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No.**GENERAL NOTICE****Trade and Industry, Department of***General Notice*

- 93 Consumer Protection Act (68/2008): National Consumer Commission: Draft enforcement guidelines: For public comments

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GENERAL NOTICE

NOTICE 93 OF 2011

NATIONAL CONSUMER COMMISSION

I, Mamodupi Mohlala, Commissioner of the National Consumer Commission, hereby publish draft enforcement guidelines for the National Consumer Commission, in terms of the Consumer Protection Act, 2008 (Act No 68 of 2008) for public comment.

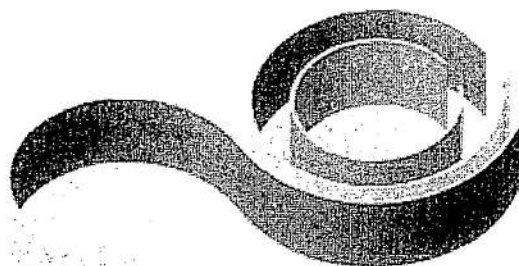
Interested persons may submit their comments on the draft guidelines in writing on or before the 10 March 2011, quoting the following reference number **(NCC/GN/0001)** to: The National Commissioner, National Consumer Commission c/o Mr. Sipho Tleane, P O Box 30251 Sunnyside, Pretoria, 0132 or per fax to (012) 394 2422 or email to STleane@thedti.gov.za

Kindly provide the name, address, telephone, fax numbers and/or email address of the person or organization submitting the comments.



Ms. M MOHLALA

COMMISSIONER: NATIONAL CONSUMER COMMISSION



NATIONAL CONSUMER COMMISSION

NATIONAL CONSUMER COMMISSION

ENFORCEMENT GUIDELINES

Definitions

Act" means the Consumer Protection Act 68/2008.

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

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

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

Investigator" means a person appointed in terms of Section 88 of the Consumer Protection Act 88/2008 to carry investigative functions of the Act, and include any person appointed on a contractual basis.

Minister" means the Minister of the Department of Trade and Industry, being a member of the Cabinet responsible for consumer protection matters.

Tribunal" means the National Consumer Tribunal established in terms of section 26 of the National Credit Act 34/2005.

Abbreviations

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

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INTRODUCTION

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PART A

(This part was last edited on 10/2/2011)

INTRODUCTION

1.1 Functions of the NCC

The National Consumer Commission (NCC) is a juristic body established by the Consumer Protection Act. It is headed by a Commissioner appointed by the Minister of Trade and Industry:

The Commissioner is responsible for all matters pertaining to the functions of the NCC and is also the accounting authority for the NCC, and as such, is responsible for—

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

As is common with such entities the Commissioner may—

- (a) assign management or other duties to employees with appropriate skills to assist the NCC in the management, or control over the functioning of the NCC; and

(b) delegate, any of the powers or functions of the Commissioner to any suitably qualified employee of the NCC.

The NCC is obliged to carry out the functions and exercise the powers assigned to it by the CPA.

In carrying out its functions, the NCC may:

- have regard to international developments in the field of consumer protection;
- consult any person, organisation or institution with regard to any matter relating to consumer protection;
- develop, and promote the voluntary use of, codes of practice in respect of:
 - Use of plain language in documents;
 - Standardised or uniform means of presenting and communicating the right to disclosure of information;
 - Alternative dispute resolution¹;
- in relation to laws that govern matters affecting consumers, the NCC must identify national or provincial legislation, or regulation that affects the welfare of consumers; and is inconsistent with the purposes of the CPA with the object of developing proposals for reform of that legislation; and
- it must consult with provincial consumer protection authorities; organs of state, consumer protection groups, alternative dispute resolution agents and suppliers,

¹ in terms of section 70

Another critical function of the NCC is the *promotion* of consumer protection within organs of state². In order to better achieve the purposes of the CPA in relation to goods and services supplied to consumers by or through any organ of state, the NCC must consult with relevant provincial consumer protection authorities, organs of state within the national sphere of government, regulatory authorities, consumer protection groups, and ombud with respect to the delivery of any such goods or services, with the object of:

- identifying any practice that is inconsistent with the purposes and policies of The CPA; and
- developing proposals for reform of any such practices; and
- reporting from time to time to the Minister with recommendations for achieving the progressive transformation and reform of practices contemplated in this section.

1.1.1 How will the NCC enforce the CPA?

In terms of chapter 6 of the CPA the NCC will enforce the CPA by:

- **promoting** informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, **but is not responsible** to intervene in or directly adjudicate any such dispute;
- receiving **complaints concerning alleged prohibited conduct** or offences, and dealing with those complaints in accordance with Part B of Chapter 3;

² S95 of CPA

- monitoring the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and
- monitoring the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;
- **investigating and evaluating alleged prohibited conduct and offences;**
- **issuing and enforcing compliance notices;**
- negotiating and concluding undertakings and consent orders contemplated in section 74;
- referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act No. 89 of 1998);
- referring matters to the Tribunal, and appearing before the Tribunal and
- referring alleged offences in terms of this Act to the National Prosecuting Authority.

This document serves to primarily highlight the manner in which the NCC will deal with complaints received.

1.1.2 Consumer Complaints

Critical to the enforcement function of the NCC is the investigation component. Prior to understanding the process that the NCC will follow in conducting investigations there are certain basic issues that an investigator/ inspector must be aware of.

As indicated hereinbefore, the NCC will be required to investigate and evaluate alleged prohibited conduct. The majority of investigations into alleged prohibited conduct, which conduct is spelt out in chapter 2 of the CPA, will emanate from complaints lodged by consumers.

1.1.3 What is a complaint?

In order to bring a matter before the NCC there must be an allegation that a consumer's rights in terms of CPA has been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. Such a complaint must be lodged in the prescribed form.

