

CONSUMER PROTECTION IN THE BANKING INDUSTRY
IN THE AGE OF TWIN PEAKS

BY

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I dedicate this dissertation to my son Ilukui Alexander Kongwa-the light of my life and a reminder each morning of God's love for our lives. My Father Dr Samuele Kekelwa Kongwa for his encouragement always impressing upon the need to continuously study. My siblings Mr Lubosi Richard Kongwa, Ms Inonge Joyce Iglesias and Mr Mutumba David Kongwa for their unwavering support in endeavours I undertake and always believing in me.

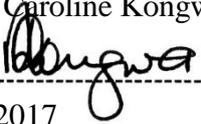
This achievement is in loving memory of my late Mother Ms Namukolo Patricia Kongwa who has been a great pillar of strength in my life, taught me to remain steadfast in what I seek to achieve and proved through her own life that all things are possible.

All Glory be to God, the most high for grace and mercy with whom all of this would not have been possible. Amen.

DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. It has not been submitted for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

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SUMMARY

The 2008 Global Financial Crisis was caused not so much by a failure in prudential regulation but rather by a failure in market conduct regulation. The light touch supervision of financial institutions allowed bad business conduct and greed to continue unabated until it resulted in spectacular financial collapse. The GFC thus highlighted the need for more intrusive, swift regulation of the role players in the financial system. It also highlighted the need for market conduct supervision to support prudential regulation and as such emphasized the role of financial consumer protection resulting in the international policy document *G20 High Level Principles of Financial Consumer Protection* being issued by the OECD in 2011.

Notably banks in South Africa have been prudentially regulated over the years but have never been subjected to dedicated market conduct regulation. Some measure of consumer protection was however afforded to consumers through the voluntary Code of Banking Practice and the Office of the Ombud for Banking Services.

Now in the Twin Peaks system of financial regulation introduced by the Financial Sector Regulation Act 9 of 2017 there will be a significant increase in the focus on financial consumer protection as one of the peaks of this model comprise of the Financial Sector Conduct Authority (FSCA) established as market conduct regulator. The FSCA has a clear mandate and an extended regulatory toolkit to enforce this mandate. Banks will now for the first time be subject to a dedicated market conduct regulator and this dissertation aims to provide an overview of how financial consumer protection in the banking industry will be increased due to the role that the FSCA will fulfil in the Twin Peaks model and the principles of “Treating Customers Fairly” that will be a key component in the FSCA’s mandate.

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Chapter One Introduction

1.1 The need for financial consumer protection

The financial well-being of society is closely linked to economic growth. The financial industry presents a wide market structure and opportunities wherein a part of the economic activity of the society takes place. This impacts on and affects the day to day life of the citizenry as huge amounts of funds flow whilst those in the banking industry value chain realises profits or losses through the provision of financial services and products. The financial services sector presents a myriad particularities which require slightly different treatment of consumers and thus consumer protection in the banking industry requires appropriate design.

The Consumer Protection Act (CPA)¹, which came into full operation on 31 March 2011, sets out as its primary aim the promotion and advancement of the social and economic welfare of consumers in South Africa through establishing a legal framework for maintaining a fair, accessible and efficient consumer marketplace; reducing and ameliorating any disadvantages experienced in accessing goods or services by vulnerable consumers; promoting fair business practices; encouraging responsible consumer behaviour and responsibility; promoting consumer education and empowerment and providing an efficient and accessible system of redress and consensual resolution of disputes for consumers.² However although the CPA currently applies to certain products and services the CPA is not banking sector specific legislation and thus the consumer protection offered by the CPA cannot be said to be dedicated “financial” consumer protection per se.

With its current move towards a Twin Peaks model of financial regulation South Africa is however undergoing a radical change with regard to its approach to the treatment of consumers of financial products and services. The Financial Sector Regulation Act 9 of 2017 that applies to financial institutions that render financial services and products, sets out the framework for the South African Twin Peaks model. In terms of the FSRA a Prudential Authority is established that is tasked with a prudential mandate of overseeing the safety and soundness of all financial institutions, including banks.³ Notably in the pre-Twin Peaks dispensation banks were prudentially regulated by the South African Reserve Bank as central bank but this did not

¹ The Consumer Protection Act 68 of 2008.

² S 3 of the Consumer Protection Act.

³ See s 32 to 34 regarding the establishment, objectives and functions of the Prudential Authority.

cover business conduct regulation of banks. The Financial Sector Regulation Act however creates the Financial Sector Conduct Authority (FSCA) as new market conduct authority that will oversee the business conduct of all financial institutions, including banks.⁴ In this Twin Peaks Model the South African Reserve Bank, as central bank, is mandated to oversee financial stability in terms of a system-wide macro-prudential mandate. Bank supervision has however been removed from the remit of the Reserve Bank and, as indicated, this task has been given to the Prudential Authority.⁵ Notably section 10(2) of the Financial Sector Regulation Act excises the application of the CPA to matters that will be regulated by the new FSCA. The establishment of the FSCA will thus usher in a new era of focused and dedicated financial consumer protection that all financial institutions and specifically banks who were not previously subjected to dedicated market conduct regulation, will have to adhere to.

The object of the Financial Sector Regulation Act is stated as follows in section 7:

“The object of this Act is to achieve a stable financial system that works in the interests of financial customers and which supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes—

- (a) financial stability;
- (b) the safety and soundness of financial institutions;
- (c) the fair treatment and protection of financial customers;
- (d) the efficiency and integrity of the financial system;
- (e) the prevention of financial crime;
- (f) financial inclusion;
- (g) transformation of the financial sector; and
- (h) confidence in the financial system.”

The Twin Peaks model set out in the Financial Sector Regulation Act thus conveys structural intervention with regards to market conduct regulation and how customers should be treated fairly. It is of great importance that consumer protection measures coupled with the structural interventions brought about by the implementation of a Twin Peaks model in South Africa will address gaps in the currently regulated framework and address the relevant lessons learnt from the 2008 Global Financial Crisis (GFC) as discussed in more detail in Chapter Two.

⁴ See s 56 to 58 regarding the establishment, objectives and functions of the FSCA.

⁵ See s 11 to 31 regarding the financial stability mandate of SARB and the framework within which this mandate has to be exercised.

1.2 Nature and scope of the research

The purpose of the dissertation is to investigate the rationale behind financial consumer protection; reflect upon the G20 high level principles for effective financial consumer protection; and specifically examine how South Africa will address the issue of market conduct regulation in the Twin Peaks model of financial regulation, focusing also on the “Treating Customers Fairly” approach as set out in the discussion document issued by National Treasury in December 2014.⁶

The research question that will be central to this dissertation is whether the Twin Peaks model, through the establishment of the Financial Sector conduct authority, will assist in introducing greater financial consumer protection in the South African banking industry?

