

**THE EFFECT OF THE UNIVERSAL "TREATING CUSTOMERS FAIRLY"  
PRINCIPLES AND THE NEW POLICYHOLDER PROTECTION RULES ON THE  
HANDLING OF INSURANCE CLAIMS IN SOUTH AFRICA**

by

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## ABSTRACT

Treating Customers Fairly (TCF) has finally been formally promulgated into the Insurance sector of South Africa via the 2017 Policyholder Protection Rules (2017 PPR's). It has been a long-standing initiative by the market conduct regulator of the financial sector, that instils confidence in consumers and provides proper protection of customers by incorporating fairness into the culture of insurers businesses.

The discussion in this dissertation considers what the universal TCF principles are and deals with the incorporation thereof into the 2017 PPR's as well as the broader legal framework of the financial sector but specifically focused on the insurance sector. By considering the TCF principles, the 2017 PPR's and the wider legal framework, the effects of the universal TCF principles and the 2017 PPR's are evaluated and discussed in the context of insurance claims handling in South Africa.

The effects of the universal TCF principles and the 2017 PPR's on the insurance claims handling in South Africa specifically focusses on the administration and insurance contract at the claims stage. The discussion focuses on the concept of fairness in respect of insurance administration and the insurance contract. The law is stated as at October 2021.

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## CHAPTER 1: INTRODUCTION

### 1.1 Research background

Treating Customers Fairly (TCF) began in the United Kingdom via a "supervisory framework" document of the *Financial Services Authority (FSA)*, an independent financial services industry regulator of the United Kingdom.<sup>1</sup> The goal was to eventually embed TCF principles within the culture of financial firms to fulfil the regulatory objectives of the UK's *Financial Services and Markets Act (FSMA)*.<sup>2</sup> Similarly in 2017, the National Treasury in South Africa released a media statement on the launch of the new financial sector Twin Peaks model of regulation that has subsequently replaced the Financial Services Board (FSB).<sup>3</sup> The Twin Peaks model established two financial sector regulatory authorities through the Financial Sector Regulation Act (FSRA)<sup>4</sup>, namely the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA).<sup>5</sup> However, prior to the FSB being replaced, the FSB, (which was the market conduct regulator at the time) liberally appropriated the UK's TCF principles.<sup>6</sup>

The Twin Peaks model aims to "create a safer financial sector that works effectively in the interests of all South Africans"<sup>7</sup> by reducing potential threats to financial stability and protecting consumers through ensuring fair treatment of consumers by financial institutions.<sup>8</sup> The FSCA prioritises regulation and supervision of the market conduct throughout the financial services sector.<sup>9</sup> Millard and Maholo state that the need for this market conduct supervision of the financial sector stems from "deep-rooted ills,

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<sup>1</sup> Financial Services Board "Treating consumers fairly: A discussion paper prepared for the Financial Services Board" 2010 <https://www.insurancegateway.co.za> (last accessed 2021-05-08) (hereinafter "TCF Discussion Paper").

<sup>2</sup> *Financial Services and Markets Act 2000 (FSMA)*. Financial Services Board "Treating customers fairly: The roadmap" (2011) <https://www.fpi.co.za> (last accessed 2021-05-08) (TFC The Roadmap).

<sup>3</sup> National Treasury "The Launch of Twin Peaks" 06 April 2018 <http://www.treasury.gov.za> (last accessed 2021-05-08) (NT Media Statement April 2018).

<sup>4</sup> Financial Sector Regulation Act 9 of 2017 (FSRA).

<sup>5</sup> The Prudential Authority (PA) objectives are set out in S 33 FSRA and the Financial Sector Conduct Authority objectives are set out in S 57 FSRA.

<sup>6</sup> Millard and Maholo "Treating customers fairly: A new name for existing principles" 2016 *THRHR* 596.

<sup>7</sup> NT Media Statement April 2018.

<sup>8</sup> National Treasury "New Twin Peaks Regulators Established" 28 March 2018 <http://www.treasury.gov.za> (last accessed 2021-05-08) (NT Media Statement March 2018).

<sup>9</sup> National Treasury "Twin Peaks in South Africa: Response and Explanatory Document" 2014 <https://juta.co.za> (last accessed 2021-05-08) (NT response and explanatory document).

such as the unequal bargaining position...between customers and providers of financial products and services".<sup>10</sup> The FSCA is primarily concerned with the financial services sector conduct in general.<sup>11</sup> The Insurance Act (IA) was promulgated to regulate prudential matters specific to the insurance industry.<sup>12</sup> This was previously regulated in the Short-Term Insurance Act (STIA)<sup>13</sup> and the Long-Term Insurance Act (LTIA).<sup>14</sup> The IA repealed the sections of STIA and LTIA that dealt with prudential matters except for section 55 of STIA and section 62 of LTIA. These two sections enable the legislature to promulgate the Policyholder Protection Rules (PPR's).

It is common knowledge that the PPR's regulate insurers' market conduct and did so long before Twin Peaks and the FSCA. Millard states that an argument can be made that market conduct regulation for the protection of consumers within the insurance industry is not a new concept brought in by the Twin Peaks model, and that the principles of fairness are also not new to the legislative framework of insurance.<sup>15</sup>

However, of significant development in line with the UK Kingdom approach of incorporating the TCF into regulation - as stated above - is the 2017 Policyholder Protection Rules (the 2017 PPR's) which were promulgated in terms of section 55 of STIA and section 62 of LTIA to provide for the fair treatment of customers of the insurance industry specifically.<sup>16</sup> The 2017 PPR's are the first PPR's to expressly incorporate the TCF principles into the insurance legislative framework and emphasises claims management and fairness in the claims process at Rule 17.<sup>17</sup> The market conduct regulatory shift from the FSB to the FSCA in terms of the Twin Peaks dispensation brought with it the TCF principles.<sup>18</sup> The aim of retaining TCF from one

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<sup>10</sup> Millard and Maholo "Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks" 2020 *Legal Certainty and Fundamental Rights* 393 – 395.

<sup>11</sup> Millard and Maholo 2020 *Legal Certainty and Fundamental Rights* 393 – 402.

<sup>12</sup> Insurance Act 18 of 2017 (IA).

<sup>13</sup> Short-Term Insurance Act 53 of 1998 (STIA).

<sup>14</sup> Long-Term Insurance Act 52 of 1998 (LTIA).

<sup>15</sup> Millard and Maholo 2020 *Legal Certainty and Fundamental Rights* 401 – 406; Millard and Maholo 2016 *THRHR* 596.

<sup>16</sup> Repeal of various ss of LTIA and STIA, GN 639 in GG41735 of 27 June 2018; Amendments of STIA Policyholder Protection Rules, GN 996 in GG41928 of 28 September 2018; Amendments of LTIA Policyholder Protection Rules, GN 997 in GG41928 of 28 September 2018.

<sup>17</sup> Rule 17 the 2017 Policyholder Protection Rules (the 2017 PPR's).

<sup>18</sup> Financial Services Board "Treating Customers Fairly: The Roadmap" 2011 [https://www.fpi.co.za/documents/Advocay/FSB\\_TCF\\_Roadmap\\_Final\\_March\\_2011.pdf](https://www.fpi.co.za/documents/Advocay/FSB_TCF_Roadmap_Final_March_2011.pdf) (last accessed 2021-05-08) (The TCF Roadmap).

market conduct regulator to another being to incorporate the TCF principles into the South African financial sector.<sup>19</sup> Similar to the *FSA* of the UK aimed at embedding TCF into the culture of financial firms in the UK.<sup>20</sup>

## 1.2 Research objectives

The fair treatment of policyholders in terms of the 2017 PPR's endeavours to achieve at least the following six (6) outcomes:

- (a) policyholders can be confident that they are dealing with an insurer where the fair treatment of the policyholder is central to the insurer's culture;<sup>21</sup>
- (b) products are designed to meet the needs of the identified types, kinds or categories of policyholders and are targeted accordingly;<sup>22</sup>
- (c) policyholders are given clear information and are kept appropriately informed before, during and after the time of entering into a policy;<sup>23</sup>
- (d) where policyholders receive advice, the advice is suitable and takes account of their circumstances;<sup>24</sup>
- (e) policyholders are provided with products that perform as insurers or their representatives have let them to expect, and the associated service is both of an acceptable standard and what they have been led to expect;<sup>25</sup> and
- (f) policyholders do not face unreasonable post-sale barriers to change or replace a policy, submit a claim or make a complaint.<sup>26</sup>

From a reading of the outcomes set out in the 2017 PPR's at Rule 1.4, the 2017 PPR's affect the entire product life-cycle of insurance.<sup>27</sup> In any product life-cycle, all steps in the process relate to and are affected by the previous. Thus, more often than not, problems that may have originated in a prior stage of the product life-cycle appear at the claims and complaints stage. The claims stage is generally triggered when a policyholder submits that the specified uncertain future event insured against has occurred and would like to claim under the policy for the loss. The 2017 PPR's contain specific provisions on claims management in Rule 17, which details the obligations of the insurer upon receipt of a claim in addition to various compliance-based rules for

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<sup>19</sup> The TCF Roadmap.

<sup>20</sup> See para 1.1 at ft 2 above.

<sup>21</sup> Rule 1.4(a) 2017 PPR's.

<sup>22</sup> Rule 1.4(b) 2017 PPR's.

<sup>23</sup> Rule 1.4(c) 2017 PPR's.

<sup>24</sup> Rule 1.4(d) 2017 PPR's.

<sup>25</sup> Rule 1.4(e) 2017 PPR's.

<sup>26</sup> Rule 1.4(f) 2017 PPR's.

<sup>27</sup> Rule 1.4 (a) – (f) 2017 PPR's.

overall fairness. This dissertation will investigate and evaluate the effect of the universal TCF principles and the 2017 PPR's on insurance claims handling in South Africa.