1.1.4 Who can lodge a complaint?

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

In addition³, the NCC may directly initiate a complaint or an investigation concerning any alleged prohibited conduct on its own motion, or when directed to do so by the Minister in terms of section 86 (b); or on the request of -

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

The following can lodge complaints with the NCC:

- Persons acting on their own behalf;
 - An authorised person acting on behalf of another person who cannot act in their own name;
 - A person acting as a member of, or in the interest of, a group or class of affected persons;
 - A person acting in the public interest (in this instance such person can only lodge the complaint with leave of the Tribunal or Court, as the case may be); and
 - An association acting in the interest of its members.
- Moreover, the NCC can also initiate a complaint or an investigation. Likewise, the Minister of Trade and Industry may also direct the NCC to investigate.

³ In terms of section 71

The person that lodges the complaint is referred to as the complainant, whereas the person against whom the complaint is lodged is called the respondent.

1.1.5 Against whom can a complaint be lodged?

The complaint can be lodged against an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership in the ordinary course of business. It does not matter whether the respondent's principal office is situated outside the country. Thus the jurisdiction of the NCC is very broad.

1.1.6 Types of matters that the NCC may deal with

In terms of the CPA⁴ the NCC will have jurisdiction over the following matters:

- 1) Every transaction occurring within the Republic unless exempted.
- 2) The promotion or supply⁵ of any goods or services within the Republic unless those goods or services have been exempted.
- 3) Goods or services supplied/ in terms of a transaction irrespective whether these are offered/ supplied in conjunction with any other goods or services or separate from any goods or services. (for eg: X supplies a copier and X also agrees to service the copier or X subcontracts the servicing)
- 4) Goods that are supplied in terms of an exempt transaction but only to the extent provided for in subsection 5. The said subsection states that if any goods are supplied in respect of an exempt transaction, those goods, the importer, producer, distributor and retailer of those goods are still subject to sections 60

⁴ Section 5

⁵ Section 5(1)(b)(i) makes reference to "supplier". It is submitted that it should have read "supply"

and 61. These sections relate to safety monitoring and recall and strict liability respectively.

- 5) Goods or services that are subject to the National Credit Act. (whilst the NCC has no jurisdiction over the credit agreement itself, it would deal with contraventions arising from the goods or services that are the subject of the credit agreement)
- 6) The supply of goods or services in the ordinary course of business to any member by a club, trade union, association, society or other collective of persons voluntarily associated and organised for a common purpose, whether for fair value consideration or otherwise, irrespective whether there is a charge or economic contribution demanded or expected in order to be or remain a member of that entity.
- 7) Franchise transactions irrespective of the value of the transaction in so far as the following⁶:
 - the solicitation of offers to enter a franchise agreement;
 - an offer by potential franchisor to enter into franchise agreement with potential franchisee;
 - a franchise agreement or supplementary agreement to a franchise agreement
- 8) It does not matter if the supplier:
 - resides or has its principal office in or outside the Republic
 - operates on a for-profit basis or otherwise
 - is an individual; juristic person; partnership; trust; organ of state; an entity owned/ directed by the State; a person is contracted or licensed by an organ of State to offer or supply any goods or services; or is a public- private partnership; or is required or licensed in terms of law to avail the goods and services to the public

⁶ Section 5(7)

1.1.7 Types of matters that the NCC may not deal with

The NCC cannot deal with transactions

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

1.1.8 Enforcement Rights of Consumer

In order to enforce any right in terms of the CPA⁷, a transaction or agreement or if a consumer wishes to resolve any dispute with a supplier, a consumer may:

- refer the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of the particular dispute;
- refer the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud; or
- if the matter is not in the jurisdiction of an ombud then it may be referred to an accredited⁸ industry ombud provided the supplier is subject to the jurisdiction of that ombud.

⁷ Section 69

⁸ In terms of section 82(6)

- apply to the consumer court of the province with jurisdiction over the matter;
- refer the matter to another alternative dispute resolution agent⁹; or
- file a complaint with the NCC in accordance with CPA¹⁰ -
- approach a Court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. (Of last resort)

1.2 What can the NCC do when a complaint is received in terms of the Consumer Protection Act

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

1.2.1 Notice of Non-Referral

A **notice of non-referral**¹¹ may be issued by the NCC to the complainant. The notice must be in the **prescribed form**. (See Regulations)

A non referral notice will be issued where the complaint

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

⁹ Section 70

¹⁰ Section 71

¹¹ Section 72

- (iv) is against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

If the Commission issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the consumer court or the tribunal

1.2.2 Referral

1.2.2.1 The NCC may refer the complaint to:

- (i) an alternative dispute resolution agent,
- (ii) a provincial consumer protection authority legislation makes provision for a referral of matters to them.
- (iii) a provincial consumer court

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

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

1.3 Investigating the Complaint

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

It may not be possible for the NCC to investigate every matter.

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

PART B

COMPLAINTS HANDLING BY THE COMMISSION

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PART B

(This part was last edited on 10/2/2011)

1. COMPLAINTS HANDLING BY THE COMMISSION

1.1 Alternate Dispute Resolution

Complaints are received from consumers, consumer NGOs and/or any person or entity acting on behalf of consumers. These complaints will be received by the NCC Contact Centre and would be escalated to the Complaints Handling Unit (CHU) of the NCC within three days of receipt.

A matter will only be escalated by the CC after a complaint is properly filed with the NCC. The physical file will also be handed over to the CHU.

Upon escalation the manager will receive the escalated file for assessment and allocation. There are four key steps in the resolution of complaints namely:

- Assessment & Allocation- within 2 Days
- Notices of Non referral -within 3 Days
- Referral - within 3 Days
- Negotiation /mediation- within 20 -30 Days depending on the complexity of the matter.