1.3 Research Methodology

The study will be desk top doctrinal research. I will examine policy documents, text books and journal articles. A specific study will be made of the provisions of the Financial Sector Regulation Act 9 of 2017 that provides for the establishment of the Financial Sector Conduct Authority (FSCA) as new market conduct regulator. It is to be noted that this topic is very new and currently there is a dearth of scholarly literature on the FSCA hence this dissertation will refer to the Financial Sector Regulation Act and relevant policy documents for purposes of addressing the study.

1.4 Delimitation

The focus of this dissertation will be on protection of financial consumers in the retail market and thus the dissertation will not address the proposed *Fair Markets Review* that will be undertaken by National Treasury in 2018 with regard to the wholesale financial market.

1.5 Chapter Lay-out

⁶ “Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework For South Africa” Discussion Document December 2014 available at www.nationaltreasury.gov.za accessed on 22 November 2017(hereinafter Treating Customers Fairly Policy Document).

Chapter One provides the background to the study. It sets out the rationale behind financial consumer protection as well as the research question. It also provides an indication of the research methodology and the chapter lay-out.

Chapter Two provides an overview of the causes of the 2008 Global Financial Crisis and the lessons subsequently learnt from the Crisis that spurred the regulatory shift towards greater financial consumer protection.

Chapter Three sets out problems in the context of financial services and products that existed prior to South Africa's move towards a Twin Peaks model of financial regulation. Specific attention is given to the Code of Banking Practice as a voluntary code that promotes greater financial consumer protection under the auspices of self-regulation.

Chapter Four then provides an overview of the role of the Financial Sector Conduct Authority, established in terms of the Financial Sector Regulation Act 9 of 2017, in the context of providing greater consumer protection to South African consumers, also in the banking sector. The basic principles of the "Treating Customers Fairly in the Financial Sector" approach is also discussed and the dissertation is concluded with some recommendations.

2.1 The Global Financial Crisis

The 2008 Global Financial Crisis (GFC) was a watershed event in the landscape of financial regulation and brought about significant shifts in how financial regulation is approached, notably also in the context of financial consumer protection. It is generally accepted that the GFC was triggered by the subprime mortgage crisis in the USA that was occasioned by the extension of subprime mortgages to persons who could not afford these mortgages –all under the ideal that “everyone in the United States should own a home.” These toxic mortgages with their high probability of default was then repackaged and securitized and sold off to investors across the globe. The US derivative markets were equally toxic with traders taking excessive risks in their pursuit of big bonuses.⁷

Various lessons, have been learnt from the GFC, as there were disastrous failures in financial regulation and supervision; corporate governance failures in financial institutions; excessive borrowing, risky investments; breakdown of accountability and ethics and failure of credit rating agencies to assess risks.⁸ The main lessons learnt from the 2008 GFC which have influenced the new global regulatory paradigm post-GFC, were:⁹

- (a) The need for a holistic view of financial sector regulation
- (b) The failure of light touch regulation and the regulatory gaps presented because of the existing silo approach to financial regulation
- (c) The need to focus not only on micro prudential regulation but also macro prudential regulation¹⁰
- (d) The importance of regulating market conduct to support prudential regulation;
- (e) The need for global co-operation in preventing macro-economic imbalances;
- (f) The importance of swift regulatory action to prevent contagion occasioned by the occurrence of a systemic event¹¹, avoiding or cushioning the effect thereof on other

⁷ Borio , ‘The Financial Turmoil of 2007–?: A Preliminary Assessment and Some Policy Considerations’, 2008 BIS Working Papers No 251.

⁸ National Treasury Policy Document “A safer financial sector to serve South Africa better” (2011) available at <http://treasury.gov.za> accessed on 8 September 2017.

⁹ Ibid.

¹⁰ Micro-prudential regulation focuses on the safety and soundness of individual institutions whereas macro-prudential regulation takes a systemwide approach.

¹¹ A systemic event is described in section 1 of the Financial Sector Regulation Act as “an event or circumstance, including one that occurs or arises outside of the Republic, that may reasonably be expected to have a substantial

institutions.

As many of the spectacular failures of financial institutions, such as the US subprime mortgage crisis, during the GFC were precipitated by the way that these institutions conducted themselves in their business with their consumers¹², the GFC highlighted and informed the need for greater financial consumer protection and more stringent regulatory action in this regard post-GFC.

2.2 The G20 High Level Principles for Effective Financial Consumer Protection

The aftermath of the 2008 GFC brought about a rethink of financial consumer protection on a global scale that is encapsulated in the *G20 High Level Principles for Effective Financial Consumer Protection*.¹³ These principles that were developed in 2011 by the OECD Committee on Financial Markets' Task Force on Financial Consumer Protection in collaboration with the Financial Stability Board and other roleplayers, were premised on the view that it is essential to protect consumer rights whilst also recognising that these rights come with consumer responsibilities.¹⁴ South Africa being a member of the G20 also subscribes to the *G20 High Level Principles for Effective Financial Consumer Protection* and these principles thus influence the reform that South Africa undertook to initiate with regards to financial consumer protection.

The following standards pertaining to financial consumer protection were laid down by the G20 in the aforesaid *High Level Principles for Effective Financial Consumer Protection*:

adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payments systems, settlement systems or financial markets, or financial institutions are able to continue to provide financial products or financial services, or services provided by a market infrastructure.”

¹² See for instance Engel and McCoy *The Subprime Virus* (2013) at 1-42 where they explain how mortgage application were manipulated and how consumers were deceived so that financial institutions that were engaged in mortgage lending could generate more transactions and higher profits.

¹³ Available at <http://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf> accessed on 3 August 2017.

¹⁴ The *High-level Principles on Financial Consumer Protection* which were endorsed by the G20 Finance Ministers and Central Bank Governors on 14-15 October 2011.

2.2.1 Principle 1: Legal, Regulatory and Supervisory Framework

This principle states the importance of having an overarching framework through which a country can develop its financial consumer protection principles. It states that financial consumer protection should be an integral part of a country's legal, regulatory and supervisory framework, and should reflect the diversity of national circumstances and global market and regulatory developments within the financial sector.¹⁵

2.2.2 Principle 2. Role of Oversight Bodies

This principle emphasizes the need for a dedicated regulator who oversees market conduct and has operational independence. It entails that there should be an oversight body dedicated and explicitly responsible for financial consumer protection, with the necessary authority to fulfil its mandates. There is thus a need for clear and objectively defined responsibilities and appropriate governance; operational independence; accountability for their activities; adequate powers; resources and capabilities; a defined and transparent enforcement framework and clear and consistent regulatory processes.¹⁶

2.2.3 Principle 3: Equitable and Fair Treatment of Consumers

This principle entails that all financial consumers should be treated equitably, honestly and fairly at all stages of their relationship with financial service providers. Treating consumers fairly should be an integral part of the good governance and corporate culture of all financial services providers and authorised agents.¹⁷

