisations play an important role in the South African recourse landscape, but they are also constrained by a number of factors, including:

Capacity constraints: Members of every institution interviewed explained that the work they were doing was constrained by a lack of skilled staff, the amount of office space or offices they were able to operate out of and the number of cases they can take to court. In addition, these institutions are often at the mercy of funders and therefore face challenges in developing a long-term vision or plan.

Need for systems: Case statistics are not systemically collected. This limits the ability to understand the scale of these operations and share the results with policymakers, regulators and other NGOs.

Lack of professionalism: Due to the civil rights background of many of these organisations, a strong consumer activism flavours communication with other industry players. While this is understood, it leads to defensiveness among other stakeholders and in the end leads to NGOs not being taken seriously. A more business-like approach could lead to greater benefits for consumers.

Lack of co-ordination: Several organisations work in this area, and they do not co-ordinate their efforts. As one body, they would have an impressive footprint, but as individual entities, they lack credibility and scale. An NGO network would be powerful if well run and if there was enough buy-in.

Necessity for standardisation and accreditation: NGOs should develop standards for handling specific problems and a system for accreditation. This would lead to a more formalised civil society.

General lack of credibility of most NGOs within the industry: Interviews uncovered scepticism about the ability of NGOs to have an impact in the recourse landscape. This could be because of the lack of a systematic approach, the style of communication, the local nature of most NGOs and the lack of co-ordination. This credibility will develop only once the other challenges are addressed.

RECOMMENDATIONS

There is a great need to simplify the consumer recourse landscape, especially for low-income consumers. Options for simplifying the landscape include:

- Maintaining the current structure with existing challenges;
- Replicating the Australian model of greater co-ordination – made difficult in South Africa by the existence of both voluntary and statutory ombuds;
- Enhancing the role of the FSOS Council to bring about desired changes;
- Creating a statutory super-ombudsman for financial services; or
- Creating a single Conduct Regulator for financial services and including dispute resolution in the mandate.

Ultimately the decision rests with policymakers and with the industry. However, based on consultations with the industry, the most pragmatic solution is to enhance the role of the FSOS Council. This will allow the continued operations of the existing structures, but with a far more powerful and stricter role played by the FSOS Council.

The success indicators include not only greater co-ordination among voluntary/recognised schemes, but also between statutory and voluntary schemes, and increased awareness about ombuds through the development and implementation of a co-ordinated awareness-raising effort targeting the range of product users that participate in the market. The FSOS Council could develop operational capacity to allow for greater involvement, not possible at present because of its institutional structure.

The advantages are:

- From a consumer viewpoint, the FSOS Council could market a single entry point, or common brand, such as a Financial Ombud Service, but retain autonomy behind the scenes;
- The council is already moving in this direction;
- Greater transparency in terms of funding;
- Potential for ombuds to retain the flexibility that they have under voluntary schemes and the relationship that they have with the industry; and
- Minimal upheaval in the landscape, provided participants recognise the need for change and are willing to co-operate.

The disadvantages are:

- The FSOS Council would need to take a stronger stance on core issues that are not favourable in the recourse landscape, such as co-operation/co-ordination, awareness-raising, jurisdictional grey areas, gaps in the recourse landscape, co-operation between recognised and statutory schemes;
- The council would need to lobby the minister to ensure that statutory ombuds also participate in co-operative efforts and to allow statutory ombuds to be more flexible (ultimately to become more similar to voluntary ombuds) through suggesting legislative changes if necessary; and
- There are still gaps in the landscape (eg non-bank credit). However, the FSOS Council could take a view on how this gap should best be addressed and advise accordingly.

The establishment of a super-ombud would therefore be destructive, as it would not recognise the positive role played by existing schemes, despite the problems in the landscape. The risk of

establishing a super-ombud also relates to the likelihood of the super-ombud taking on the characteristics of a statutory ombud. These characteristics are not entirely desirable, particularly in a marketplace that requires greater accessibility and therefore less formality and greater flexibility.

It is therefore recommended that the FSOS Council should play a more active and stronger role in the landscape to address the problems identified in this report. The council is still young and can mature into a powerful body that can bring about much needed transformation in this landscape.

ALTERNATIVE DISPUTE RESOLUTION FOR NON-BANK CREDIT

The non-bank credit segment of the market is still not supported by an ADR mechanism. While complaints are currently addressed by the NCR, it is our view that an alternative dispute resolution mechanism would provide consumers with a more flexible recourse channel. An ombud for non-bank credit could focus purely on dispute resolution, enabling the NCR to focus on the regulation of the industry, the enforcement of the Act and facilitating mechanisms such as debt counselling.

A few options exist for addressing this gap in the landscape, namely:

- Forming of a new voluntary or statutory Ombud for Credit;
- Allowing the FAIS Ombud jurisdiction over registered credit providers through the Minister of Finance declaring them financial institutions in terms of section 17 of the FSOS Act;
- Changing the terms of reference of the Banking Ombud to include non-bank credit; and
- Expanding the jurisdiction of the CIO to include non-bank credit in its jurisdiction and change name to Credit Ombud.
- Changing the terms of reference of the CIO to include non-bank credit in its jurisdiction and change name to Credit Ombud. Should groups of non-bank credit providers not want to be part of such an initiative, non-bank credit providers or certain categories could be declared “financial institutions” under section 17 of the FSOS Act, with the result that such credit providers would fall under the jurisdiction of the FAIS Ombud.