1.1.1 Assessment & Allocation phase

Upon receipt of the escalated complaints from CC, the manager CHU will assess validity and problem-type and allocate matters to officials for negotiation and mediation. The Manager will allocate the complaint to the appropriate official within two days of receipt. The turnaround time for allocation and assessment is two days.

a) Assessment

- The manager in complaints will assess information in the file
- Assess complaint to confirm jurisdiction
- Make initial recommendation

b) Allocation

Record allocation on the allocation Data-base (including- Date of allocation, name of official)

Turnaround time for this process is 2 days

1.1.2 Notices of Non Referral

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

The turnaround-time for referring the notices of non referral to the office of the Commissioner is 3 days; this is meant to avoid raising expectations that the matter will be investigated.

1.1.3 Referral.

The unit will establish referral protocols with Provinces, Regulators, Ombud-schemes and ADR Agents. Referrals will be to such entities in accordance with the referral protocols.

Referrals will be in writing and will include all documents received from the complainant. Written confirmation of referrals will be issued in writing to the complainant. The said written confirmation will include the name of the institution to which the matter has been referred, the contact person and the contact details of the person.

All referrals will be done within 3 days of allocation.

1.1.4 Negotiation / Mediation Phase

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

- a) Where insufficient information has been provided, request the complainant to furnish further information.
- b) Where sufficient information has been provided, proceed with a mediation and negotiation process
- c) Request for intervention of an independent expert or mediator in case of a complex complaint

a) Request for further information from the complainant

If the information provided by the complainant is not sufficient to enable officials to determine the core of the complaint, the official must contact the complainant to request further information.

The request for additional information can be done telephonically or in writing depending on the appropriate mode of correspondence stated by the complainant in the complaint form.

The complainant will be given a maximum of 5 days to provide the required information. Should the complainant fail to provide the required information within the stipulated time frame, the official must conduct a final follow-up and if necessary extend the deadline by no more than 5 days.

Should the complainant still not furnish the additional information after the extended 5 day period, the official must record the action and close the file.

b) Analysis of Facts

When all the facts related to the complaint and supporting information has been obtained, the facts in dispute must be analysed against the law, primarily the Act. Analysis of the facts may take into consideration international law and foreign jurisprudence.

c) Negotiation and mediation phase

When the complainant has supplied all necessary information, the matter is analysed. Upon analysis, the official prioritizes the complaints taking into account the following factors:

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

The mediation methods to be employed by officials in Complaints Handling are: telephone mediation, written mediation, and or face to face mediation.

1. Telephone Mediation

The telephone will be used initially in most matters.

As a mediation method, use of the telephone is quicker, and it has low cost implications for consumer and business. It is effective for less complex complaints and where business is cooperative. If settlement is reached it must be confirmed in writing and a copy of the confirmation is sent to both the consumer and business for reference purposes.

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

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

The official must then furnish a summary of the complaint and the redress sought by complainant e.g. refund and/or repair etc. S/he should provide the respondent with the opportunity to respond to the allegations. The respondent must be allowed to suggest possible methods of resolving the complaint. In the event that the complainant is not entirely satisfied with the offer the official should also probe for other possible offers.

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

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

ii) Written Mediation

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

In which case, the official would prepare a letter with a summary of the complaint. S/he should also attach a copy of the original complaint (but take caution to exclude offensive statements). The first written correspondence to the respondent must include a statement to the effect that a formal mediation process may follow, in the event that the complaint is not resolved amicably. The latter is sent to the respondent with a deadline to respond within a maximum of 7 days from date of the letter. Tele-fax or e-mail communication is encouraged because receipt is immediate.

Should the response be an offer to settle the complaint, the official will notify the complainant in writing and attach correspondence from the respondent. If settlement is accepted it will be confirmed in writing. A copy of the confirmation is sent to both the consumer and business for reference purposes.

In the event that the complainant is not satisfied with all the offers made by the respondent, the official must decide, in consultation with the managers, the reasonableness of the refusal by the complainant to accept the offer and may suggest other possible remedies.

In the event that the respondent does not agree with the remedy suggested or disputes the allegations, the official must advise the complainant of the deadlock and/or dispute of fact which results in the matter not being capable of resolution.

In circumstances where the response is not forth coming, the official should conduct a follow-up by telephone, if more time is requested the official will provide an additional 5 days period. The official will be required to update the file at all times on all steps taken,

If the allegations are that there is an unfair business practice then the matter must be escalated to the Consumer Investigations. The official must provide a brief escalation report. The official must then advise the complainant of the escalation and explain the process in terms of the Consumer Protection Act. In the event where there are other available remedies i.e. or legal remedies via the courts, the official must inform the complainant accordingly. In the event where there is no settlement and there is reasonable ground that a business is engaged in a prohibited practice, the complaint may be escalated for a purpose to obtain a compliance notice in terms of section 100.

This action should be followed by a written confirmation that the matter is incapable of resolution and would be escalated to the Consumer Investigations and/or referred to relevant bodies, whichever is applicable. The official must then update the case file, escalate it for investigation and close the file.

The turnaround time for resolving complaints through written mediation is 20 working days. In the event where a settlement agreement has been obtained from the respondent a further period of 15 days may be allowed to ensure that the respondent honours the settlement, failing which the matter shall be escalated for purpose of a consent order to be issued and confirmed by the National Consumer Tribunal.

iii) Face to face mediation

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

With this mediation method, the official visits the business for the purposes of negotiating a settlement; the consumer may be present at her/his request. This method is quicker and may involve minimal traveling costs for the consumer. It is effective for both simple and very complex complaints.

The official must telephone respondent, introduce her/himself and provide a brief background of the function of the Complaints Handling Unit. S/he should then request the name & position of the person on the other end of the line. Ideally officials should request to speak to the senior official of the company who would be able to take decisions. The official will then request to visit the premises of the respondent for a mediation meeting.