2.2.4 Principle 4. Disclosure and Transparency

This principle requires financial services providers and authorised agents to provide consumers with key information that informs the consumer of the fundamental benefits, risks and terms of the product. Consumers should be made aware of the importance of providing financial services providers with relevant, accurate and available information. They should also be

¹⁵ *G20 High Level Principles of Financial Consumer Protection* at 5.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

provided with information on conflicts of interest associated with the authorised agent through which the product is sold.¹⁸

2.2.5 Principle 5. Financial Education and Awareness

With the level of literacy required of not only the financial service provider, financial education and awareness should be promoted by all relevant stakeholders and clear information on consumer protection, rights and responsibilities should be easily accessible by consumers. The provision of broad based financial education and information to deepen consumer financial knowledge and capability should be promoted, especially for vulnerable groups.¹⁹

2.2.6 Principle 6: Responsible Business Conduct of Financial Services Providers and Authorised Agents

In accordance with this principle, financial services providers and authorised agents should have as an objective, to work in the best interest of their customers and be responsible for upholding financial consumer protection. Financial services providers should also be responsible and accountable for the actions of their authorised agents.²⁰

2.2.7 Protection of Consumer Assets against Fraud and Misuse

This principle states that relevant information, control and protection mechanisms should appropriately and with a high degree of certainty protect consumers' deposits, savings, and other similar financial assets, including against fraud, misappropriation or other misuses.²¹

2.2.8 Protection of Consumer Data and Privacy

Consumers' financial and personal information should be protected through appropriate control and protection mechanisms. These mechanisms should define the purposes for which the data may be collected, processed, held, used and disclosed (especially to third parties). The mechanisms should also acknowledge the rights of consumers to be informed about data-

¹⁸ Ibid.

¹⁹ *G20 High Level Principles of Financial Consumer Protection* at 6.

²⁰ Ibid.

²¹ *G20 High Level Principles of Financial Consumer Protection* at 7.

sharing, to access data and to obtain the prompt correction and/or deletion of inaccurate, or unlawfully collected or processed data.²²

2.2.9 Complaints Handling and Redress

This Principle requires jurisdictions to ensure that consumers have access to adequate complaints handling and reform mechanisms that are accessible, affordable, independent, fair, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on the consumer. In accordance with the aforementioned, service providers and authorised agents should have in place mechanisms for complaints handling and redress. Recourse to an independent process should be available to address complaints that are not adequately resolved via the financial service providers and authorised agents internal dispute resolution mechanisms. It is required that at a minimum aggregate information with respect to complaints and their resolution should be made public.²³

2.2.10 Competition

Competition in itself is a way of extending financial consumer protection as a competitive financial markets results in lower prices and more product choices.²⁴ Principle 10 thus states that nationally and internationally competitive markets should be promoted in order to provide consumers with greater choice amongst financial services and create competitive pressure on providers to offer competitive products, enhance innovation and maintain high service quality. Consumers should be able to search, compare and, where appropriate, switch between products and providers easily and at reasonable and disclosed costs.²⁵

2.3 Twin Peaks: towards greater financial consumer protection in South Africa

Although South Africa's financial institutions were relatively resilient during the GFC, the indirect impact through job losses was devastating and it also became clear that some reform

²² Ibid.

²³ Ibid.

²⁴ Neuhoff *et al* *A Practical Guide to the South African Competition Act* (2016) at 9.

²⁵ G20 High Level Principles of Financial Consumer Protection at 10.

in the approach to financial sector regulation was necessary.²⁶ The erstwhile Minister of Finance Pravin Gordhan remarked that “the financial sector affects all people and companies who transact through the financial system....The global financial crisis has demonstrated the weakness of a light-touch financial regulatory system. Even through our financial system weathered the storm, South Africa lost nearly a million jobs as a result of the global contagion that originated from the crisis in the banking and financial systems of the developed world. Had South Africa experienced a financial crisis, many jobs would have been lost....The dilemma that faces most countries is that the financial sector is globally integrated, but regulated nationally. For this reason there needs to be minimum international standards and greater co-ordination among different national regulators. Through our participation in the multilateral institutions’ and forums such as the IMF, the G20, the Financial Stability Board, the Basel Committee on Bank Supervision....South Africa has committed itself to implement higher global financial standards to make the financial sector safer and better. It is against this background we have committed ourselves to a wide ranging set of reforms....the effort to improve the institutional structures to support financial regulation.”

The drive for greater protection of financial consumers in South Africa gained momentum after the 2008 GFC with the move from a sectoral model of financial regulation towards a Twin Peaks model of financial regulation which gives priority to business conduct regulation as one of the peaks of financial regulation. “Twin Peaks” as a regulatory approach was the brainchild of Michael Taylor who devised this approach in 1995. The Twin Peaks model was stated to be a focused approach to financial regulation, designed to yield greater efficiencies than that produced by a fragmented regulation of the financial system.²⁷ Taylor’s idea was that when financial services are regulated, it should be done with two goals in mind, namely to protect the stability and integrity of the financial system (“systemic protection”) and to ensure that the interests of individual depositors, investors, and policy-holders are protected (“consumer protection”).²⁸ He suggested that to ensure efficient financial regulation and supervision a Twin Peaks model comprising of systemic protection, on the one hand, and consumer protection, on the other hand, should be implemented and that these “peaks” should be regulated by two separate bodies, having overlapping staff and governing boards, all answerable to the Treasury.

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²⁶National Treasury Policy Document 2011 ‘A safer financial sector to serve South Africa better’<http://www.treasury.gov.za/twinpeaks/20131211%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> accessed 6 November 2016

²⁷Michael Taylor “*Twin peaks*”: *A regulatory structure for the new century* published by the Centre for the Study of Financial Innovation, 1995 – Financial Service Industry - Issue 20 of DSFI series, hereinafter Taylor 1995.

²⁸ Ibid.

²⁹ Ibid.

The evolution of the South African Twin Peaks model can be traced back to 2011 when the National Treasury published a policy paper titled ‘A safer financial sector to serve South Africa better’³⁰ Consumer protection and market conduct regulation was set as policy priority to particularly to curb the unfair treatment of customers and to protect the poor and vulnerable from unfair market conduct. National Treasury pointed out that financial consumer protection cuts across the four policy priorities of financial stability, consumer protection, financial inclusion and combatting financial crime. It also involved aspects such as financial inclusion, treating customer fairly principles, access to financial services, financial education strategies and the need for consumers to have a readily available alternative dispute resolution mechanism in form of an Ombud.³¹

The policy paper on ‘A safer financial sector to serve South Africa better’ sets out the argument that from a consumer protection point of view financial services are different. Further it is argued that the financial services sector also has a number of peculiarities which require slightly different treatment and thus consumer protection in the financial services requires appropriate design.