The following research objectives will be addressed:

- a) To discuss the legislative framework underpinning the South African insurance industry;
- b) To analyse the specific legal requirements pertaining to insurance claims handling in South Africa;
- c) To investigate and evaluate the effect of the universal TCF principles and the 2017 PPR's on insurance claims handling in South Africa.

#### **1.4 Methodology**

The research will entail a literature review of the relevant legislation and regulations that govern insurance claims handling in South Africa.

The historical approach will be utilised to briefly examine the origin of the TCF principles as a concept and how they came to be incorporated into the South African regulatory framework. The National Treasury media statements, discussion papers, legislative amendments and journal articles of Millard and Maholo, amongst other sources, will be referred to.

A descriptive approach will be utilised to describe the South African insurance legislative framework and regulations, specifically the 2017 PPR's. Focus will be placed on the financial sector legislation in general and insurance-specific legislation regarding the prudential and market conduct regulation on claims handling. Articles by authors such as Millard,<sup>28</sup> amongst others, illustrate a gradual development and further entrenchment of the principles of fairness into the legislative framework and the effect this has on the product life-cycle of insurance. Case law will be discussed where a judgement significantly impacted the development of the law or illustrates the practical

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<sup>28</sup> Millard "Through the looking glass: Fairness in insurance contracts – A caucus race?" 2014 *THRHR* 547 – 566; Millard "The impact of the Twin Peaks Model on the Insurance Industry" 2016 *PER/PELJ* 5; Millard and Maholo 2020 *Legal Certainty and Fundamental Rights* 393 – 421.



impact of the TCF principles and the 2017 PPR's on insurance claims handling in South Africa.

### **1.5 Overview of chapters**

- a. Chapter 1: This chapter introduces the research topic and states the purpose of the dissertation.
- b. Chapter 2: Discusses the TCF principles and how they came to be incorporated into the South African insurance legislative and regulatory framework.
- c. Chapter 3: A discussion of the South African financial sector and insurance legislative and regulatory framework, specifically the 2017 PPR's.
- d. Chapter 4: In this chapter, the specific legal requirements of the insurance claims handling in South Africa will be evaluated. Specifically, the effect of the universal TCF principles and the 2017 PPR's on insurance claims handling in South Africa.
- e. Chapter 5: This chapter sums up the findings of the dissertation.

### **1.6 Delineation and limitations**

The 2017 PPR's is not the first PPR's to regulate the market conduct of insurers. The current study will focus in depth on the 2017 PPR's as far as it relates to incorporating the TCF principles and insurance claims handling in South Africa. Where reference is made to PPR's, it is to be interpreted to refer to both the Short-term Insurance and Long-Term Insurance PPR's.

Furthermore, although cursory reference is made to the origin of statutory TCF principles and aspects of the English Insurance law, this dissertation does not represent a definitive comparison between the South African insurance legislative framework and that of the United Kingdom. The reference to the UK and TCF principles is only for illustrative purposes regarding the TCF experience in the UK as far as it affects TCF development in South Africa.

The FSCA's market conduct regulation pertains specifically to licencing, supervision, enforcement, and adopting a regulatory strategy by an administrative committee to achieve specific objectives. The current discussion will not specifically deal with all the

objectives of the FSCA and how it is reached. However, where relevant, its impact on the claims handling process will be discussed.

Where reference is made to short-and long-term insurance, the same must be interpreted to refer to non-life and life insurance and *vice versa*.

For the sake of clarity and consistency, the word policyholder will be used throughout, unless the word customer or insured would be more appropriate to the aspect being discussed.

The referencing style utilised herein is the De Jure style format.

The law, as discussed herein, is as at October 2021.

## CHAPTER 2: TREATING CUSTOMERS FAIRLY (TCF)

### 2.1 Introduction

Among the various proposed legislative developments under discussion in the financial sector regulation over the past 10 years is the principle of Treating Customers Fairly (TCF). TCF has now been promulgated into the South African insurance sector through the 2017 Policyholder Protection Rules (the 2017 PPR's). The National Treasury stated at the start of the legislative process that TCF is to be a "regulatory approach that seeks to ensure that specific, clearly articulated fairness outcomes for financial services customers are demonstrably delivered by regulated financial institutions".<sup>29</sup>

TCF is an outcome-based approach by the market conduct regulator (the previous Financial Services Board (FSB),<sup>30</sup> and now the present Financial Sector Conduct Authority (FSCA)).<sup>31</sup> The purpose of promulgating TCF is to ensure fair treatment of customers is rooted in the culture of financial firms,<sup>32</sup> as the aim of TCF is to ensure that "customer's financial services needs are appropriately met through a sustainable industry".<sup>33</sup> The current chapter will discuss what the universal TCF principles are and why TCF.

### 2.2 The common law principle of good faith in contract

Before the formal incorporation of TCF into the 2017 PPR's by the market conduct regulator, as a means to ensure insurers incorporate fairness into their culture via compliance with the TCF rules, insurers applied the common law of contract principle of good faith.<sup>34</sup> The basic idea of insurance is the transferring of risk.<sup>35</sup> Reinecke describes insurance in an economics sense as "involving the transference of the risks of a community of exposed persons to a third party and for the risks to be spread by

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<sup>29</sup> Financial Services Board "Treating Customers Fairly: The Roadmap" 2011 (last accessed 2021-05-08) [https://www.fpi.co.za/documents/Advocay/FSB\\_TCF\\_Roadmap\\_Final\\_March\\_2011.pdf](https://www.fpi.co.za/documents/Advocay/FSB_TCF_Roadmap_Final_March_2011.pdf) (The TCF Roadmap).

<sup>30</sup> Financial Services Board Act 97 of 1990 (repealed);

<sup>31</sup> S56 Financial Sector Regulation Act 9 of 2017 (FSRA).

<sup>32</sup> The TCF Roadmap 6.

<sup>33</sup> The TCF Roadmap 9.

<sup>34</sup> As above.

<sup>35</sup> Reinecke, Van Niekerk & Nienaber *South African Insurance Law* (2013) 1 – 3.

the latter over that community”.<sup>36</sup> The insurance contract is utilised to spread this risk. Good faith as a cornerstone of contract is the “idea that parties to a contract should behave honestly and fairly in their dealings with one another”.<sup>37</sup> The debate on the role of good faith in contract as a counterweight to freedom of contract has been the topic of much discussion over the years.<sup>38</sup> The Supreme Court of Appeal (SCA) remained firm in the judgement of *South African Forestry Co Ltd v York Timbers Ltd*,<sup>39</sup> that [A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules”. The *York* judgement in taking this conservative stance that it is not for the courts to act upon to enforce or refuse a contractual term for offending their personal sense of fairness or equity was strongly criticised.<sup>40</sup>

However, in the judgement of *Barkhuizen v Napier*,<sup>41</sup> the court seems to lend support for the approach of the *York* case in that the court held that the term had to be tested against public policy (the values of the *boni mores*, being the community) to determine if the term being applied is, first, reasonable and if so whether the operation of the term is enforced in a fair manner. The court in *Barkhuizen* opposed any notion that a term may be contrary to public policy if it merely operates harshly or may be unfair.<sup>42</sup>

A recent constitutional court case illustrates this point once again. In the case of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,<sup>43</sup> the court had to decide on the enforcement of a time clause in a contract that would result in the applicants losing their business and cause a black economic empowerment initiative to fail.<sup>44</sup> The court found in *Beadica* that parties cannot escape contractual terms on the basis that the enforcement of the term would be unfair as the values enshrined in the Constitution of the Republic of South Africa, 1996 do not

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<sup>36</sup> Reinecke, Van Niekerk & Nienaber (2013) 3.

<sup>37</sup> Hutchinson *et al* *The Law of Contract in South Africa* (2017) 22.

<sup>38</sup> Hutchinson *et al* (2017) 27 – 34.

<sup>39</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 27.

<sup>40</sup> See Hutchinson *et al* (2017) 31 referring to Pretorius “Individualism, collectivism and the limits of good faith” 2003 *THRHR* 638; Lubbe “Taking fundamental rights seriously. The Bill of Rights and its implications for the development of contract law 2004 *SALJ* 441.

<sup>41</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>42</sup> As above.

<sup>43</sup> *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 SA 13 (CC).

<sup>44</sup> *Beadica*.

provide a court with the power to interfere with contractual relationships, but rather provides values to test if the term is contrary to public policy.<sup>45</sup>

Another recent judgement in which an insurance contract interpretation was challenged in the Supreme Court of Appeal is the case of *Santam v Ma-Afrika Hotels and The Stellenbosch Kitchens*.<sup>46</sup> The case revolved around the interpretation of the insurance contract specifically with regard to the clause on business interruption and infectious diseases, notably covid-19, and whether the agreed indemnity period is 18 months or three months.<sup>47</sup> The court in *Ma-Afrika* tested the contractual term, by firstly looking at if the term itself is reasonable and thereafter how the term was enforced in the circumstances and held that "[h]aving regard to the analysis of the text, the context, as well as the purpose of the policy and the Schedule...Our conclusion on the interpretation of the policy is not only cohesive but makes business sense".<sup>48</sup> The court concluded that the indemnity period is 18 months and that there is ambiguity in the Santam policies that Santam would not admit, to avoid the *contra preferentem rule*, which on face value seems unreasonable.<sup>49</sup>

The principle of good faith in the common law of contract has in terms of the courts not become a freestanding rule to enforce or reject a contractual clause, however, it is part of how one is to negotiate and perform in terms of a contract. It is submitted that insurers have prior to the TCF initiative been incorporating the concept of fairness into their business via the common law.

### 2.3 What are the universal treating customers fairly principles?

The universal TCF principles are a set of outcome-based principles that aim to incorporate fairness into the culture of financial service providers.<sup>50</sup> The TCF outcomes were initially published as principles on the FSB's website, and financial service

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<sup>45</sup> *Beadica* 71 – 73. The court in *Beadica* also held that *Barkhuizen* remains the leading authority on the role of equality in contracts at para 38 – 58.