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

In instances where the respondent is conducting a prohibited business practice, the official must inform the respondent of the directorate's view that the business might be conducting an unfair business practice. The official must further explain the consequences of the contravention and the sanctions that can be imposed. S/he must then explain that the department is guided by the concept of corporate leniency and the voluntary compliance driven approach and recommend an appropriate corrective action. In the event where there is no settlement and there is reasonable ground that a business is engaged in a prohibited practice, the complaint may be escalated for a purpose to obtain a compliance notice in terms of section 100.

When a settlement is reached the official should end the mediation conference with the undertaking that a written confirmation of the conference incorporating the settlement agreement will be prepared and sent to both parties for reference purposes. The written agreement must be sent within two days. Details of the respondent will be referred to Education and Compliance to assist the company involved in the prohibited practice to comply.

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

(iv) Extraordinary mediation measure

- Employment of services of independent mediators in cases where questions about impartiality of the NCC may impede success of a mediation process or complexity of the case in question so desires.
- Employment of services of experts to assist in analysis of disputed facts in mediation processes.
- Mass complainants face to face mediation against a respondent who all the complainants have similar disputes against.
- In the event that a respondent fails to cooperate with usage of civil means of communication, summons in terms of the Act may be used to bring the respondent to audience of the Commission.

(v) Finalization Phase

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

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

- Refer matter to investigations.
- Refer matter to the provincial tribunal for adjudication
- Refer matter to the NCT
- The official must then update the case file, close the file.
- The turnaround times for resolving complaints through mediation are 20 working days.

vi) Procedure for Escalation

An escalation report should be prepared within three days of decision to escalate. The report should be brief and must contain details of the complainant and respondent, summary of the complaint and break down of actions taken in attempting to resolve and reasons for concluding that the complaint is incapable of amicable resolution.

2. INVESTIGATIONS BY THE NCC

All matters escalated from the Complaints Handling Unit and or received by the Investigations Unit of the NCC will be screened by a Screening Committee established in the said Investigations Unit.

2.1 SCREENING OF COMPLAINTS AND SCREENING STANDARDS/ ENQUIRIES OF NCC

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

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

Critical to the screening is determining, in terms of section 4 (1) of the CPA, whether there is an allegation that the consumer's rights as contained in the CPA have been:

- infringed;
- impaired;
- threatened; and or

whether there is an allegation of prohibited conduct (Chapter 2 and regulations) that occurred or is occurring.

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

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

From a procedural perspective, section 71 of the CPA requires the complaint to the NCC to be filed in the prescribed form. The Regulations contain the said form and all complainants should be encouraged to follow this simple requirement.

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

- if directed by the Minister of Trade and Industry;
- on its own motion;
- on the request of a provincial consumer protection authority, a regulatory authority, accredited consumer protection group.

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

2.2. Enforcement Criteria

The Enforcement Criteria are criteria which the NCC uses to make decisions about whether to commence or continue with an investigation, the most appropriate type or types of enforcement action, and the appropriate response in each case. The criteria provide standard, objective criteria against which to measure the complaints received and issues raised. The different Provinces may also have priority areas for enforcement work which will need considering.

Those attending the weekly screening meetings are responsible for determining the appropriate action for each enquiry.

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

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

The following criteria, amongst others will be considered:

2.2.1 Jurisdiction of National Consumer Commission

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

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

2.2.2 Strategic Significance and Seriousness of Matter

When a complaint is received it is imperative that the issue that comes to the fore must be of such weight, significance and or importance, to warrant an investigation. In determining whether a matter warrants investigation, the following factors will be considered:

- whether intervention by NCC will have a timely impact on market conduct;
- quantum of financial loss or other detriment suffered by the consumer(s).
In relation to loss or detriment, consideration may be given to the number of consumers affected or an assessment of the impact of the conduct on an affected individual;
- the health and safety of the community or other public interest;

- prevalence of the alleged prohibited conduct. Whether the conduct is widespread and the application of a sanction is likely to have a deterrent effect;
- the conduct is systemic; deliberate and not inadvertent; a blatant or flagrant breach.
- the complaint is not trivial and/or a technical breach without harm.

2.2.3 Special Circumstances Surrounding the Complaint and Sufficiency and Quality of Evidence

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

- any special circumstances attaching to the complaint that gives the complaint added significance ie: any disability and/or characteristic of the class of complainant that puts them in a susceptible or a high risk category, these could relate to rural, poor, young, aged consumers, in other words, vulnerable consumers;
- the matter has been referred by another consumer protection agency or consumer advocate;
- the complainant is willing to support fully proposed NCC action;
- an assessment of the credibility of the witness;
- timeliness of the complaint as compared to the time of the alleged offence and the effect of any statute of limitations;
- availability of corroborative evidence;
- availability of obvious defences;
- the likely outcome in the event of a finding of guilt, having regard to the penalty options available to the Tribunal or Court and the impact of such an outcome on the community;
- a history of complaints against the alleged offender;
- the alleged offender has been the subject of previous enforcement action by NCC.

- alleged offender is not responsive to consent orders and/or dispute resolution;
- a risk of continuing misconduct;
- legislative requirement for NCC to undertake an investigation.

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

2.3 How Enquiries are Resolved at Screening Meetings?

Following the weekly screening meeting

Having screened the matters, the Screening Committee can, in terms of section 72 of the CPA, make the following resolutions:

- i) to issue a **notice of non-referral** to the complainant;

If a notice of non referral is issued it has to be done in the prescribed form which is contained in the regulations. The reason for issuing such a notice must be that the complaint is either:

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

If the weekly screening meeting concludes that a notice of non referral must be issued, the enquiry is recorded in the minutes as notice of non-referral. A brief letter signed by the Commissioner explaining why the matter will not be investigated further is prepared and issued to the Complainant.

ii) Referral to ADR Agent and Provinces

The Screening Committee could resolve that the matter be referred to:

- An ADR agent;
- Provincial Consumer Protection Authority;
- Consumer Court

so that the parties could attempt to resolve the dispute in terms of section 70 of the CPA. However, such a referral is not permitted if an unsuccessful attempt was made at resolving the dispute and where an ADR agent was used; or where a notice was issued by the ADR agent to the effect that ADR failed.