The aforementioned policy paper argues that the financial services industry should be held to a higher standard of consumer protection than other industries for a number of reasons:

- (a) loss of deposits or savings imposes immediate hardship on consumers;
- (b) the underperformance or even failure of financial products such as retirement annuities may impose considerable hardship on consumers;
- (c) quality or appropriateness of financial products such as life, property and income protection insurance is only established sometime after purchase or when a disaster occurs;
- (d) many long term financial contracts impose heavy penalties for cancellation and switching;
- (e) high and opaque fees;
- (f) information asymmetry.

³⁰ National Treasury Policy Document 2011 ‘A safer financial sector to serve South Africa better’<http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%20%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> accessed 6 November 2017.

³¹ Ibid.

The National Treasury policy paper titled ‘A safer financial sector to serve South Africa better’(commonly known as the Red Book)³² was followed by a further policy paper in 2013 titled ‘Implementing a twin peaks model of financial regulation in South Africa’ (commonly known as the Roadmap)³³. Legislative developments thereafter ensued which resulted in a number of drafts of the Financial Sector Regulation Bill which set out the Twin Peaks framework of financial regulatory reform in South Africa. Eventually on 21 August 2017 the Financial Sector Regulation Act 9 of 2017 was signed into law by the President although it has not yet been put into operation at the time of writing this dissertation.

³²<http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> accessed 6 November 2016

³³ <http://www.gov.za/sites/www.gov.za/files/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> accessed 6 November 2016

Chapter 3 Financial Consumer Protection in the Banking Industry prior to Twin Peaks

3.1 Introduction

The sectoral model of financial regulation that prevailed in South Africa prior to the GFC in terms whereof various regulators supervised different financial institutions created a fragmented approach to financial consumer protection and left many regulatory gaps, such as for instance the lack of market conduct regulation of banks.³⁴ Various problems existed in the context of financial consumer protection inter alia³⁵

- (a) financial service providers appeared insufficiently focused on customer needs and interests;
- (b) many market conduct challenges were common across the sub-sectors in the financial sector;
- (c) structural intervention was required to address poor customer outcomes due to poor financial literacy;
- (d) abusive practices existed even where there was already regulatory coverage;
- (e) regulatory silo's impeded reform which lead to fragmented supervision and regulatory arbitrage;
- (f) financial consumers were not sufficiently empowered and literate;
- (g) fee structures were opaque and complex;
- (h) there was a focus on premium price rather than value;
- (i) unsuitable, incorrectly targeted products were sold;
- (j) inadequate or poor disclosures were made to financial consumers

³⁴ In terms of the Banks Act the South African Reserve Bank was the prudential supervisor of banks. However no dedicated market conduct regulator for banks existed.

³⁵ Treating customers fairly in the financial sector (A draft market conduct policy framework for South Africa, December 2014)
<http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> accessed 31 July 2017

3.2 The Code of Banking Practice

In the banking industry the Code of Banking Practice sought to infuse a greater measure of financial consumer protection prior to South Africa's move towards a Twin Peaks model of Financial regulation. The Code of Banking Practice³⁶ is a voluntary code for banks that are members of the Banking Association of South Africa (BASA)³⁷. The Code came into effect in 2004 and was amended in 2012.³⁸ It sets out the minimum standards for service and conduct that a consumer can expect of a bank and regulates the provision of services and products and how they relate to the consumer at a personal level and small business customer level.³⁹ The Code applies to personal and small business customers. A 'personal customer' is 'any individual who maintains an account or who receives other services from a bank'.⁴⁰ A 'small business' is a business with a turnover of less than R5 for the last financial year.⁴¹ However even small businesses with an annual turnover of R10 million or less per year may make use of the services of the banking ombudsman.⁴²

The Code of Banking Practice highlights the rights and responsibilities of the consumer and that of the bank in serving the consumer guided by four main principles i.e. fairness, transparency, accountability and reliability. As such the Code covers a wide range of aspects that fall within the scope of the bank's relationship with its customer and the range of services and products delivered by banks to their customers and contains provisions that cover the following matters: customer entitlements and responsibilities⁴³; key commitments by banks⁴⁴;

³⁶ The code of banking practice,2012 <http://www.banking.org.za/docs/default-source/default-document-library/code-of-banking-practice-2012.pdf?sfvrsn=10> accessed 11 August 2017

³⁷ [The Banking Association South Africa is the mandated representative of the banking sector and addresses industry issues through:](#)

- ✦ Lobbying and advocacy
- ✦ Policy influence
- ✦ Guiding transformation in the sector
- ✦ Acting as a catalyst for constructive and sustainable change in the sector
- ✦ Engagement with critical stakeholders

<http://www.banking.org.za/about-us/association-overview> Accessed 11 August 2017. BASA ensures that it facilitates an enabling conducive banking environment through robust engagement with government and stakeholders ensuring that they play an enabling role within the context of transformation challenges prevailing in South Africa.

³⁸ The 2012 Code of Banking Practice is available at www.banking.org.za. The Code was inter alia revised to align it with the measure of protection afforded by the Consumer Protection Act 68 of 2008 that came into full effective operation on 31 March 2011.

³⁹ Turnover should be less than R1 Million

⁴⁰ Cl 12 of the Code.

⁴¹ Cl 12 of the Code.

⁴² Terms of Reference par 3.1(b) (31 May 2011).

⁴³ Cl 3 of the Code.

⁴⁴ Cl 4 of the Code.

access to banking services⁴⁵; principles of conduct⁴⁶: confidentiality and privacy; equal treatment; marketing, advertising promotion, loyalty and rewards programmes; credit insurance ; disclosure; charges and fees; interest rates and copies of documents; accounts⁴⁷; credit⁴⁸; payment services⁴⁹ and dispute resolution.⁵⁰

The Code makes provision for the office of the Ombud for Banking Services (OBS) whose jurisdiction has been consented to by the members of BASA. The OBS deals with complaints relating to products and services of a bank to the value of less than R2 Million, and that have arisen within three years from referral.⁵¹

The OBS has jurisdiction to mediate and making determinations on matters referred to in terms of the Code of Banking Practice and the law where appropriate. Its decisions are based in fairness. Determinations by the OBS can be made an order of court if both the bank and consumer consent. If a bank refuses to make a recommendation of the refusal to comply then the OBS is permitted to publish same on its website. The primary role of the OBS is to ensure consumer protection in the banking industry considering that the matters referred to the OBS for mediation are influenced by the Code of Banking Practice, matters emanating from the FAIS Act, the National Credit Act and the Consumer Protection Act.⁵²

The advantages of the Code of Banking Practice are that it seeks to promote good banking practices by setting minimum standards for the bank when dealing with a consumer; increase a better understanding of what to reasonably expect of the product and services; seeks to promote fair and open relationships between the bank and the consumer; and attempts to foster consumer confidence in the banking system.