Based on this assessment, it appears as though the industry is moving forward with the fourth option, ie expanding the jurisdiction of the CIO. The institutional fit of this option is most appropriate given the CIO’s existing “membership” includes microlenders, retailers and other credit providers. For the non-bank credit gap to be adequately filled, some support and force is required from the FSOS Council to discourage adding yet another player to the landscape and to compel retailers to participate. However, should some groups of credit providers be unwilling, or should it not be possible to procure the commitment of all credit providers to participate, the fifth option of expanding the jurisdiction of the CIO and declaring non-bank credit providers “financial institutions” at least ensures that all non-bank credit providers will be subject to an ombud’s jurisdiction.

JUDICIAL CHANNELS

Firstly, it is suggested that consumer organisations try to influence the development of the Legal Services Charter, to extract the most benefit possible for consumers through provisions for pro bono work and work in developing the capacity of paralegals and other community-based law centres.

Secondly, it is suggested that the operations and thresholds of the Small Claims Court be carefully investigated to determine how these operations can be up-scaled to meet the needs of more

consumers on a broader range of issues. The services provided at present generally have a good reputation and are appreciated by consumers, despite their having to wait in queues for assistance and travel distances to get to operational courts. The Department of Justice should consider operating Small Claims Courts with paid individuals rather than volunteers only.

It is essential that debt administrators be held accountable for their conduct. Sector regulators, the banking industry, credit providers and civil society should jointly place pressure on the Department of Justice to address this problem through ensuring an adequate legal and regulatory framework and through supervising administrators.

Collective action lawsuits could have a significant impact on the consumer recourse landscape, but are not practiced for civil cases. The viability of introducing collective action lawsuits needs to be studied to determine the impact on the heavily burdened courts and the likely impact for consumers.

DEPARTMENT OF TRADE AND INDUSTRY

The dti has a vision for addressing the consumer protection landscape and introducing legislation that better protects consumers. The Consumer Protection Bill will be relevant in the financial sector where the sector legislation appears to be lacking in terms of consumer protection, but not where sector regulation is adequate, eg banking services (excluding credit). The latest version of the Bill is said to have greater clarity on this.

The dti needs to explore the reasons behind the low levels of use of their help desk services (506 complaints in 2005/2006). Without achieving scale, the benefits are low. A follow-up consumer survey could be conducted to see whether awareness has improved and to gauge how the dti can be most relevant to consumers. It is suggested that this study be conducted before the establishment of the Consumer Commission provided for in the Bill, so that it is designed around the needs and demands of consumers.

SECTOR REGULATORS

There is a need to define legislation on debt counselling. This is under way and should provide a greater sense of clarity on how debt counselling will happen in practice.

Sector regulators need to continue to forge closer relationships with ombuds that support the protection of consumers falling within their ambit. This can be more formalised reporting of recurring problems or systemic risks to regulators.

As effective as ombuds could be, they only handle complaints related to member institutions which are licensed and supervised. The mandate of sector regulators to license institutions is important for consumer protection and consumer recourse. In markets where there are informal/illegal operators, this is particularly important and challenging. In some instances legislative or regulatory change may be necessary to cater for a tiered structure of supervised institutions with different capital adequacy, reporting and other requirements. For example, funeral parlours would find it difficult to adhere to the same requirements as a large insurance firm but would still need to be licensed and regulated, to a lesser degree.

CIVIL SOCIETY

Given the important role that civil society plays in the landscape, it is proposed that this be a focus area of development stemming from this research. The role played by civil society could be greatly enhanced if certain changes and developments were incentivised and supported.

Civil society organisations should be strengthened and co-ordinated. The mechanism through which to do this needs to be discussed and explored with FinMark Trust. The initiative would need to be carefully designed to encourage desirable outcomes for the development of the consumer recourse landscape.

The work that is done by civil society organisations is not often captured and reported on. Through developing a database of cases handled by organisations, evidence of harmful practices would be far more powerful and credible.

The formation of a network of NGOs that work on consumer recourse in the financial service sector would be powerful if well run and if sufficient buy-in is achieved. Stemming out of co-ordination, NGOs could develop standards for handling problems and develop a system for accreditation. This would act as an incentive to adhere to standards and would lead to a more formalised civil society.

Greater credibility for civil society will develop as these challenges are addressed and results are demonstrated.

INDUSTRY ASSOCIATIONS HANDLING COMPLAINTS

Industry associations should not be handling external dispute resolution as they are not independent, nor geared to handle disputes. The recommendations made on creating a Credit Ombud would make the dispute resolution of the MFSA and FTA unnecessary. However, the establishment of a Credit Ombud does not address consumer recourse in terms of non-credit related issues in the retail sector. The Consumer Protection Bill may introduce requirements for more accessible external dispute resolution for clients of furniture and apparel retailers.

CROSS CHANNEL CO-ORDINATION

Aside from better co-ordination within the various channels, there is a necessity for co-ordination across channels and the facilitation of referral between civil society organisations and ombuds, for example. The appropriate organisation to manage and catalyse this process is not obvious and therefore some thought needs to go into identifying an appropriate body.