If the weekly screening meeting concludes that it is more appropriate for the alleged conduct to be handled by An ADR agent; Provincial Consumer Protection Authority; or Consumer Court the enquiry is recorded in the minutes as Referral to ADR agent; Provincial Consumer Protection Authority; or Consumer Court.

The enquiry is referred to the relevant entity by the relevant component of NCC who then advises the complainant to contact that entity and thereafter monitors progress.

iii) Referral to another Regulator/ Agency

If the weekly screening meeting concludes that it is more appropriate for the alleged conduct to be handled by another enforcement or regulatory agency who has jurisdiction over the matter, the enquiry is recorded in the minutes as ADR Referral to Regulator/ Agency together with the details of the party to whom the matter is referred.

The enquiry is referred to the relevant entity of the NCC who then advises the complainant to contact the relevant entity and thereafter monitors progress.

A referral is not merely a simple forwarding of a matter to the relevant person or entity. Any referral has to be done in accordance with the NCC's referral policy and procedures. The monitoring of such referrals is crucial. Such monitoring will occur in terms of the Monitoring policy and procedures of the NCC.

iv) NCC Investigation

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

2.4. Complainant Disagrees with Screening Decision

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

2.5 Approval and allocation of Cases

Once an investigation is assigned, the complainant is contacted telephonically to verify the complaint and acknowledges its receipt; this is immediately followed up with a written acknowledgement of receipt.

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

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

- prepare an initial screening report within 2 days of receiving the complaint. The screening report will briefly describe the nature of the complaint, identify key issues for initial investigation, and offer a recommendation (if possible) for/against early disposition
- investigate on the directions of the NCC;
- prepare an Investigation Report with recommendations;
- table the report to NCC

NB: If, after an investigation, a referral is not made then essentially there are merely two recommendations that an investigator/ inspector can make. These are either proposing a consent order or a compliance notice.

2.6. Purpose of Investigation

The purpose of the investigation is to:

- 1) Determine whether an offence has been committed in terms of the CPA or
- 2) The Respondent has engaged in prohibited conduct.

Prohibited conduct is to be found in chapter 2 of the CPA and in the regulations.

2.7 Receipt of Complaint by Investigations Unit

2.7.1 Case Discussion Meeting

Case discussion meetings are held once a week. At these meetings the officials of the Division gives input into:

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

At these case discussion meetings:

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

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

2.7.2 Report on Receipt of New Complaint to Exco and Progress reports

This report is provided to Exco within 7 days of receipt of a new complaint. The report to Exco is a synthesis of three processes, namely, the screening report, the input from the inspector (primarily the verification of the complaint) and the input from the Division staff at the case discussion meeting. The report will contain such information as the case number, the names of the parties, the sector/ industry within which the conduct occurs, a short description of the complaint, the relevant sections of the Act and the name of the senior inspector and the expiry date. Confidential information will not be made available to the public except to the NCC management and Exco.

The progress report will be based on the report to Exco. It will contain regular updates on the status of the investigation. Reports on status involve short statements, such as "request for information from complainant sent on [date]." Updates will be done once a week by the inspectors and the full report on all cases will be compiled on a monthly basis. This report will contain very brief descriptions of the matter and the current status of all open investigations. The report is restricted information and will be available on the intranet/ case management system to all NCC staff for their information and for incorporation into the reports of the NCC.

2.7.3 Request for input from complainant

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

2.7.4 Evidence gathering

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

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

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

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

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

For a routine investigation one would be able to issue a compliance notice or enter into an agreed consent order with less investigation.

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

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

- "reasonable "
- "Reasonably likely"
- "Calculated to"

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

2.7.5 Investigation Report

i) Investigation Report

Once an investigation is complete and if action or NCC settlement is proposed, a detailed investigation report must be prepared. The primary purpose of an investigation report is to aid the Enforcement Division of the NCC in making a decision as to the appropriate enforcement action. The report provides the Division with the investigator's recommendations as to the appropriate enforcement action, and clear and concise information in support of the recommendations.

The investigation report should contain recommendations as to:

- the appropriate resolution
- any further action required for eg where referral to the Tribunal is the recommended outcome, the recommendations should include appropriate guidance to the Legal Unit.

- The report and the recommendations made in it should be objective and legally precise. This is the case even though a good investigation usually starts out with some basic facts mixed with intuitive feeling. That initial approach is gradually refined to indicate liability through a more robust and objective analysis of the facts.
- For routine investigations one would not normally prepare a detailed report but this may be warranted in many cases. However, where a report is not prepared for routine investigations a summary in the form of a memorandum is required. Regardless, one should still reach a conclusion and make a recommendation to the manager as to how the investigation should be resolved.

ii) Investigation Report Format

All finalisation reports should at least contain:

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

- confirmation of redress being provided by the supplier to the consumer, where relevant.
- certification of the report by both Legal Unit and Investigations Manager

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

2.7.6 Recommendations

The following recommendations may be made by an investigator.

A. Consent Order

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

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

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

However, in terms of the CPA¹² a consent order can include an award of damages. This award can only be included if the Complainant consents thereto. In such an instance the consent of the Complainant will have to be acknowledged. Presumably this can be done on the draft order itself or on a separate document but with reference to the draft order.