The Code makes no specific mention of consumer protection even though on assessment of the provisions of the Code of Banking Practice it is clearly aligned to the consumer rights set in the CPA⁵³ Whilst it is an ideal conduit through which financial consumer protection could

⁴⁵Cl 5 of the Code.

⁴⁶Cl 6 of the Code.

⁴⁷Cl 7 of the Code.

⁴⁸Cl 8 of the Code.

⁴⁹Cl 9 of the Code.

⁵⁰Cl 10 of the Code.

⁵¹ <http://www.banking.org.za/about-us/association-overview> Accessed 11 August 2017

⁵² Ibid.

⁵³ Chapter 2 and 3 of the CPA.

effectively and efficiently be dealt with the self-regulation model and the Code of Banking Practice has its shortcomings. The exact status of the Code of Banking Practice is uncertain and it is submitted that this may impede its ability to create a solid basis for enforceable financial consumer protection. Du Toit however is of the view that the South African Code of Banking Practice is much more than an ethical code or mere soft law. Initially the 2004 version of the Code provided that none of the provisions of the Code would be legally binding in any court of law and that the Code's provisions could not be used to influence the interpretation of the legal relationship between the customer and the bank.⁵⁴ The 2004 version also stated that the Code would not give rise to a trade custom or tacit contract or otherwise between the customer and the bank.⁵⁵ In contrast to the aforementioned clause of the 2004 Code the 2012 Code makes no mention of the binding nature of the Code in a court of law. However Du Toit remarks that it would be possible to regard some of the provisions of the Code as terms implied into the bank-customer agreement by law (*naturalia*) derived from trade usage.⁵⁶ He states that it is also possible that a trade usage may 'harden' into a rule of law as all banks who are members of the Banking Association of South Africa (BASA) should apply and promote the Code to their clients, and accordingly the provisions of the Code might well be regarded 'as universally and uniformly observed within the banking industry.'⁵⁷

The Code of Banking Practice indeed plays a significant role in practice in extending some measure of protection to consumers in the banking industry. Nevertheless it is submitted that the Code by itself does not provide comprehensive financial consumer protection that is aligned with all the principles stated in the G20 High Level Principles of Effective Financial Consumer Protection as discussed in Chapter Two or that may be enforceable in a court of law. The measure of financial consumer protection in the banking industry may however see some significant improvement due to South Africa's move to a Twin Peaks model of financial regulation which now brings banks within the supervisory jurisdiction of the new market conduct regulator, the Financial Sector Conduct Authority (FSCA) as alluded to in more detail in Chapter 4. This is also because the Treating Financial Customers Fairly" approach will be one of the key matters on the FSCA's regulatory agenda.

⁵⁴ Cl 1 of the 2004 Code.

⁵⁵ *Ibid.*

⁵⁶ Du Toit "Reflections on the South African Code of Banking Practice" 2014 TSAR 568-579 at 570.

⁵⁷ *Ibid.* He points out that it would not matter if a bank occasionally departs from the code. He further indicates (at 572) that even if one were to insist in the requirement that the trade usage must have been 'long-standing' to be recognized by a court of law, many of the provisions from the 2012 Code were taken from, or are similar to provisions in previous versions and he argues that they can thus still be regarded as long-established or because a particular usage probably already existed even before its inclusion in any version of the Code.

Chapter Four The Financial Sector Conduct Authority and market conduct regulation

4.1 Introduction

Protecting consumers and ensuring that they are treated fairly by financial institutions is the essence of market conduct policy and law. Market conduct regulation aims to prevent, and otherwise manage, the dangers that arise from a financial institution conducting its business in ways that are unfair to customers or that undermines the integrity of financial markets and confidence in the financial system.⁵⁸ Market conduct regulation aims to minimise the potential for financial institutions to exploit or unfairly treat their customers (conduct risk) and prioritise a positive customer experience and outcomes aligned to the customer's needs and expectations.⁵⁹ Given that no dedicated regulator existed to oversee market conduct by banks in the pre-Twin Peaks regime it is submitted that the establishment of the Financial Sector Conduct Authority (FSCA) as market conduct regulator in terms of section 56 of the Financial Sector Regulation Act as discussed in more detail below, will serve to improve the level of consumer protection to financial customers in the banking sector.

4.2 The Financial Sector Conduct Authority

4.2.1 Mandate and Objectives

The Financial Sector Conduct Authority (FSCA) is one of the regulatory peaks of the Twin Peaks model. It replaces the previously existing Financial Services Board (FSB) and has a far more comprehensive mandate than the FSB as it is the systemwide market conduct regulator for all financial institutions, including banks. The FSCA is managed by an executive committee consisting of the Commissioner of the FSCA and Deputy Commissioners.⁶⁰ Within 6 months after the date on which Chapter 4 of the FSRA takes effect the executive committee must adopt a regulatory strategy for the FSCA that must be reviewed at least annually and may be amended at any time. This regulatory strategy must inter alia set guiding principles for the FSCA on how it should perform its regulatory and supervisory functions.⁶¹

⁵⁸ Treating customers fairly in the financial sector (A draft market conduct policy framework for South Africa, December 2014) <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> accessed 31 July 2017.

⁵⁹ Ibid.

⁶⁰ S60 of the Financial Sector Regulation Act read with s62.

⁶¹ S70(1) read with s70(2) and (3) of the Financial Sector Regulation Act.

Section 76 sets out the obligation of the FSCA to collaborate with the Reserve Bank and the other regulators when performing their functions in terms of financial sector laws. In this regard the financial sector regulators and the Reserve Bank must enter into memoranda of understanding and must also publish same.⁶²

The objective of the Financial Sector Conduct Authority is to enhance and support the efficiency and integrity of financial markets; and protect financial customers by promoting fair treatment of financial customers by financial institutions; and to provide financial customers and potential financial customers with financial education programs, and otherwise to promote financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions. The FSCA must also assist the Reserve Bank in maintaining financial stability.⁶³

4.2.2 Functions

In order to achieve its objective, the FSCA must regulate and supervise the conduct of financial institutions. It must co-operate with, and assist, the Reserve Bank, the Financial Stability Oversight Committee⁶⁴, the Prudential Authority, the National Credit Regulator, and the Financial Intelligence Centre, as required in terms of the FSRA. It must also co-operate with the Council for Medical Schemes in the handling of matters of mutual interest; promote sustainable competition in the provision of financial products and financial services, including through co-operating and collaborating with the Competition Commission. It is further tasked to promote financial inclusion; regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions. The FSCA must also administer the collection of levies and the distribution of amounts received in respect of levies; conduct and publish research relevant to its objective; monitor the extent to which the financial system is delivering fair outcomes for financial customers, with a focus on the fairness and appropriateness of financial products and financial services and the extent to which they meet the needs and reasonable expectations

⁶² S77 of the Financial Sector Regulation Act.

⁶³ S57 of the Financial Sector Regulation Act.