<sup>46</sup> *Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another* 255/2021 SA 141 (SCA).

<sup>47</sup> As above.

<sup>48</sup> *Ma-Afrika* 61.

<sup>49</sup> *Ma-Afrika* 61 – 62.

<sup>50</sup> Financial Services Board "Treating consumers fairly: A discussion paper prepared for the Financial Services Board" 2010 <https://www.insurancegateway.co.za> (last accessed 2021-05-08) (hereinafter "TCF Discussion Paper").

providers were encouraged to integrate the TCF principles into their business culture.<sup>51</sup> At that stage, there was no TCF formally in the PPR's, resulting in legal uncertainty as to what extent financial service providers were legally required to comply, if at all.<sup>52</sup> Due to TCF suggesting a shift towards a culture of "flexibility and adaptability" and no formal rules to comply with, firms were left to their own devices to figure out what would constitute fair treatment of consumers, as no formal regulations were in place clearly setting out the desired outcomes and the requirements to achieve TCF.<sup>53</sup>

In this regard, fairness as a concept is not defined in the TCF principles. However, the idea of "fairness" in the context of TCF, is stated in the 2010 TCF Discussion Paper, to not equate to "being nice to consumers, nor does it amount to creating satisfied customers "even if this is the most likely of outcomes".<sup>54</sup> As the example used in the 2010 discussion paper rightly illustrates, a consumer who does not fully understand the product due to the complexity of the products may be satisfied although the consumer was not treated fairly, and likewise, a consumer that was treated fairly may be unsatisfied.<sup>55</sup>

Fairness in TCF is to be achieved by the incorporation of the six fairness outcomes in the culture of the company (the TCF principles), as set out below.<sup>56</sup>

**Outcome 1:** Customers are confident that they are dealing with firms where the fair treatment of customers is central to the firm culture;

**Outcome 2:** Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly;

**Outcome 3:** Customers are given clear information and are kept appropriately informed before, during and after the time of contracting;

**Outcome 4:** Where customers receive advice, the advice is suitable and takes account of their circumstances;

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<sup>51</sup> Millard and Maholo "Treating customers fairly: A new name for existing principles" 2016 *THRHR* 597.

<sup>52</sup> As above.

<sup>53</sup> Millard and Maholo 2016 *THRHR* 597.

<sup>54</sup> Financial Services Board "Treating consumers fairly: A discussion paper prepared for the Financial Services Board" 2010 5 <https://www.insurancegateway.co.za> (last accessed 2021-05-08) (TCF Discussion Paper).

<sup>55</sup> As above.

<sup>56</sup> The TCF Roadmap 7.

**Outcome 5:** Customers are provided with products that perform as firms have led them to expect, and the associated services is (sic) both of an acceptable standard and what they have been led to expect;

**Outcome 6:** Policyholders do not face unreasonable post-sale barriers to change or replace a policy, submit a claim or make a complaint."

The 2011 TCF Roadmap stated that the fairness outcomes are to be delivered throughout the product life-cycle.<sup>57</sup> The product life-cycle comprises the product and service design, promotion and marketing, advice, point of sale, information after the sale, and complaints and claims handling.<sup>58</sup> As discussed in the 2010 Discussion Paper, the success of TCF is reliant on the six fairness outcomes being accepted and implemented not just by the compliance team of firms but from board-level right through to management and beyond.<sup>59</sup> As set out in the 2010 TCF Discussion Paper, "firms need to embrace the TCF principles [the six fairness outcomes] at various levels", namely leadership, strategy, decision-making, controls, performance management and reward.<sup>60</sup>

If one considers that TCF is an outcome-based approach, it is logical that fairness be integrated throughout the firm's culture as all employees in the business directly impact the outcome at the different stages. In the current context, the synonyms for fairness as per the Oxford English Dictionary are "Honesty; impartiality, equitableness, justness [and] fair dealing."<sup>61</sup> The various employees throughout the product life-cycle are thus to act with honesty, impartiality, equitableness, justness and fair dealing to ensure a fair outcome for the consumers of financial products. The universal TCF principles are thus the guide to fairness - published and later to be promulgated - by the market conduct regulator for the financial sector.<sup>62</sup>

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<sup>57</sup> As above.

<sup>58</sup> The TCF Roadmap 8.

<sup>59</sup> The TCF Discussion Paper.

<sup>60</sup> The TCF Discussion Paper 6.

<sup>61</sup> The Oxford English Dictionary online search for "fairness" at <https://www-oed-com> (last accessed 2021-09-27).

<sup>62</sup> The TCF Roadmap.

## 2.4 Why treating customers fairly?

The former FSB identified a need for a regulatory framework that would apply consistently across the financial sector to combat the challenges which financial products and services presented to customers, especially given the fact that the consequences of unfair treatment (poor decision making) on financial transactions by customers are usually only felt years later.<sup>63</sup>

The concept of TCF was borrowed (or appropriated) from the United Kingdom's supervisory framework by the former market conduct regulator, the FSB, to combat the challenges faced by consumers in the financial sector.<sup>64</sup> Following the 2010 TCF Discussion Paper, the FSB stated in the 2011 TCF Roadmap that TCF would be incorporated into the South African regulatory framework for financial services to protect consumers.<sup>65</sup> The protection of consumers in the South African legislative framework is not a novel concept. The Consumer Protection Act<sup>66</sup> (CPA) is the primary legislation protecting South African consumers. However, financial products (and therefore insurance products) are exempt from the scope and application of CPA by the Financial Services Laws General Amendment Act.<sup>67</sup>

The need for TCF thus stems from an identified need to combat unbecoming conduct in the South African financial sector where customers have experienced unfair treatment.<sup>68</sup> This "unbecoming" or improper conduct consist, for example, of the following: the product design may defeat the actual purpose of the product,<sup>69</sup> the products marketed most often only focus on the good reasons to purchase and not the associated risks involved,<sup>70</sup> improper advice may be given as there is an incentive to earn more commission,<sup>71</sup> the absence of clear and simple language confusing customers, and finally for example at claim stage, the consumer is informed of an exclusion clause that bars the specific claim which was unbeknown to the consumer

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<sup>63</sup> The TCF Roadmap 6.

<sup>64</sup> TFC Discussion Paper.

<sup>65</sup> The TCF Roadmap 6.

<sup>66</sup> The Consumer Protection Act 68 of 2008 (CPA).

<sup>67</sup> The Financial Services Laws General Amendment Act 45 of 2013.

<sup>68</sup> The TCF Discussion Paper 6.

<sup>69</sup> As above.

<sup>70</sup> The TCF Discussion Paper 7.

<sup>71</sup> As above.



given inadequacies in the product life-cycle (ultimately operating to the detriment of the policyholder).

Millard and Maholo made the point in 2016 that TCF is not a new or novel concept in the financial services industry.<sup>72</sup> They correctly indicate that the Financial Advisory Intermediary Services Act (FAIS)<sup>73</sup> together with the General Code of Conduct (GCC) has "proven to be effective in protecting the rights of consumers".<sup>74</sup> The writer agrees with Millard and Maholo that TCF is not a new concept and that the common law, statute, rules and regulations had existed prior to the concept of TCF to ensure a fair dispensation for consumers. However, TCF is not a mere exercise of applying rules. The writer submits that TCF is much more. It is a shift in mindset, approach and decision making that instils the concept of fairness throughout the product life-cycle as well as into the culture of a firm. TCF has the potential of changing the way financial service providers interact with consumers.<sup>75</sup> It is submitted that TCF is a concept of fairness to ensure the protection of policyholders through fairness outcomes, the realisation of which is supported by and facilitated with rules.

Why TCF? Because TCF is part of the continuous development of consumer protection in the financial sector. It addresses the needs of consumers. The FSB originally introduced it. The FSCA, as the current market conduct regulator, is building on the work of the FSB to ensure "improved customer confidence, the supply of appropriate products and services and enhanced transparency and discipline in the industry".<sup>76</sup> It can be argued that the formal incorporation of the TCF principles into the 2017 PPR's represents a marked shift from a principles approach to a rules-based system to facilitate enforcement through an outcomes-based approach.

## 2.5 Conclusion

The universal TCF principles, namely the six fairness outcomes, are part of the market conduct regulator's objective of ensuring a stable financial sector that provides improved consumer confidence and appropriate products and services. In this way, it

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<sup>72</sup> Millard and Maholo 2016 *THRHR* 612.

<sup>73</sup> Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS).

<sup>74</sup> Millard and Maholo 2016 *THRHR* 612.

<sup>75</sup> The TCF Roadmap.

<sup>76</sup> The TCF Roadmap 9.

enhances discipline in the industry.<sup>77</sup> Originally the TCF principles were only principles, and insurers were encouraged to incorporate the six fairness outcomes into their firm's culture. However, the TCF principles recently became part of the 2017 PPR's as formal rules that are to be applied by insurers. This will be discussed in detail in chapter 3 below.

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<sup>77</sup> See para 2.3 above.

## CHAPTER 3 THE LEGAL AND CONCEPTUAL FRAMEWORK

### 3.1 Introduction

The legal and conceptual framework for Treating Customers Fairly (TCF) and the 2017 Policyholder Protection Rules (2017 PPR's) are set out in this chapter. As previously mentioned, the TCF universal principles are no longer just recommended principles.<sup>78</sup> The market conduct regulator has formally incorporated the TCF universal principles into the rules applicable to the insurance industry via the 2017 PPR's.<sup>79</sup> The aim is to impose fairness into the culture of insurers businesses, the product life-cycle and specifically of interest in this dissertation, insurance claims handling in South Africa.<sup>80</sup>

### 3.2 The legal framework

#### 3.2.1 Current legislation of insurance sector

The legal framework of the insurance sector has undergone significant development in the past few years. The impact of the various developments on specific aspects of insurance in South Africa has been discussed by multiple authors.<sup>81</sup> Before 2017 all insurance products in South Africa were regulated by the Short-term Insurance Act<sup>82</sup> (STIA) and the Long-term Insurance Act<sup>83</sup> (LTIA), together with the Financial Advisory and Intermediary Services Act (FAIS).<sup>84</sup> FAIS regulated the activities of insurance intermediaries and advisors in the insurance sector.