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

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

For award of damages under Section 74(3), an offer made to the respondent will be tabled to the complainant. In case a dispute arises between both the respondent and the complainant on the offer so tabled, the matter will be referred to an ADR agent.

Since the order is entered into between the NCC and the Respondent it would follow that it must be approved by the NCC. Thus, the investigator/ inspector will propose a draft consent order, in consultation with the parties. It is critical that the Respondent and Commission agree to the proposal. If either party does not agree there cannot be a consent order. At all times, it must be explained and understood by the parties that it is a draft and that it is subject to the approval of the NCC and then further subject to it being made an order by the NCT or a court. The draft order is then submitted to the manager investigations who will present this to the Legal section of the NCC in accordance with the approved processes followed in such circumstances.

Thereafter, the matter is submitted by the Head of Enforcement to Exco for their input, deliberations, approval or rejection.

¹² Section 74(3)

All consent orders will be signed on behalf of the NCC by the Commissioner or by any other duly delegated employee of the NCC. It must be remembered that suppliers and service providers conduct their business through various types of entities- sole proprietorship, partnership, close corporations, private and public companies, not for profit entities etc. For a consent order to be effective, it must be confirmed that the person signing as Respondent or on behalf of the Respondent is duly authorised to do so.

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

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

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

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

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

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

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

If a consent order is not entered into then the issuing of a Compliance Notice may be considered.

The case management system must be updated.

B. Compliance Notices

A compliance notice is issued in terms of the CPA¹³. This notice can only be issued if a provision of the CPA has been breached, in other words, if the Respondent has engaged in prohibited conduct.

Before the NCC issues a compliance notice:

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

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

¹³ section 100

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

In order to justify or establish a belief on reasonable grounds the NCC will need evidence of the breach. Such evidence will usually be available subsequent to an investigation. A recommendation for a compliance notice to be issued will mainly emanate from the investigator/ inspector.

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

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

The compliance notice will be drafted by the investigator/ inspector checked by Legal and then issued together with an investigation report to the senior. The matter will be canvassed at the NCC Exco. If approved, it will be signed by the Commissioner or duly delegated employee, recorded in the Compliance Notice Register and then despatched in an appropriate manner.

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

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

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

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

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

Once a compliance notice has been issued, compliance thereto must be monitored. In order to monitor compliance, the investigator/ inspector will create a checklist as against the notice and make arrangements to verify compliance for the working day following the expiry date of the notice.

The recommendation may be that the:

- 1) NCC issue a compliance certificate.
- 2) NCC apply to the Tribunal for a fine to be imposed.
- 3) NCC may refer the matter to the National Prosecuting Authority for prosecution as an offence in respect of any particular compliance notice. (Cannot impose an administrative fine and prosecute at the same time).

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

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

At all times the case management system must be updated.

2.7.7 Recommendation of Referral to the Tribunal

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

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

2.8 Finalisation of investigations and turnaround times

2.8.1 *Finalisation of cases in terms of the CPA*

Investigation into a matter is deemed to be finalized in terms of the CPA on the following grounds after concluding investigation:-

- (a) by issuing a notice of **non-referral** on the grounds contemplated in section 116¹⁴, and in any other grounds the Commission reasonably believe it should.¹⁵
- (b) by referring the matter to the **National Prosecuting Authority**, if the Commission alleges that a person has committed an offence in terms of this Act (for offences refer to 110).¹⁶ The matter will be dealt with under the Criminal Procedure Act.
- (c) by referring the matter to **equality court**, as contemplated in section 10, if the complaint involves a matter in terms of Part A of Chapter 2 of the Promotion of Equality and Prevention of Unfair discrimination Act.
- (d) after **consent order** has been agreed to, signed by the parties and submitted to Legal before it being confirmed by NCT.
- (e) by referring a matter to a **consumer court** of the province in which the supplier has its principal place of business.¹⁷
- (f) after referring a matter to **the Tribunal** for the imposition of an admin fine in terms of section 73(2)(b).

¹⁴ Section 73(1)(a)

¹⁵ Section 75(1)

¹⁶ Section 73(1)(b)

¹⁷ Section 73(2)

2.8.2 *Categories of cases and turnaround times*

(a) *Categories of cases*

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

- (i). **Non-Complex Matters** are those matters that after investigation a Commission may issue a non-referral in terms of section 116, referral to the provincial court in terms of section 73(2) , referral to equality court in terms of section 73(1)(i). Usually matters of non-complex are decided on their facts without or with minimal evidence.
- (ii). **Complex Matters** are those matters that after investigation a Commission will issue a compliance notice, agree to a consent order or refer the matter to the National Prosecuting Authority, or apply to the Tribunal for the imposition of an administration fine. Complex matters will be decided mainly on evidence gathered.
- (iii). **Exceptional Matters** are those matters that after investigation a Commission will issue a compliance notice, agree to a consent order or refer the matter to the National Prosecuting Authority, or apply to the Tribunal for the imposition of an administration fine. In these matters, evidence gathering exercise rely on the external forces i.e. court order for search and seizure, warrants to enter premises.

2.8.3 (b) Turnaround Times

- (i) Receive a file, assess the information. Acknowledge receipt and request further information. (for all categories turn-around time **5 working days- 1 week**)
- (ii) Diaries file for which the complainant should furnish the outstanding information (for all categories - **1 week**)
- (iii) **Initial investigation** – preliminary investigation to decide whether referral, non referral or develop an investigation plan and draft report to Exco with your recommendation (**2 weeks**).
 - Non- complex matters- draft non- referral or referral notice (**4 weeks**)
 - Complex and Exceptional Matters - agree into consent orders, issue compliance notice or refer the matter to National Prosecuting Authority (NPA) and apply to the Tribunal for the imposition of administrative fine. In this stage the investigator starts with the investigations by gathering and assessing evidence (**6 months**).
- Consultation with experts, product testing, interviews, inspection, summons etc.
- (iv) Status Report- prepare report on the findings of the investigation with recommendations. The status report should recommend either a referral, non-referral, issuance of compliance notice, agree into a consent order or apply for imposition of an administrative fine. (**1 week**)
- (v) Monitoring of Compliance Notice (**4 weeks or any extended time agreed upon**)
- (vi) Matters referred to Legal Services (consent orders, administrative fines and matters to NPA) (**1 week to prepare and escalate the file**).