⁶⁴ Established in terms of section 20 of the Financial Sector Regulation Act to primarily support the Reserve Bank in performing its functions in relation to financial stability.

of financial customers. Finally it must formulate and implement strategies and programs for financial education for the general public.⁶⁵

4.3 Regulatory toolkit

The framework for financial consumer protection created by the Financial Sector Regulation Act will be of little value unless the Act also provides the FSCA with the necessary regulatory powers. Accordingly the FSCA is empowered with a regulatory toolkit that is directed at enabling it to effectively execute its mandate. This toolkit comprises the ability to issue standards and directives, enter into enforceable undertakings, make debarment orders and impose administrative penalties. It also includes specific investigative powers that are entrusted to the FSCA.⁶⁶

4.3.1 Standards

A very important power that the FSCA will have that will serve to enhance financial consumer protection is its power to make conduct standards. Section 106 (1) empowers the FSCA to make conduct standards for or in respect of financial institutions; representatives of financial institutions; key persons of financial institutions and contractors. The conduct standards must be aimed at achieving on or more of the following:⁶⁷

- (a) ensuring the efficiency and integrity of financial markets;
- (b) ensuring that financial institutions and their representatives treat customers fairly;
- (c) ensuring that financial education programmes or other activities promoting financial literacy are appropriate;
- (d) reducing the risk that financial institutions, representatives, key persons and contractors engage in conduct that is or contributes to financial crime; and assisting in maintaining financial stability.

Conduct standards may be made on efficiency and integrity requirements for financial markets and measures to combat abusive practices. It may also be made on requirements for the fair treatment of consumers, including in relation to: the design and suitability of financial products and services; the promotion, marketing and distribution of, and advice in relation to,

⁶⁵ Section 57 of the Financial Sector Regulation Act.

⁶⁶ See sections 129 -139 of the Financial Sector Regulation Act.

⁶⁷ Section 106(2) of the Financial Sector Regulation Act.

those products and services; the resolution of complaints and disputes relating to those services, including redress; the disclosure of information to financial customers. It further includes principles, guiding processes and procedures for the refusal, withdrawal or closure of a financial service or product by a financial institution. In this regard consideration must be given to relevant international standards and practices, and subject to the requirements of any other financial sector law or the Financial Intelligence Centre Act, including disclosures to be made to the financial customer and reporting of any refusal, withdrawal or closure to a financial sector regulator. Other aspects on which the FSCA may issue standards include the design, suitability, implementation, monitoring and evaluation of financial education programmes, or other initiatives promoting financial literacy.⁶⁸

In accordance with section 106(4) a conduct standard may declare specific conduct in connection with a financial product or service to be “unfair business conduct” if the conduct:

- (a) is or is likely to be materially inconsistent with the fair treatment of financial customers;
- (b) is deceiving, misleading or is likely to deceive or mislead financial customers;
- (c) is unfairly prejudicing or is likely to unfairly prejudice financial customers or a category of financial customers; or
- (d) impedes in any other way the achievement of any objectives of a financial sector law.

In relation to a credit provider regulated in terms of the National Credit Act⁶⁹ the FSCA may however only make conduct standards as provided for in section 108, as indicated below, and the only after consultation with the National Credit Regulator.⁷⁰

In accordance with section 108 conduct standards may be made on the following additional matters: fit and proper requirements; governance; appointment, duties, responsibilities, remuneration, reward, incentive schemes and the suspension and dismissal of members of governing bodies and their substructures and of key persons; the operation of and operational requirements for financial institutions; financial management; risk management; control functions; record-keeping and data management; reporting by financial institutions and representatives to a financial sector regulator; outsourcing; insurance arrangements, including reinsurance of financial institutions; amalgamation, merger, acquisition, disposal and dissolution of financial institutions; requirements for identification and management of conflicts of interest and requirements for safekeeping of assets.

⁶⁸ Section 106(3)(a) to (d) of the Financial Sector Regulation Act.

⁶⁹ Act 34 of 2005.

⁷⁰ S106 (5) and (6) of the Financial Sector Regulation Act.

Where a standard concerns providers of payment services or is aimed at assisting in financial stability the FSCA must first obtain the concurrence of the Reserve Bank.⁷¹ Standards made by the FSCA must also be published on its website in accordance with section 108(3).

4.3.2 Directives

Whereas standards lay down minimum requirements for conduct by financial institutions directives are regulatory tools that the FSCA can use to ensure that financial institutions comply with the conduct standards that the FSCA issued. The FSCA may accordingly issue a written directive to a financial institution requiring the institution to take certain action specified in the directive. Directives may be issued if the financial institution is conducting its business in a way that poses a material risk to the efficiency and integrity of financial markets; if the financial institutions treatment of customers are such that the institution will not be able to comply with its obligations in relation to fair treatment of consumers and if the institution is providing financial education in a manner that is not in accordance with the relevant conduct standards.⁷² Directives may also be issued if the financial institution or a key person, representative or contractor of the financial institution has contravened or is likely to contravene a financial sector law for which the FSCA is the responsible authority or has not complied with an enforceable undertaking accepted by the FSCA or is involved or likely to be involved in financial crime or is causing or contributing or likely to contribute to instability in the financial system.⁷³

The aim of the directive must be to stop the financial institution from contravening financial sector laws, or reducing the risk of such contraventions; ensuring that the institution or the person to whom the directive is issued complies with the enforceable undertaking that was accepted by the FSCA; stop its involvement in financial crime and reducing the risk of such involvement; reducing the risk that a systemic event may occur or remedying the effects of a contravention of a financial sector law or a person's involvement in financial crime.⁷⁴

Before issuing a directive to a financial institution the FSCA must follow a consultative process as set out in section 146 of the FSRA. The Directive must specify a reasonable period

⁷¹ S109 of the Financial Sector Regulation Act.

⁷² S144(1)(a) to (c) of the Financial Sector Regulation Act.

⁷³ S144(1)(d) of the Financial Sector Regulation Act.

⁷⁴ S144(3) of the Financial Sector Regulation Act.

for compliance and the financial institution or person to whom the directive is issued is obliged to comply with the directive.⁷⁵

4.3.3 Enforceable undertakings

Another tool that the FSCA can use to improve financial consumer protection is that of enforceable undertakings. In terms of section 151 a person may give a written undertaking to the FSCA concerning that person's future conduct and once accepted by the FSCA that undertaking becomes enforceable by the FSCA. An enforceable undertaking may include an undertaking to provide specific redress to financial customers.⁷⁶ The FSCA may then publish such financial undertaking. Upon non-compliance with an enforceable undertaking the FSCA may then approach the Tribunal to make any one or more of the following orders:⁷⁷

- (a) an order directing the person to comply with the undertaking;
- (b) if the undertaking relates to a past contravention of the Financial Sector Regulation Act, an order directing the person to perform a specified act, or to refrain from a specified act, in order to remedy the effects of the contravention and/or to ensure that the person does not contravene the undertaking again;
- (c) any other incidental or relevant order.