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<sup>78</sup> See para 2.3 above.

<sup>79</sup> See para 1.1 above.

<sup>80</sup> See para 1.2 above.

<sup>81</sup> De Jager "The South African reserve bank: blowing winds of change" (Part 2) 2013 *SA Mercantile Law Journal* 492; Millard "Through the looking glass: Fairness in insurance contracts – A caucus race?" 2014 *THRHR* 547; Millard "The impact of the Twin Peaks Model on the Insurance Industry" 2016 *PER/PELJ* 1; Millard and Maholo "Treating customers fairly: A new name for existing principles" 2016 *THRHR* 597; Van Heerden and Van Niekerk "Twin Peaks: The role of the South African central bank in promoting and maintaining financial stability" 2017 *THRHR* 636; Donnelly "Do You Always Get Something out: The Impact of Insurance Act 18 of 2017 and Revised Policyholder Protection Rules on Material Misrepresentation and Non-Disclosure" 2018 *AFRICAN L.J* 593; Millard "CoFL and T(CF): Further along the Road to Twin Peaks and a Fair Insurance Industry" 2018 *THRHR* 374; Millard "The devil is not in the detail: On microinsurance, policyholder protection and financial inclusion" 2019 *THRHR* 82; Millard and Maholo "Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks" 2020 *Legal Certainty and Fundamental Rights* 393.

<sup>82</sup> Short-term Insurance Act 53 of 1998 (STIA).

<sup>83</sup> Long-term Insurance Act 52 of 1989 (LTIA).

<sup>84</sup> Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS).

The Twin Peaks regulatory model was a major development in the South African financial sector. Twin Peaks is an attempt to end the silo approach in financial regulation.<sup>85</sup> The Financial Sector Regulation Act<sup>86</sup> (FSRA) was the long-anticipated Act to give the Twin Peaks model life.<sup>87</sup> The FSRA made provision for (1) a Prudential Regulator and (2) the Financial Sector Conduct Authority (FSCA). The FSCA superseded the Financial Services Board (FSB) as the new market conduct regulator.<sup>88</sup>

A further significant development was the promulgation of the Insurance Act<sup>89</sup> (IA). The IA aims to "provide for a legal framework for the prudential regulation and supervision of Insurance Business in the Republic that is consistent with the Constitution of the Republic of South Africa, 1996" and more specifically promote and maintain a fair, safe and stable insurance market in addition to replacing certain parts of STIA and LTIA.<sup>90</sup> The objective of the IA, as stated in section 3 thereof, is to establish a legal framework that:

- "(a) facilitates the monitoring and the preservation of the safety and soundness of insurers;<sup>91</sup>
- (b) enhances the protection of policyholders and potential policyholders;<sup>92</sup>
- (c) increases access to insurance for all South Africans;<sup>93</sup>
- (d) promotes the broad-based transformation of the insurance sector;<sup>94</sup> and
- (e) contributes to the stability of the financial system in general."<sup>95</sup>

The IA repealed a significant portion of the STIA and LTIA that dealt with prudential regulation, but specifically not sections 55 of STIA and 62 of LTIA, which empowers the regulator to promulgate market conduct rules.<sup>96</sup> Section 55 of STIA and section 62 of LTIA provides the legislature with the ability to promulgate the PPR's.<sup>97</sup> As stated by Millard in 2019, the PPR's are the "most important instrument for the protection of

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<sup>85</sup> See Millard 2018 *THRHR* 375 for discussion on why Twin Peaks and legislative developments.

<sup>86</sup> Financial Sector Regulation Act 9 of 2017 (FSRA).

<sup>87</sup> Millard 2018 *THRHR* 375 for discussion on why Twin Peaks and legislative development.

<sup>88</sup> S 56 FSRA.

<sup>89</sup> Insurance Act 18 of 2017 (IA).

<sup>90</sup> Preamble IA.

<sup>91</sup> S 3(a) IA.

<sup>92</sup> S 3(b) IA.

<sup>93</sup> S 3(c) IA.

<sup>94</sup> S 3(d) IA.

<sup>95</sup> S 3(e) IA.

<sup>96</sup> Schedule 1 IA, which contains the table on Laws Amended of which significant portions of STIA and LTIA are repealed.

<sup>97</sup> S 55 STIA; S 62 LTIA.

policyholders...".<sup>98</sup> The writer agrees that the PPR's provide for consumer protection in the insurance industry in a very specific way, especially the 2017 PPR's that are infused with the TCF universal principles. The IA and the PPR's regulate the prudential and market conduct of insurance companies.<sup>99</sup>

### 3.2.2 Insurance legislation in the pipeline

At the time of writing this dissertation, the second draft of the Conduct of Financial Institutions Bill (COFI Bill) had been published for comment at the end of 2020.<sup>100</sup> In a media statement, National Treasury stated that "[t]he Bill aims to significantly streamline the legal landscape for conduct regulation in the financial services sector" and make the TCF principles legally binding and enforceable on all financial institutions.<sup>101</sup>

The discussion on the impact of the COFI Bill - when promulgated into legislation – on the financial sector in general and specifically insurance is beyond the scope of this dissertation. However, it is crucial to keep COFI in mind as COFI aims to "significantly streamline the legal landscape for conduct regulation in the financial sector and give legislative effect to the market conduct policy approach, including implementation of the [TCF] principles".<sup>102</sup> Once enacted, COFI will result in the repeal of the existing PPR's and the remaining provisions of the STIA and LTIA. COFI and its subordinate legislation will consolidate all market conduct rules for all financial service providers.<sup>103</sup>

### 3.3 The policyholder protection rules

The PPR's are specific to the regulation of the insurance industry.<sup>104</sup> The IA, as stated above, specifically focuses on the prudential regulation of insurers while the PPR's

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<sup>98</sup> Millard 2019 *THRHR* 587.

<sup>99</sup> Millard 2019 *THRHR* 586.

<sup>100</sup> Second draft COFI Bill, GN519 in GG43741 of 29 September 2020.

<sup>101</sup> National Treasury "Media statement 2<sup>nd</sup> draft COFI Bill published for comment" September 2020 [http://www.treasury.gov.za/comm\\_media/press/2020/2020092901%20MEDIA%20STATEMENT%202ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf](http://www.treasury.gov.za/comm_media/press/2020/2020092901%20MEDIA%20STATEMENT%202ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf) (last accessed 2021-09-13).

<sup>102</sup> As above.

<sup>103</sup> Millard 2018 *THRHR* 390.

<sup>104</sup> National Treasury "Response document supporting the revised Conduct of Financial Institutions Bill" September 2020 [http://www.treasury.gov.za/comm\\_media/news\\_archive\\_2020.aspx](http://www.treasury.gov.za/comm_media/news_archive_2020.aspx) (last accessed 2021-10-03).

regulate the market conduct of the insurers.<sup>105</sup> The initial PPR's were published in 2004; the amended PPR's were published in 2017.<sup>106</sup> The 2017 PPR's impact how insurers engage with policyholders, especially regarding fairness outcomes and how to ensure the same is achieved. The PPR's are, in essence, a form of consumer protection measure as the PPR's impact the obligations and the contractual rights of the policyholders and the insurers alike.

### 3.3.1 The 2004 policyholder protection rules

The 2004 PPR's consisted of six sections comprising 13 pages in total. The objective was "to ensure that policies as defined...are entered into, executed and enforced in accordance with sound insurance principles and practice[s] in the interest of the parties and the public interest".<sup>107</sup> The 2004 PPR's contained a few very basic rules on direct marketing, void provisions, the general format of policies, general rules and some aspects under the heading miscellaneous.<sup>108</sup> In essence, the focus of the 2004 PPR's was on fairness, honesty and acting with the necessary due skill, care and diligence in direct marketing and setting out the basic rules regarding specific clauses in the policies.<sup>109</sup>

Due to the nature of the 2004 PPR's insurers, in essence, regulated their own market conduct. They were not subjected to a list of rules to ensure compliance with conduct regulations. As Millard and Maholo indicated, insurers and intermediaries were not left entirely to their own devices as both the FIAS Act and the General Code of Conduct (GCC) contained regulations to ensure fairness in the South African financial regulatory environment.<sup>110</sup> Thus although there were no specific rules to ensure compliance within the 2004 PPR's, the FAIS Act together with the GCC set out requirements to be complied with by insurers that protected consumers.

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<sup>105</sup> See para 3.2 at fn 68 above.

<sup>106</sup> Replacement of Policyholder Protection Rules, GN1407 in GG41321 of 15 December 2017; Replacement of Policyholder Protection Rules, GN1433 in GG41329 of 15 December 2017.

<sup>107</sup> Rule 2 the 2004 Policyholder Protection Rules (2004 PPR's).

<sup>108</sup> Rule 2 – 11 the 2004 PPR's.

<sup>109</sup> As above.

<sup>110</sup> Millard and Maholo "Treating customers fairly: A new name for **existing** principles" 2016 *THRHR* 595.