3 THE DEBRIEF

A debrief will be held as soon as possible at the conclusion of the investigation.

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

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

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

The debrief can involve the Division on large investigations that resulted in litigation.

Debriefing must be documented in a file for future reference.

4 CONCLUSION

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

5. POWERS IN SUPPORT OF AN INVESTIGATION

5.1. SUMMONS

5.1.1 Why will summons be issued?

At any time during an investigation conducted in terms of the CPA¹⁸, that is, an investigation approved by the NCC, the NCC may issue a summons to any person:

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

5.1.2 Validity of summons

For the summons to be valid it:

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

5.1.3 Duty of Inspector/ Investigator after Summons served

An inspector or investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object:

¹⁸ section 72 (1)(d),

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

5.1.4 Duty of a person after Summons served

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

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

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

(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.

5.2 AUTHORITY TO ENTER AND SEARCH UNDER WARRANT

5.2.1 Obtaining Search Warrants

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

5.2.2 Who can issue a Search Warrant?

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

5.2.3 When can a Search Warrant be issued?

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

- a contravention of the Act has taken place, is taking place, or is likely to take place on or in those premises; or
- that anything connected with an investigation in terms of the Act is in the possession of, or under the control of, a person who is on or in those premises.

A warrant to enter and search may be issued at any time.

5.2.4 Requirements for a Valid Search Warrant

A search warrant must specifically –

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

5.2.5 Duration of a Valid Search Warrant

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

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

5.2.6 Execution of a Search Warrant

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

A person authorised by the warrant may enter and search premises named in that warrant.

Immediately before commencing with the execution of a warrant, a person executing that warrant must either:

- if the owner, or person in control, of the premises to be searched is present;
- provide identification to that person and explain to that person the authority by which the warrant is being executed; and
- hand a copy of the warrant to that person or to the person named in it; or
- if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

5.2.7 Powers to enter and search

A person who is authorised under section 103 to enter and search premises may¹⁹ –

- enter upon or into those premises;
- search those premises;
- search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
- examine any article or document that is on or in those premises that has a bearing on the investigation;
- request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;

¹⁹ Section 104

- take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
- use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to –
 - i. search any data contained in or available to that computer system;
 - ii. reproduce any record from that data;
 - iii. seize any output from that computer for examination and copying; and
 - iv. attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

An inspector authorised to conduct an entry and search in terms of section 103 may be accompanied and assisted by a police officer²⁰.

5.2.8 Conduct of entry and search²¹

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

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

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

²⁰ Section 104 (i)(3)

²¹ Section 105

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

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

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

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

A police officer who is authorised to enter and search premises under section 103, or who is assisting an inspector who is authorised to enter and search premises under section 104 may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises²².

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

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

²² Section 105(7)

5.2.9 Storage for seized goods

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

5.3 CONFIDENTIALITY

5.3.1 Claims that information is confidential

When submitting information to the NCC, the Tribunal, or an inspector or investigator appointed in terms of this Act, it may be claimed that all or part of that information is confidential.

Any such confidentiality claim contemplated must be supported by a written statement explaining why the information is confidential.

The NCC, Tribunal, inspector or investigator, as the case may be, must:

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

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

If any reasons for a decision in terms of this Act would reveal any confidential information, the NCC, or Tribunal as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 5 business days before publishing those reasons.

Within 5 business days after receiving a copy of proposed reasons in terms of subsection (5), a party may apply to the court for an appropriate order to protect the confidentiality of the relevant information.

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

5.3.2 Breach of Confidence

It is an offence to disclose any personal or confidential information concerning the affairs of any person obtained²³:

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

However, this does not apply to information disclosed:

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

5.4 OFFENCES AND PENALTIES

5.4.1 Offences relating to prohibited conduct

It is an offence²⁴:

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

²³ Section 107

²⁴ Section 108

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

5.4.2 Penalties

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

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

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

5.4.3 Administrative fines

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

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

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

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

PART C**EVIDENCE & PROCEDURAL FAIRNESS**

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PART C

(This part was last edited on 10/2/2011)

EVIDENCE & PROCEDURAL FAIRNESS

1 Evidence handling

Documentary or other additional evidence must be appropriately collected, recorded, seized and secured in accordance with NCC's **exhibit and property handling policy**.

1.1 Witness Statements

All relevant information required for enforcement before a court or tribunal is recorded in witness-statement format.

A signed statement is desirable because:

- it serves as a basis for investigation or provides information for further enquiry
- the interviewee endorses the accuracy of its content by signing it
- it is easy to review and assess
- it reduces the time required to produce briefs of evidence for those interviewees who will be required to give evidence
- the interviewee can refer to the statement to refresh his or her memory if they come to the NCT or appear in Court, and
- it allows an interviewee to be cross examined on the contents of the statement if:
 - he or she is called to give evidence for the NCC and is declared hostile, or
 - the NCC decides not to call him or her as a witness but he or she is called by the defence and gives evidence inconsistent with the contents of the statement.

Investigators should record statements in writing at the time of the interview or, if that is not possible, as soon as practicable after the interview. Investigators should not record an interview on a dictaphone, tape or laptop in order so that what the witness said can be drafted into a statement later. Any recordings are discoverable and any inconsistencies may affect the witness's credibility in the NCT or in Court. It is important that the witness is able to fully reconstruct and clarify his or her recollections before this is committed to a statement.