Where a person fails to comply with an order by the Tribunal regarding an enforceable the FSCA may file a certified copy of the Tribunal with the Registrar of a competent court upon which the Tribunal order then has the effect of a civil judgment and may be enforced as if lawfully given by that court.⁷⁸

4.3.4 Debarment orders

Debarment orders are also regulatory tools that can improve financial consumer protection. The FSCA may make a debarment order in respect of a natural person if that person has contravened a relevant financial sector law in a material way; or materially contravened an acceptable undertaking that was accepted by the FSCA; or attempted or conspired with, aided; abetted; induced; incited or

⁷⁵ Section 147 and 149 respectively of the Financial Sector Regulation Act.

⁷⁶ Section 151(2) of the Financial Sector Regulation Act.

⁷⁷ Section 151(6) of the Financial Sector Regulation Act.

⁷⁸ Section 151(8) of the Financial Sector Regulation Act.

procured another person to materially contravene a relevant financial sector law; or materially contravened a law of a foreign country that corresponds to a financial sector law.⁷⁹

A debarment order prohibits the person against whom it is made, for a period specified in the order, from:⁸⁰

- (a) providing or being involved in the provision of specified financial products or services, generally or in circumstances specified in the order;
- (b) acting as key person of a financial institution; or
- (c) providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.

4.3.5 Leniency agreements

The financial sector regulation Act further provides that the FCSA may enter into a leniency agreement with a person in exchange for that person's cooperation in an investigation or in proceedings relating to conduct that is in contravention of a financial sector law. In exchange for such cooperation the FCSA can then undertake not to impose an administrative penalty on such person.⁸¹

4.3.6 Administrative penalties

Monetary penalties can deter unfair conduct by financial institutions. The FSCA is therefore also empowered to impose an administrative penalty on a person who has contravened a financial sector law. In determining an appropriate administrative penalty the FSCA must consider the following: the need to deter the relevant conduct; the degree to which the person concerned has cooperated with the FCSA; submissions by the person concerned; the nature, duration, seriousness and extent of the contravention; any loss or damage suffered by another person as a result of the conduct; the extent of commercial benefit derived from that conduct; previous contraventions of a financial sector law; the effect of the conduct on the financial system and financial stability; the effect of the

⁷⁹ Section 153 (1)(a) to (d) of the Financial Sector Regulation Act.

⁸⁰ Section 151(2) of the Financial Sector Regulation Act. Section 151(3) provides that the debarment order takes effect from the on which the order is served on the person concerned alternatively on a later date specified in the order.

⁸¹ Section 156 of the Financial Sector Regulation Act.

proposed penalty on financial stability and the extent to which the conduct was deliberate or reckless.⁸² The FSCA must also publish the order in terms whereof the penalty is imposed.⁸³

4.3.7 Investigative powers

The Financial Sector regulation Act further affords the FSCA wide investigative powers. The FSCA may appoint investigators in terms of section 134 to carry out investigations. Such investigator may then conduct an investigation in respect of any person if the FSCA reasonably suspects that such person may have contravened, may be contravening or may be about to contravene a financial sector law for which the FSCA is responsible.⁸⁴

The powers of investigation is set out in section 136 and inter alia includes the power to demand relevant information from persons and requiring them to appear before the investigator for this purpose and/or to provide relevant documents; to copy relevant documents or take such document into possession. The investigator is also afforded the power to enter any premises relevant to the investigation and conduct a search at such premises and may, if necessary obtain a warrant from a competent court enabling such search.⁸⁵

4.4 CoFi

It is to be noted that the Financial Sector Regulation Bill is merely the first stage of Twin Peaks and provides the broader architectural framework for Twin Peaks. In due course many amendments will be effected to existing legislation to align it with the Twin Peaks model.⁸⁶ Specifically with regard to market conduct regulation, the intention is eventually that all current sectoral laws will eventually be merged into a comprehensive and harmonised Conduct of Financial Institutions Act (CoFi).⁸⁷

It is indicated that CoFi will comprise of the following key components: clear definition of regulatory perimeter; licensing and authorisation of all persons providing financial products or

⁸² Section 167(1) and (2) of the Financial Sector Regulation Act. Where the FSCA has commenced proceedings against such person for the prosecution of an offence an administrative penalty is not competent.

⁸³ Section 167(6).

⁸⁴ Section 135(1)(a) of the Financial Sector Regulation Act.

⁸⁵ Section 137 and 138 respectively of the Financial Sector Regulation Act.

⁸⁶ Some of these amendments have already been effected by Schedule 4 of the Financial Sector Regulation Act.

⁸⁷ Treating Customers Fairly Policy document 34.

services; an outcomes focused approach to market conduct regulation and supervision; flexible and broad subordinate regulatory powers; powers for gathering regulatory information that support pre-emptive, outcomes-driven supervision as well as strong enforcement and administrative powers. The CoFi Act will set out conduct principles that will be aligned to the six Treating Customers Fairly outcomes as pointed out below in paragraph 4.5.⁸⁸

Treasury has indicated that such consolidation and streamlining will not just aid the FSCA as supervisory authority, but that it would also bring significant benefits to the industry, reducing cost of compliance under the previous fragmented system of market conduct supervision.⁸⁹ It is submitted that this will also be beneficial to consumers who will be saved from having compliance costs filtered through to them.

4.5 Treating Customers Fairly

As part of its mandate the FSCA will also ensure that financial institutions, including banks, comply with the “Treating Customers Fairly” (TCF) guidelines for their interaction with their financial consumers. TCF is described as “an outcomes based regulatory and supervisory approach designed to ensure that specific, clearly articulated fairness outcomes for financial customers are delivered by regulated financial firms. In terms of the TCF approach financial institutions are expected to demonstrate that they deliver the following 6 TCF outcomes during the product lifecycle, from product design and promotion through advice and servicing to complaints and claims handling and throughout the product value chain:⁹⁰

- (a) customers can be confident that they are dealing with firms where TCF is central to the corporate culture;
- (b) products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly;
- (c) customers are provide with clear information and kept appropriately informed before, during and after point of sale;
- (d) where advice is given it is suitable and takes account of customer circumstances;
- (e) products performs as financial institutions have led customers to expect and service is of an acceptable standard and as they have been led to expect; and

⁸⁸ Treating Customers Fairly Policy Document 34-37.

⁸⁹Ibid.

⁹⁰ Treating Customers Fairly Policy Document at 50.

(f) customers do not face unreasonable post-sale barriers imposed by financial institutions to change products, switch providers, submit a claim or make a complaint.