### 3.3.2 The 2017 policyholder protection rules

On 1 January 2018, the 2017 PPR's became operative.<sup>111</sup> Millard notes that the promulgation of these rules marked the formal incorporation of TCF into the legislative framework - from a mere publication of TCF principles on the FSB's website.<sup>112</sup> This prior mere publication caused legal uncertainty as to the enforceability and applicability of TCF to the insurers.<sup>113</sup> Millard notes that the FAIS Ombud had stated that insurers had to comply with "TCF" or "TCF Principles" even before the promulgation of the 2017 PPR's.<sup>114</sup> This is illustrated in the case of *Forge v Old Mutual*<sup>115</sup> in which the FAIS Ombud pronounced that Financial Service Providers (FSP's) are bound by the TCF principles, "which have now been accepted within the entire financial services industry".<sup>116</sup>

Importantly the 2017 PPR's are only applicable to the insurance sector, and thus, the formal incorporation of TCF into the general financial sector is still awaited. The promulgation of the COFI Bill will mark the formal incorporation of TCF principles in the financial services sector.<sup>117</sup> In terms of Rule 1.3 of the 2017 PPR's "An insurer remains responsible for meeting the requirements set out in these rules." Millard argues that the formal incorporation of TCF into the PPR's brings legal certainty to market conduct regulation on insurers instead of placing a disproportionate burden on intermediaries and advisors alone.<sup>118</sup> The writer agrees with this argument as the entire product life-cycle must be appropriately regulated and the rules enforced throughout as one part of the life cycle is of necessity linked to the other. If one considers the six fairness outcomes in this context, the success of the regulation to ensure consumer protection is dependent on how the various employees of the insurers conduct themselves throughout the entire product life-cycle.<sup>119</sup>

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<sup>111</sup> See para 3.2.2 above at fn 81.

<sup>112</sup> Millard "CoFL and T(CF): Further along the Road to Twin Peaks and a Fair Insurance Industry" 2018 *THRHR* 381.

<sup>113</sup> As above.

<sup>114</sup> Millard 2018 *THRHR* 381

<sup>115</sup> *Forge v Old Mutual* Case nr FAIS 03558/16-17 KZN 4.

<sup>116</sup> As above.

<sup>117</sup> See para 3.2 above.

<sup>118</sup> Millard 2018 *THRHR* 381.

<sup>119</sup> See para 2.2 above.

Notably, the 2017 PPR's compared to its predecessor, the 2004 PPR's is significantly more comprehensive regarding regulation. The current PPR's being the 2017 PPR's as amended in 2018, consists of 66 pages and contains detailed rules impacting and affecting the entire product life-cycle.<sup>120</sup> It should be noted that the 2017 PPR's as amended, brought the regulatory universe of South Africa's insurance sector in line with international standards. In this regard, in a media statement by the National Treasury in 2017, it was stated as background to the PPR's and regulation that the purpose is to align with international standards in terms of the International Association of Insurers Supervisors (IAIS) core principles.<sup>121</sup>

For the purpose of fully understanding the effect of the TCF and PPR's on insurance claims handling in South Africa the product life-cycle must be kept in mind. In this regard the various sections of the 2017 PPR's will now briefly be discussed in paragraph 3.3.2.1 to 3.3.2.8 below. The various sections deal with the different stages of the product life-cycle.

### **3.3.2.1 Interpretation**

The importance of interpretation in insurance cannot be overstated. It is part of the daily function of any insurance business throughout the entire product life-cycle. For example, when one considers product design, the policyholder's needs and how the policy documents will be read and interpreted at the claims stage should be considered. The interpretation of a specific term or sentence can be the difference between what is covered and what is not covered under the policy. Notably, the 2017 PPR's as amended, contain a significant section of definitions. The writer submits that the additional definitions provide the necessary clarity and detail otherwise left to interpretation by the insurer and policyholders, which can cause unnecessary disputes more often than not, to the detriment of the policyholder.

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<sup>120</sup> Amendment of the 2017 PPR's, GN996 in GG41928 of 1 October 2018 (2017 PPR's as amended).

<sup>121</sup> National Treasury and Financial Services Board "Media Statement Release of final insurance conduct regulations and policyholder protection rules"  
[http://www.treasury.gov.za/comm\\_media/press/2017/2017121501](http://www.treasury.gov.za/comm_media/press/2017/2017121501) (last accessed 2021-10-03).



### **3.3.2.2 Fair Treatment of Policyholders**

It is interesting to note that fair or fairness is not defined in the 2017 PPR's, despite it being the foundation of the incorporated TCF principles. There are, however, specific rules that set out requirements for fair treatment of policyholders in Rule 1.<sup>122</sup> The definition of "policyholder" is expanded for the purpose of Rule 1 to include a potential policyholder and members of a group scheme.<sup>123</sup> There is a clear duty placed on insurers to "at all times "Act with due skill, care and diligence when dealing with policyholders", and policyholders is not limited to current insured persons but potential policyholders as well as members of a group scheme.<sup>124</sup> The duty on insurers in respect of policyholders has thus been widened. Furthermore, insurers must:

- (a) In any engagement with a policyholder, and in all communications and dealings with a policyholder, act honourably, professionally and with due regard to the fair treatment of the policyholder;<sup>125</sup> and
- (b) at the start of any engagement initiated by the insurer clearly explain the purpose thereof.<sup>126</sup>

From the above, it is noted that to ensure fairness, the regulator has recognised that insurers' conduct towards policyholders is just as important as the conduct of intermediaries and advisors.

In this regard, the six fairness outcomes that embody the TCF principles as set out above are contained in Rule 1.4 of the 2017 PPR's as amended.<sup>127</sup> These fairness outcomes primarily place specific duties on insurers in order to achieve fair treatment through compliance throughout the entire product life-cycle.

### **3.3.2.3 Products**

In terms of Rule 2, there are specific duties placed on insurers when developing products that must be taken into consideration when designing a product and when the product is marketed.<sup>128</sup> In essence, the rules require that the insurers use adequate information on the "needs of...identified types, kinds or categories of policyholders or members" when developing products; <sup>129</sup> thoroughly assess the

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<sup>122</sup> Chapter 2 at Rule 1.1 - 1.10 the 2017 PPR's as amended.

<sup>123</sup> Chapter 2 at Rule 1.1 the 2017 PPR's as amended.

<sup>124</sup> As above; Chapter 2 at Rule 1.2 the 2017 PPR's as amended.

<sup>125</sup> Chapter 2 at Rule 1.3(a) the 2017 PPR's as amended.

<sup>126</sup> Chapter 2 at Rule 1.3(b) the 2017 PPR's as amended.

<sup>127</sup> See para 2.2 above.

<sup>128</sup> Chapter 3 at Rule 2.1 - 2.4 the 2017 PPR's as amended.

<sup>129</sup> Chapter 3 at Rule 2.1(a) the 2017 PPR's as amended.

products to ensure the products are consistent with the insurer's objectives; the kinds or categories of policyholders and their needs; as well as take into account the fair treatment of policyholders.<sup>130</sup> The regulator has subsequently published recommended amendments in 2021 to the 2017 PPR's (as amended in 2018) in terms of which the section on product design has undergone significant changes, the details of which are beyond the scope of this discussion.<sup>131</sup> The further detailed recommended 2021 amendments indicate the market conduct regulators recognition of the significant impact that the product design has on on policyholders.<sup>132</sup>

Microinsurance products and standards,<sup>133</sup> consumer credit and credit life insurance,<sup>134</sup> cooling-off rights,<sup>135</sup> negative option selection of policy terms or conditions,<sup>136</sup> as further categories under product design, is beyond the scope of this dissertation's discussion. However, it is crucial to keep all these issues in mind when evaluating the degree of fairness brought about by these regulations. Issues like the determining of premiums,<sup>137</sup> void provisions,<sup>138</sup> waiver of rights,<sup>139</sup> and the signing of blank or uncompleted forms<sup>140</sup> often arise in the post-sale stage of the product life-cycle. If not appropriately done earlier, these are difficult and complex areas to cover when navigating fairness and interpreting the policy.

### **3.3.2.4 Advertising and disclosure**

Millard notes that advertising and disclosure are "[t]he best examples of the inclusion of fairness as a basis in market conduct".<sup>141</sup> For this dissertation, it is essential to keep the aspect of disclosure in mind. If not done correctly by the insured at the pre-sale or sales stages, disclosure is another source of problems at the claims stage. This

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<sup>130</sup> Chapter 3 at Rule 2.1(b) the 2017 PPR's as amended.

<sup>131</sup> FSCA Communication 14 of 2021 (INS) "Publication of proposed amendments to the Policyholder Protection Rules made under section 62(1) of the Long-term Insurance Act, 1998 (Act No. 52 of 1998) and under section 55 of the Short-term Insurance Act, 1998 for public comment" [https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2014%20of%202021%20\(INS\).pdf](https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2014%20of%202021%20(INS).pdf) (last accessed 2021-10-11).

<sup>132</sup> As above.

<sup>133</sup> Chapter 3 at Rule 2A the 2017 PPR's as amended.

<sup>134</sup> Chapter 3 at Rule 3 the 2017 PPR's as amended.

<sup>135</sup> Chapter 3 at Rule 4 the 2017 PPR's as amended.

<sup>136</sup> Chapter 3 at Rule 5 the 2017 PPR's as amended.

<sup>137</sup> Chapter 3 at Rule 6 the 2017 PPR's as amended.

<sup>138</sup> Chapter 3 at Rule 7 the 2017 PPR's as amended.

<sup>139</sup> Chapter 3 at Rule 8 the 2017 PPR's as amended.

<sup>140</sup> Chapter 3 at Rule 9 the 2017 PPR's as amended.

<sup>141</sup> Millard 2018 *THRHR* 383.

includes the role played by the broker or underwriter. Rule 11 of the 2017 PPR's as amended, provides for disclosure.<sup>142</sup>

Disclosure is a two-way street. On one side, the insured has a duty to disclose certain information, and on the other, the insurer has a duty to disclose certain information. The nature and basis of the information significantly impact whether the insured or insurer will be willing to enter into the insurance contract and on what terms. For example, the insurer may have a specific exclusion or waiting period it would like to add to the insurance contract based on adverse information provided by the potential policyholder. Waiting periods or exclusionary clauses must be disclosed to the potential policyholder.<sup>143</sup> Importantly the duty to disclose is not a once-off event, but it can be continuous in nature given the nature of the policy.<sup>144</sup>

### **3.3.2.5 Intermediation and Distribution**

Rule 12 of the 2017 PPR's, as amended, deals with intermediaries and distributions.<sup>145</sup> The purpose of this rule is to ensure the protection of policyholders and potential policyholders when insurers utilise the services of intermediaries.<sup>146</sup> Here the emphasis is on licencing and fit and proper requirements. The details are beyond the scope of this dissertation but are essential to keep in mind when determining the overall level of fairness.