If a statement cannot be taken at the time of interview, it is considered better practice to make handwritten notes of the interview and then draft a statement based on those notes.

1.2. Purposes of taking a statement

Statements are used for the following purposes:

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

1.3 Conducting the interview and taking the statement

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

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

Once the interviewee has told the story and appears to have exhausted his or her recollection, go through the story again with him or her. Ask questions to probe and clarify inconsistencies. Notes may be taken at this point.

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

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

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

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

1.4 When recording a statement

When taking a statement:

- record the statement in chronological order using separate paragraphs for each change of subject or part of an event
- Exhaust each point before moving on to the next

- If the interviewee is talking about more than one event or offence, deal with each one in full before starting the next event or offence
- Write in the first person i.e. in the words of the person making the statement
- Do not correct the interviewee's vocabulary or grammar unless it is necessary to clarify what they mean
- Avoid the use of abbreviations or slang unless it has already been clarified and recorded as to what this means
- Do not underline, mark or otherwise draw attention to any part of the statement
- Include specific dates and times – not just "last night"
- Be explicit when referring to people or objects
- Where exhibits are involved, the chain of evidence needs to be proved by including information such as when the interviewee
 - Saw the item
 - Located or uplifted the item
 - Sold or disposed of the item
 - Handed it to an investigator

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

1.5 Statement endorsements

Whenever possible have an interviewee endorse and sign his or her statement. Once the statement is recorded in writing ask the interviewee to read it. If necessary read the statement aloud to him or her.

On the bottom of the statement, write or have the interviewee write:

"I have read the above statement (or the above statement has been read aloud to me) and to the best of my knowledge it is true."

The interviewee should then sign the statement below the endorsement. The investigator then witnesses the endorsement by writing: *"The above statement was recorded and signature witnessed by me at (location) on (date)"*, or if the interviewee has written out the statement himself or herself in the presence of the investigator *"The above statement was made in my presence and signature witnessed by me at (location) on (date)"*.

1.6 Activity recording

All occurrences, actions and decisions must be recorded on an investigation running-sheet or file note. Until the introduction of an online compliance system, the minimum standard is legibly handwritten, records (word-processed documents are preferred) to include, where relevant:

- actions taken in investigating the complaint;
- significant incidents/ events during the course of investigation of the complaint, especially, any occurrences of a breach;
- decisions made that affect the course or outcome of an investigation.

All records made are dated, timed and signed by the writer and either placed without delay on the investigation file, or an annotation made on the file as to where the records may be located.

2 Procedural Fairness

Where practicable, if a supplier is suspected of having breached NCC administered legislation the allegation should be personally put to the supplier. When this occurs:

- the supplier's response should be recorded by the use of contemporaneous notes;
- if the matter is serious then the supplier should be invited to participate in a formal interview;
- should the supplier consent to a formal interview then it may be conducted on audiotape;
- the formal taped record of interview should have appropriate structure and protocols; and
- in all cases only one person suspected of committing the breach should be interviewed at a time.
- the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA) must be taken into account.

3 Assessment of evidence

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

- NCC still has jurisdiction;
- availability, competence and credibility of witnesses;
- manner in which evidence was obtained;
- availability of independent and corroborative evidence;

- availability of competent and admissible evidence;
- sufficient weight of evidence behind each element of an offence;
- supplier has had an opportunity to respond to an allegation;
- lines of defence open to, or indicated by, the supplier; and
- any other factors that could affect the likelihood of successful enforcement action.
- Adherence to all chains of evidence at all times.

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

3.1 Sufficiency of evidence

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

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

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

3.2 Insufficient evidence

If there is insufficient evidence the investigation should be reviewed to identify other avenues of inquiry that can reasonably be expected to reveal further facts to clarify the matter one way or another. If these avenues of inquiry exist they should be followed within reason. An investigation may be closed at any time if there is insufficient evidence to take further action, and continued exploration of the matter cannot reasonably be justified, or for a policy reason.

4 Investigation reporting

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

5 Dealings with the complainant

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

- contact the complainant within five (5) working days;
- confirm the issues for investigation with the complainant;
- explain what NCC can and cannot do;
- advise the estimated time frame for the investigation; and
- make a file note recording the contact made and listing the issues discussed.

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

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

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

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

PART D**INVESTIGATION CASE FILE REVIEW AND AUDIT PROCESSES**

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PART D

(This part was last edited on 10/2/2011)

INVESTIGATION CASE FILE REVIEW AND AUDIT PROCESSES

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

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

1. Scope

This standard applies to, amongst others, staff engaged in investigations, compliance and enforcement duties.

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

2. Business Process – Investigation Case File Review and Audit

The framework is composed of four elements that work together to assess, inquire, address and analyse information relating to complaints and suspected breaches of legislation, and undertake appropriate enforcement, whilst ensuring policy and standards are appropriately applied. These elements are:

- case assessment;
- inquiry;
- enforcement; and
- review.

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

The file review and audit process is conducted in several parts, namely:

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

3. Self / Peer Review

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

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

4. Management Review

Management reviews are an essential part of the case file review and audit process. Drawing on the expertise of supervisors or managers of investigations staff, will ensure a balanced overview of each file is maintained, with appropriate follow-up actions are recommended and monitored. Supervisors and/or managers will complete the Case File Review Checklist – Management Review assessing compliance with accepted investigations methodology and framework requirements.

Completed checklists are to be placed on file and entries made in the Investigation/File Activity Sheets stating when and by whom the last Management review was conducted. An essential prerequisite for completion of the branch review and associated checklist will be the timely and accurate completion of the self / peer review checklist.

Reviewing officers are encouraged to provide feedback to ensure that the review process is both effective and value adding.

5. Issues of Management

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

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