Part of the TCF initiatives will entail implementing a harmonised disclosure framework; conducting a Retail Distribution Review; improving internal complaints mechanisms of financial institutions and designing a revised competency framework for intermediaries.⁹¹ For example, in the context of harmonising the disclosure framework for financial institutions “Key Information Documents” (KIDS) are being developed that are specifically designed to give consumers information about financial products in an easily understandable language; that are succinct enough to be readable; that is in a standardized format that aids comparability and that is given at a time that is relevant to the consumer’s decision.⁹² Also with regard to improving internal complaints mechanisms it is indicated that the regulatory framework to be developed by the FSCA should set consistent obligations for all financial institutions to develop and implement complaints management processes (CMPs) and to set consistent standards which these processes should meet. It is intended that all regulated financial institutions should have a CMP with the following components:⁹³

- (a) a detailed description of the CMP which makes it clear to customers and employees how the system works and how and by whom it is overseen;
- (b) a simplified outline of the CMP that makes it quick and easy for consumers to understand who to contact, what is required from them , what the financial institution will do and what the applicable waiting periods are;
- (c) standards for record keeping and reporting, to make sure complaints are captured correctly and reported correctly. It is stated that this will enable the FSCA to exercise oversight , and to require publication of complaints data in a manner that makes it possible for the financial sector to learn from customer feedback obtained through the CMPs; and
- (d) standards whereby financial institutions have to be able to demonstrate how they are monitoring, and learning from, customer complaints, including not only those captured by their own system but also from data published by the FSCA on complaints handling throughout the financial sector.

⁹¹ Treating Customers Fairly policy document at 51.

⁹² Treating Consumers Fairly policy document at 53.

⁹³ Treating Customers Fairly policy document at 55.

4.6 Consolidated Ombud System

Treasury aptly points out that a fundamental component of an effective consumer protection framework is appropriate customers recourse channels. This means that consumers should have access to affordable, effective and independent mechanisms to address complaints, resolve disputes, and secure a fair outcome. Although a comprehensive discussion of ombuds is beyond the scope of this dissertation it needs to be pointed out that under the Twin Peaks model the ombud system will also be consolidated and strengthened. Chapter 14 of the Financial Sector Regulation Act deals with ombuds. An Ombud Council is established in terms of section 175 with the objective to assist in ensuring that financial customers have access to and are able to use, affordable, effective, independent and fair alternative dispute resolution processes for complaints about financial institutions.⁹⁴

The Ombud Council will promote greater consumer protection through its functions which include the following: the recognition of industry ombud schemes; promotion of cooperation and collaboration between ombuds; protection of the impartiality of ombuds; taking steps to facilitate access by financial customers to ombuds; publicizing the type of complaints ombuds will deal with; resolving overlaps in jurisdiction of ombuds; monitoring performance of ombud schemes and supporting financial inclusion.

4.7 Conclusion and recommendations

The establishment of the FSCA as dedicated market regulator armed with an appropriate regulatory toolkit will greatly improve financial consumer protection. Banks will now also be regulated and supervised by the FSCA and it can be expected that banks will also adhere to the TCF culture and treat their customers and potential customers more fairly. The emphasis that the Financial Sector Regulation Act places on actions by the FSCA to promote financial literacy will assist financial consumer to apply their minds and take an informed decision pertaining to the appropriateness of financial products and services. Financial education and literacy programs will assist to achieve better transparency and upfront disclosure on financial products and services and in reduce information asymmetry which will also improves the bargaining power of financial customers.

⁹⁴ Section 176 of the Financial Sector Regulation Act.

Better market conduct regulation and improved financial consumer protection will contribute to increased financial stability and a more stable economy within which the financial services environment may thrive and at the same time serves as a deterrent to those financial service providers who would want to exploit financial consumers through irresponsible and abusive practices. In addition financial consumers will be confident to take part in the financial system.

The mandate of the FSCA to issue conduct standards appear to be proactive rather than a reactive approach to financial consumer protection. These standards will indicate to financial institutions what is expected from them insofar as financial products and services are concerned and will serve to minimize risky behaviour that can be detrimental to consumers. The FSCA's enforcement powers is also strengthened by its authority to issue directives in order to enforce compliance with conduct standards and applicable financial laws. Financial consumer protection is also served by the power that the FSCA has to enter into enforceable undertakings (which can be likened to consent agreements) that can be enforced like a civil court judgment in the event of non-compliance. The publication of directives and enforceable undertakings will also make financial consumers more aware of infringements of their consumer rights and will make them more vigilant against abuses perpetrated by financial institutions and specifically banks that they deal with.

The regulatory approach provides a sound framework for financial regulation and effectively regulated financial institutions which will ensure that potential market conduct risks are anticipated and the relevant action is taken to mitigate against them.

Protecting consumers and ensuring they are treated fairly by financial institutions is the essence of market conduct policy and law. In addition to strengthening and expanding the market conduct regulatory framework and implementing the Treating Customers Fairly initiative outlined above, there is a need to improve regulator coordination. Lessons learned from the GFC and principles adopted from the G20 pertaining to effective financial consumer protection assisted in South Africa's economy being resilient even though the effects may have been experienced indirectly by financial consumers.

The shift to a twin-peaks system of financial regulation will mean substantially stronger market conduct coordination and regulation by the FSCA. To ensure this is effective the FSCA will be equipped with a regulatory tool kit and rule making powers and responsibilities to include overseeing the market conduct of banks, including developing principles on how banks should

set their fees, how these fees should be reported, how they liaise and advise consumers and what constitutes fair and unfair market conduct.

The regulatory framework and parameters for consumer protection have been defined and will require effective coordination between the many agencies and ministries responsible for implementation of financial consumer legislation. Currently, at least three government ministries are involved: Finance, Trade and Industry and Justice and Constitutional development, as well as many more state owned agencies.

The importance of consumer financial literacy and education lies in its capability to improve people's financial well-being. The current financial sector environment has abundant and increasingly complex product offerings. This, combined with a growing range of financial challenges facing households at the macro and micro levels, implies that enhanced financial understanding and awareness by consumers is essential. Improved consumer financial education reduces information and disclosure barriers by the financial service providers.

Conduct standards to tackle enforcement for contraventions, increased emphasis on remedial action for reckless consumer treatment will expose and hold accountable management or shareholders for governance failures and the introduction of the financial services tribunal will bring about easily accessible dispute resolution channels with dependable strategies to resolving financial consumer disputes

It is therefore recommended that the FSCA sets out a clear regulatory strategy that will cause financial institutions, especially banks, to realize that the FSCA "means business" when it comes to the enforcement of its market conduct mandate. The standards that FSCA issues must be well-considered and proportionate and not occasion too excessive compliance cost that will only be filtered through to consumers of financial products and services. The Financial Sector Regulation Act has given the FSCA enough teeth and it will be up to the FSCA to use its regulatory toolkit to properly enforce its mandate and ensure greater protection for financial customers in the banking industry. It is hoped that the envisaged CoFi legislation will also assist in harmonising market conduct regulation and in the process extend greater consumer protection to consumers in the banking industry.

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