### **3.3.2.6 Product Performance and Acceptable service**

The product performance and acceptable services aspect pertains to data management,<sup>147</sup> on-going review of product performance,<sup>148</sup> period of grace,<sup>149</sup> and record keeping.<sup>150</sup> In respect of fairness, the rules, in essence, regulate the collection, accessing, storage, review and use of data to ensure a sustainable and proper functioning insurer throughout the entire product life-cycle.<sup>151</sup> All insurance products

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<sup>142</sup> Chapter 4 at Rule 11 the 2017 PPR's as amended.

<sup>143</sup> Chapter 4 at Rule 11.1 the 2017 PPR's as amended.

<sup>144</sup> Chapter 4 at Rule 11.6 the 2017 PPR's as amended.

<sup>145</sup> Chapter 5 at Rule 12 the 2017 PPR's as amended.

<sup>146</sup> Chapter 5 at Rule 12.2 the 2017 PPR's as amended.

<sup>147</sup> Chapter 6 at Rule 13 the 2017 PPR's as amended.

<sup>148</sup> Chapter 6 at Rule 14 the 2017 PPR's as amended.

<sup>149</sup> Chapter 6 at Rule 15 the 2017 PPR's as amended.

<sup>150</sup> Chapter 6 at Rule 16 the 2017 PPR's as amended.

<sup>151</sup> Chapter 6 at Rule 13.1 - 13.8 the 2017 PPR's as amended.

are to be reviewed in terms of these rules continuously to ensure that products are consistent with the needs of the targeted policyholders.<sup>152</sup>

Furthermore, in terms of Rule 15, insurers are required to insert a period of grace of not less than 15 days for payment after the due date. For monthly policies, the provision must apply from the second month.<sup>153</sup> Finally, under this section, insurers are also required to keep a proper record of all policy-related communications in an accessible manner for a period of at least five years.<sup>154</sup> It is clear from a reading of the Rules 14 to 16 that the 2017 PPR's as amended, aim to ensure fairness for the consumer in how data is managed, how products perform, periods of grace, and how records are kept.

These rules place an onerous duty on insurers that will reflect in the cost of insurance products - especially regarding information collection, the use of information in running the business and how it may or may not impact policyholders.

### **3.3.2.7 No Unreasonable Post-Sale Barriers**

No unreasonable post-sale barriers in the 2017 PPR's specifically focuses on claims management,<sup>155</sup> complaints<sup>156</sup> and the termination of policies.<sup>157</sup> This forms the main focus of the dissertation as far as it relates to claims management.<sup>158</sup>

The 2004 PPR's did not contain detailed rules on claims management. The 2017 PPR's have extensive and detailed rules on what is required from insurers to ensure fairness for policyholders in the post-sale stage of the product life-cycle. The following aspects are set out in detail in terms of Rule 17:

- Establishment of claims management framework;<sup>159</sup>
- Requirements for claims management framework;<sup>160</sup>

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<sup>152</sup> Chapter 6 at Rule 14 the 2017 PPR's as amended; see para 3.3.2.3 above.

<sup>153</sup> Chapter 6 at Rule 15 the 2017 PPR's as amended.

<sup>154</sup> Chapter 6 at Rule 16 the 2017 PPR's as amended.

<sup>155</sup> Chapter 7 at Rule 17 the 2017 PPR's as amended.

<sup>156</sup> Chapter 7 at Rule 18 the 2017 PPR's as amended.

<sup>157</sup> Chapter 7 at Rule 19 the 2017 PPR's as amended.

<sup>158</sup> Chapter 7 at Rule 17 the 2017 PPR's as amended.

<sup>159</sup> Chapter 7 at Rule 17.2 the 2017 PPR's as amended.

<sup>160</sup> Chapter 7 at Rule 17.3 the 2017 PPR's as amended.

- Allocation of responsibilities;<sup>161</sup>
- Claims escalation and review process;<sup>162</sup>
- Decisions relating to claims and time limitation provisions for the institution of legal action;<sup>163</sup>
- Recordkeeping, monitoring and analysis;<sup>164</sup>
- Communication with claimants;<sup>165</sup>
- Reporting of claims information;<sup>166</sup>
- Excesses;<sup>167</sup>
- Prohibited claims practices;<sup>168</sup> and
- Claims received during a period of grace.<sup>169</sup>

The claims management Rules contained in Rule 17 of the 2017 PPR's as amended will be discussed and evaluated in chapter 4 below. However, at this stage, it is crucial to highlight very briefly that these rules materially impact the management of insurance claims in South Africa.

All insurers are required to establish a claims management framework.<sup>170</sup> In terms of Rule 17.2.1:<sup>171</sup>

An insurer must establish, maintain and operate an adequate and effective claims management framework to ensure the fair treatment of policyholders and claimants that –

- (a) is proportionate to the nature, scale and complexity of the insurer's business and risks;
- (b) is appropriate for the business model, policies, services, and policyholders and beneficiaries of the insurer;
- (c) enables claims to be assessed after taking reasonable steps to gather and investigate all relevant and appropriate information and circumstances with due regard to the fair treatment of claimants;
- (d) does not impose unreasonable barriers to claimants; and
- (e) address and provide for, at least, the matters provided for in this rule.

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<sup>161</sup> Chapter 7 at Rule 17.4 the 2017 PPR's as amended.

<sup>162</sup> Chapter 7 at Rule 17.5 the 2017 PPR's as amended.

<sup>163</sup> Chapter 7 at Rule 17.6 the 2017 PPR's as amended.

<sup>164</sup> Chapter 7 at Rule 17.7 the 2017 PPR's as amended.

<sup>165</sup> Chapter 7 at Rule 17.8 the 2017 PPR's as amended.

<sup>166</sup> Chapter 7 at Rule 17.9 the 2017 PPR's as amended.

<sup>167</sup> Chapter 7 at Rule 17.10 the 2017 PPR's as amended.

<sup>168</sup> Chapter 7 at Rule 17.11 the 2017 PPR's as amended.

<sup>169</sup> Chapter 7 at Rule 17.12 the 2017 PPR's as amended.

<sup>170</sup> Chapter 7 at Rule 17.2 the 2017 PPR's as amended

<sup>171</sup> As above.

In essence, the rules state that insurers must act proportionately, appropriately and reasonably to comply with the rules and to ensure fair treatment of policyholders.

### **3.3.2.8 Administration**

This section is very brief and, as the heading states, deals with administration. It states that the 2004 PPR's are repealed by the 2017 PPR's. It sets out the details of the short title and commencement of the various sections.<sup>172</sup> There are no provisions under this heading that address fairness specifically other than stating that the 2017 PPR's are in force and saying what it is to be called.

### **3.4 Evaluation of the legislative framework**

The legislative framework has undergone significant development in respect of the laws governing the insurance sector.<sup>173</sup> The PPR's are significant in respect of market-conduct regulation and protecting policyholders.<sup>174</sup> In promulgating the new IA and publishing the 2017 PPR's the legislature has indicated that the universal TCF principles are now enforceable rules that apply to insurers.

The rules give life to the idea of fairness in the insurance product life-cycle. The way insurers conduct themselves as well as the insurance contract is impacted. Insurers are no longer the sole entity determining what is fair and whatnot. The legal system imposes a fairness foundation on insurers. To be successful and to be competitive, they will have to operate within the law. It is submitted that the legislative developments (mainly the 2017 PPR's as amended) aim to ensure that insurers conduct their business in a specific manner to instil consumer confidence and protection into the culture of the insurance business.

### **3.5 Conclusion**

Following the repeal of most of the STIA and LTIA by the promulgation of the IA and the 2017 PPR's, the legal and conceptual framework has developed to incorporate TCF and fairness as central to the new insurance sector. The responsibility to comply

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<sup>172</sup> Chapter 8 at Rule 1 to 2 of the 2017 PPR's as amended.

<sup>173</sup> See para 3.2.1 above.

<sup>174</sup> See para 3.3 above.

with the latest developments rests with insurers. It will have a significant impact on the insurance business culture and insurance contracts.

The new 2017 PPR's thus impact the handling of insurance claims in South Africa, which will be discussed in detail below in chapter 4.

## CHAPTER 4 INSURANCE CLAIMS HANDLING IN SOUTH AFRICA

"Knowledge is the sum total of our experiences...[[]isten to what people have to say, look carefully at what comes before our eyes, and then stop to understand the significance of what we hear and see, not only in terms of our immediate job but in relation to the entire operation of which it is an important part."<sup>175</sup>

### 4.1 Introduction

The development of Treating Customers Fairly (TCF) from a principle-based approach to an outcome-based approach through rules and ultimate the accompanying enforcement is in line with the United Kingdom's experience.<sup>176</sup> Claims handling forms part of the post-sale phase of the product life-cycle. The Policyholder Protection Rules (PPR's) aim to ensure fair treatment of the policyholders, and detailed rules are contained under chapter 7 of the 2017 PPR's as amended, which has the heading "No Unreasonable Post-Sale Barriers".<sup>177</sup> The Oxford English Dictionary online defines "unreasonable" as an idea, action "that is not based upon good sense or sound judgment or unfair, unjustifiable or inequitable".<sup>178</sup> Thus the heading itself is self-explanatory. The protection will be by removing any unreasonable barriers to policyholders in the claims and complaints stage if the insurance company's decision is based upon unfair reasoning or grounds. Keeping this in mind, this chapter will discuss and evaluate the insurance claims handling and the impact of the TCF and the PPR's thereupon in South Africa.

### 4.2 Claims management (handling)

#### 4.2.1 Background

In the court case of *Lake v Reinsurance Corporation Ltd*<sup>179</sup> an insurance contract was defined as:

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<sup>175</sup> Rasmussen "Claims Management" 1966 *Insurance Law Journal* 668.

<sup>176</sup> Financial Services Board "Treating consumers fairly: A discussion paper prepared for the Financial Services Board" 2010 3 <https://www.insurancegateway.co.za> (last accessed 2021-05-08) (TCF Discussion Paper).

<sup>177</sup> Chapter 7 the 2017 PPR's as amended.

<sup>178</sup> Oxford English Dictionary online search <https://www-oed-com.uplib.idm.oclc.org/view/Entry/216857?redirectedFrom=unreasonable#eid> (last accessed 2021-10-11).

<sup>179</sup> *Lake v Reinsurance Corporation Ltd* 1972 (3) SA 124 (W) at para 127 – 128.



"a contract between an insurer (or assurer) and an insured (or assured), whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent on the happening of a specified uncertain event in which the insured has some interest."

As noted by Reinecke and others, the above definition attempts to cover all forms of insurance.<sup>180</sup> However, as also indicated by Reinecke, the definition may not encompass all types of insurance contracts. However, it is a solid basis to work from.<sup>181</sup>

It is common practice in the insurance sector for insurers to draft contracts (the product) appropriate to address the risk needs of policyholders. This is also now legally required by the 2017 PPR's as amended when designing a product.<sup>182</sup> It must be kept in mind that an insurance contract is a nominate contract, and as such, the general principles of contract law will apply.<sup>183</sup> However, as discussed in chapter 3, prevailing legislation, regulation, and rules may qualify the common law principles.

The insurance contract is generally contained in two documents titled (1) "policy schedule" and (2) "policy wording", which together make up the insurance contract – sometimes accompanied by one or more endorsements. The policy schedule contains details of the insuring period, contracting parties, limits insured, premiums and so forth. At the same time, the policy wording contains specific clauses that, *among other things*, set out the cover and obligations of the parties. Insurers generally use endorsements to limit cover in particular instances due to, for example, the claims history of the prospective insured or disclosures made by the prospective insured at the sale stage that escalates the risk beyond the risk appetite of the insurer. A standard clause found in insurance contracts is the "insuring clause". This specific clause, in essence, sets out the basis of the insurance contract. It plays a crucial role at the claims stage. In the claims management process, one analyses the information provided by the policyholder when submitting a claim. One has to determine whether

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<sup>180</sup> Reinecke, Van Niekerk & Nienaber *South African Insurance Law* (2013) 5.

<sup>181</sup> As above.

<sup>182</sup> See para 3.3.2 on product design above.

<sup>183</sup> Specific contracts are contracts that are identifiable by the type of clauses that are generally found in that type of contract, it is such that the contract can be identified without containing a heading. There are generally accepted practices applicable to a specific contract.

the factual situation falls within the "four walls" of the insurance contract, specifically the insuring clause, to determine the insurance company's liability.

The claims management stage is vital to a successful insurance contract and, naturally, the insurance business. From a consumer viewpoint, the claims management stage is where the "value for money" proposition is ultimately tested.<sup>184</sup> The writer agrees, from practical experience, that the best test of a policy is at the claims management stage as one is required to thoroughly consider each clause of the insurance contract and systematically work through the entire contract before deciding on whether or not to "accept, repudiate or dispute a claim or quantum of a claim for a benefit under a policy".<sup>185</sup>

#### **4.2.2 Purpose and objectives of claims management**

The purpose of claims management, in essence, is to consider claims made. Claims are defined in the 2017 PPR's to mean "unless [the] context indicates otherwise, a demand for policy benefits by a person in relation to a policy, irrespective of whether or not the person's demand is valid".<sup>186</sup> The objective is to consider the claim made with fairness. Due to the required in-depth application and analyses of all the aspects relevant to the product, if the cover is declined, problems in the product life-cycle usually come to the fore in claims management.

Fairness at the claims stage is not a band-aid to fix mistakes. Fairness is achieved at the claims stage by establishing a claims management framework that is appropriate and proportionate to the insurance business and risks covered by the company's policies. It enables claims assessment and investigation with due regard for fairness.<sup>187</sup> Fairness is not to impose unreasonable barriers.<sup>188</sup> This objective is further achieved by complying with the "further rules" in the 2017 PPR's as amended.

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<sup>184</sup> Millard "The devil is not in the detail: On microinsurance, policyholder protection and financial inclusion" 2019 *THRHR* 603 – 604.

<sup>185</sup> Chapter 7 at Rule 17.6.1 the 2017 PPR's as amended.

<sup>186</sup> Chapter 1 at Rule 2 the 2017 PPR's as amended.

<sup>187</sup> Chapter 7 at Rule 17.2.1 (a) – (e) the 2017 PPR's as amended.

<sup>188</sup> Chapter 7 at Rule 17.2.1 (d) the 2017 PPR's as amended.

## 4.2.3 Requirements for a claims management framework

### 4.2.3.1 Overview

The requirements for a claims management framework were briefly touched on in chapter 3 above, namely Rule 17.2 of the 2017 PPR's as amended was quoted and briefly discussed.<sup>189</sup> The purpose was to set out the current legislation, regulations and rules in which claims management operates as per the 2017 PPR's in the context of the legal framework.<sup>190</sup> Rule 17.2 summarises the overview requirements that insurers must implement to be compliant. Rule 17.3 contains the details on implementing the claims management framework.

The details of Rule 17.3 to Rule 17.11 materially affect the claims management of insurers, and it is necessary to examine the details of these rules to evaluate the impact on the insurance contract, compliance and ultimately claims handling in South Africa.

### 4.2.3.2 The structure

Rule 17.3 provides the structure of the claims management framework. The requirements are that Insurers must:

- provide for a proper allocation of resources for dealing with claims across the business of the insurer";<sup>191</sup>
- have appropriate performance standards to prevent conflict of interest and ensure objectivity and impartiality;<sup>192</sup>
- prepare "documented procedures for the appropriate management of claims from the time the claims are received until it is finalised" and include expected timeframes;<sup>193</sup>
- document the interest payable in the event of late payment, the rate, and the process to be followed;<sup>194</sup>

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<sup>189</sup> See para 3.3.2.7 above.

<sup>190</sup> See para 3.1 above.

<sup>191</sup> Chapter 7 at Rule 17.3.1(a) the 2017 PPR's as amended.

<sup>192</sup> Chapter 7 at Rule 17.3.1(b) the 2017 PPR's as amended.

<sup>193</sup> Chapter 7 at Rule 17.3.1(c) the 2017 PPR's as amended.

<sup>194</sup> Chapter 7 at Rule 17.3.1(d) the 2017 PPR's as amended.

- document and "clearly define" the escalation, decision-making, monitoring and review processes in the claims management framework.<sup>195</sup>

The regulator has thus not only set out the structure of a claims management framework but requires the structure explicitly to be documented by insurers. It is submitted that this will facilitate oversight and enforcement by the Financial Sector Conduct Authority (FSCA).

Apart from the allocation, incentivisation and documented procedures from when a claim is received until it is finalised. It is required in terms of Rule 17.3(f) that there be proper record keeping of claims as well as monitoring and analysis of claims and reporting to executive management, the board of directors or a relevant committee.<sup>196</sup>

This includes recordkeeping of:

- (1) identified risks, trends and actions taken in response thereto;<sup>197</sup> and
- (2) the effectiveness and outcomes of the claims management framework.<sup>198</sup>

The rules further require ongoing internal reporting to facilitate continued self-monitoring by insurers of the claims management process. The insurer's business, if compliant with the rules, will ensure stability and continued growth and improvement. This is beneficial to the insurance sector and the financial sector stability. It is also in line with the purpose of the FSCA as the market conduct authority.<sup>199</sup>

It is interesting to note that the rules also state that insurers must have "appropriate communication with claimants and their authorised representatives on the claims processes and procedures".<sup>200</sup> This puts a duty on insurers to cogently and adequately communicate with claimants directly or indirectly via intermediaries. Rule 17.6.3 requires "plain language when an insurer communicates a decision to either repudiate or dispute a claim".<sup>201</sup> This the writer submits is essential as claimants are usually laypersons who are not trained and educated in the intricacies of insurance law. They

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<sup>195</sup> Chapter 7 at Rule 17.3.1(e) the 2017 PPR's as amended.

<sup>196</sup> Chapter 7 at Rule 17.3.1(f) the 2017 PPR's as amended.

<sup>197</sup> Chapter 7 at Rule 17.3.1(f)(i) the 2017 PPR's as amended.

<sup>198</sup> Chapter 7 at Rule 17.3.1(f)(ii) the 2017 PPR's as amended.

<sup>199</sup> S 106 Financial Sector Regulation Act 9 of 2017.

<sup>200</sup> Chapter 7 at Rule 17.3.1(g) the 2017 PPR's as amended.

<sup>201</sup> Chapter 7 at Rule 17.6.3 the 2017 PPR's as amended.

may struggle to understand the decisions of insurers if communication is over-technical or jargonised. This would be unfair to claimants as they will not understand the decision and may leave and not challenge the outcome or incur further expenses that could have been avoided. One should strive for jargon-free language.

Furthermore, insurers are required in terms of Rule 17.3.1(h) to meet the requirements for "reporting to the Authority and public reporting in accordance with this rule...", the regulator does not expressly state what "rule" is referred to.<sup>202</sup> The writer noted in this regard that in Rule 17.9, the regulator provides a bit more detail on the aspect of reporting. In this regard, insurers "must have appropriate processes in place to ensure compliance with reporting any claims information".<sup>203</sup> Thus the reporting will be on any of the requirements contained in Rule 17 to the relevant Authority and perhaps how the insurer is compliant. The regulator can therefore call upon the insurers to report on their claims management framework and claims. This is linked to the enforcement function of the FSCA who can issue directives.<sup>204</sup>

The final aspect of the discussion is on combating fraud and money laundering.<sup>205</sup> In terms of Rule 17.3.1(i), insurers must establish a compliance program for combating fraud and money laundering that is appropriate to the exposure and vulnerabilities of the insurer and consistent with their risk management framework. This rule recognises that insurers are financial service providers and that fraud and money laundering threatens the country's financial stability. Insurers and all other financial service providers have a legal duty to combat this. Financial stability is essential for the protection of policyholders if one considers the purpose of the PPR's which is to protect and ensure fair treatment.<sup>206</sup>

#### **4.2.3.3 Concluding remarks**

In concluding on the requirements of the claims management framework in terms of Rule 17.3 of the 2017 PPR's, it is noted that great emphasis is placed, on the fact that, insurers must have a well-documented claims management framework as prescribed

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<sup>202</sup> Chapter 7 at Rule 17.3.1(h) the 2017 PPR's as amended.

<sup>203</sup> Chapter 7 at Rule 17.9 the 2017 PPR's as amended.

<sup>204</sup> S 144 FSRA.

<sup>205</sup> Chapter 7 at Rule 17.3.1(i) the 2017 PPR's as amended.

<sup>206</sup> Chapter 2 at Rule 1.4 the 2017 PPR's as amended.

in the 2017 PPR's to be compliant. Proper recordkeeping of all claims is required. Insurers must comply with specific standards in respect of each rule.

The complete claims management framework is set out in Rule 17 of the 2017 PPR's, only Rules 17.1 to 17.3 thereof has been discussed in detail in this dissertation, to illustrate the main administrative impact on the product life-cycle – post sale on claims handling in South Africa. It is noted that Rules 17.4 to 17.11 of the 2017 PPR's contain specific further details that are not relevant for the current discussion.

### **4.3 Evaluation of effect on insurance claims handling**

Insurance claims handling is a core function of any insurance business. The process is administratively intense and involves an analysis of the insurance contract and all information relevant to the claim made.<sup>207</sup> Following an evaluation of the common law contractual principle of good faith, the universal TCF principles, the legal framework of the insurance sector and the 2017 PPR's, the identified impact on insurance claims handling in South Africa mainly effects the administration of claims and the insurance contract.

#### **4.3.1 Administration**

The incorporation of TCF principles in the 2017 PPR's has placed a formal and very specific administrative duty on insurers.<sup>208</sup> This administration is an integral part of a claims department and especially if one wants to be competitive in the market. Insurers, their appointed intermediaries, and the service providers of insurers must have all documentation setting out the claims management framework and the process to deal with contingencies such as interest payable. Insurers must have an internal protocol for reporting claims to the relevant internal executive board (or committee) and the appropriate regulatory authority.<sup>209</sup>

All insurers have specific rules in compliance with these requirements. If an insurer is non-compliant, the FSCA may issue a directive to ensure compliance with financial

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<sup>207</sup> See para 4.2.1 above.

<sup>208</sup> See para 3.3.2 above.

<sup>209</sup> See para 4.2.3 above.

sector laws.<sup>210</sup> It is submitted that to protect policyholders and ensure fairness insurers are now legally required by TCF and the 2017 PPR's to have proper record keeping.

#### 4.3.2 The insurance contract

The insurance contract is crucial to the insurance sector and is ultimately what the claims department will be considering when a claim is made.<sup>211</sup> TCF has brought with it the requirement of fairness, which is not specially defined in the 2017 PPR's, but the market conduct regulator wants to ensure fairness through enforcement of the 2017 PPR's.<sup>212</sup> Fairness in contracts is, however, not a new concept. In fact, the cornerstone of good faith in contracts contains the idea of fairness.<sup>213</sup> Contract law aims to provide for a structure of rules and principles to govern when an understanding binds people.<sup>214</sup> Fairness, as per TCF and PPR's are, as the National Treasury stated, not "the same as being nice to consumers, nor does it amount to creating satisfied customers".<sup>215</sup>

In claims management, one is responsible for evaluating the policy together with the claim made to determine if there is a valid or invalid claim. An unhappy insured may decide to approach an Ombud or a Court to challenge an insurer's decision. The insurance contract (policy) will most likely take centre stage in this challenge. As discussed in chapter 2 above, the courts are reluctant to impose good faith as a freestanding rule by which the court may decide to reject or enforce a contractual term, the contractual term is rather tested to determine if it is reasonable and thereafter if it operates reasonably (this is dependent on the circumstances).<sup>216</sup>

It is submitted that the effect of TCF on the insurance contract and, by implication, insurance claims handling is such that insurers' general contractual rights are not diminished. It can be argued on the strength of the latest case law that it enhances and protects the contractual expectations of insurers and insureds alike.<sup>217</sup> Based on

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<sup>210</sup> S144 FSRA.

<sup>211</sup> See para 4.2.1 above.

<sup>212</sup> See chapter 3 above.

<sup>213</sup> Hutchinson *et al* *The Law of Contract in South Africa* (2017) 21.

<sup>214</sup> Hutchinson *et al* (2017) 22.

<sup>215</sup> See para 2.2 above.

<sup>216</sup> As above.

<sup>217</sup> See para 2.2 above.

TCF, insurers have an "additional duty" to disclose and draw to the insured's attention adverse contractual terms. The insurers must also indicate to the insured how to make representations and complaints and provide the contact details to submit the same.<sup>218</sup>

Fairness is not what the insurance companies' the claims department or courts personally perceives it to be. The test is not subjective. The general principles of contract and the interpretation of the contract in the context of the *boni mores* will determine fairness in the context. The 2017 PPR's remind insurers that fairness is a societal value that directs the actions of individuals and companies – and in the case of the 2017 PPR's that are enforceable by law. The effect is the improved protection of policyholders through accountability, reasonableness, and equitableness, which are enforced through principles and rules that place additional duties on insurers.<sup>219</sup> Fairness has thus not become a self-standing requirement for insurance contracts via the 2017 PPR's to the contract, but we may see further debate in future as to the extent to which the 2017 PPR's do in fact perhaps amend the common law.

The experience with the 2017 PPR's will probably form the backbone of the Conduct of Financial Institutions Bill (COFI Bill) once it is promulgated into legislation in future. In that sense, the insurance sector is the pathfinder for the rest of the financial sector.

#### **4.4 Conclusion**

Claims management is a core function of an insurance business. It is in the post-sale stage where the resilience of a company's policy life-cycle is tested along with the "fairness values" of an insurer.<sup>220</sup>

The universal TCF principles have formally been entrenched in the insurance sector via the 2017 PPR's (as amended). It impacts the compliance regime of all insurers, specifically the processes leading up to the conclusion of the insurance contract and the administrative procedures at the claims stage.

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<sup>218</sup> Chapter 7 at Rule 17.10 the 2017 PPR's as amended.

<sup>219</sup> See para 4.2.3 above.

<sup>220</sup> See para 4.2.1 above.



The concept of fairness in insurance forces insurers to act reasonably, equitably and just towards policyholders. Fairness was already entrenched into the insurance sector prior to TCF, however the formal promulgation thereof enables the market conduct regulator and relevant forms to better enforce the common law principle of good faith.

## CHAPTER 5: CONCLUSION

The universal Treating Consumers Fairly (TCF) principles, namely the six fairness outcomes, are part of the market conduct regulator's objective of ensuring a stable financial sector that aims to ensure improved consumer confidence, appropriate products and services and enhanced discipline in the industry.<sup>221</sup> Originally the TCF principles were only principles, and insurers were encouraged to incorporate the six fairness outcomes into their culture. The TCF principles have now been formally incorporated into the 2017 Policyholder Protection Rules (PPR's) and are enforceable by the Financial Sector Conduct Authority (FSCA).<sup>222</sup>

The promulgation of the 2017 PPR's marks the formal incorporation of requirements by insurers to comply with specific rules to ensure better protection of policyholders.<sup>223</sup> The regulator aims to promote and maintain a stable financial sector and, by implication, a stable insurance sector, thus improving consumer confidence and promoting a culture of fairness in insurers' business.<sup>224</sup>

The main effects of TCF and the 2017 PPR's on insurance claims handling in South Africa is administrative and contractual. There is an additional administrative burden to document and report on insurers' internal processes, procedures, and decisions. The interpretation of the contract and communication with the insured must be rendered with fairness.<sup>225</sup> Finally the experience with the 2017 PPR's will probably form the backbone of the Conduct of Financial Institutions Bill (COFI Bill) once it is promulgated into legislation in future. In that sense, the insurance sector is the pathfinder for the rest of the financial sector in respect of the principle of fairness.

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<sup>221</sup> See para 2.3 above.

<sup>222</sup> See para 4.2.3 above.

<sup>223</sup> See para 3.3 above.

<sup>224</sup> See para 3.4 above.

<sup>225</sup> See para 4.2 – 4.3 above.

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## LIST OF ABBREVIATIONS

<b>FAIS</b>	Financial Advisory and Intermediary Services
<b>FSA</b>	Financial Services Authority
<b>FSCA</b>	Financial Sector Conduct Authority
<b>FSMA</b>	<i>Financial Services and Market Act</i>
<b>FSB</b>	Financial Services Board
<b>FSRA</b>	Financial Sector Regulation Act
<b>GCC</b>	General Code of Conduct
<b>IA</b>	Insurance Act
<b>IAIS</b>	International Association of Insurers Supervisors
<b>LTIA</b>	Long-Term Insurance Act
<b>PA</b>	Prudential Authority
<b>PPR's</b>	Policyholder Protection Rules
<b>STIA</b>	Short-Term Insurance Act
<b>TCF</b>	Treating Customers Fairly