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Market Conduct Regulation of the Retirement Fund Industry in South Africa

by

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ABSTRACT

The thesis analyses the regulatory reforms on market conduct regulation of the retirement fund industry in South Africa. The position before and after the regulatory reforms brought by the introduction of the twin peaks model of financial regulation in the style of the Financial Sector Regulation Act 9 of 2017 ("the FSRA"), are evaluated against the objectives of the government for the retirement industry and the vision of a new and reformed market conduct framework for the retirement fund industry. The research benchmarks the South African market conduct framework for retirement funds against international best practices and the Australian framework. The research finds that financial regulation has been introduced internationally, to ensure sufficiency and effectiveness in the financial sector, and is an ongoing task aimed at achieving global and economic stability.

Research conducted prior to the twin peaks identified that there is inadequate financial inclusion in the retirement fund industry, as retirement fund benefits are mainly accessible to individuals who occupy formal jobs and earn a good income, and entrepreneurs. Despite South Africa's large and stable retirement fund industry, there is a substantial number of people who do not have access to retirement benefits. There is also a substantial number of people who do not contribute to retirement funds due to various reasons such as due to their being a seasonal worker, a part-time worker, an informal worker, a self-employed individual, being employed by a small legal entity or earning a low income. There are numerous people who, despite having access to retirement benefits, do not have sufficient retirement savings. Some members of retirement funds are not fully aware of the retirement benefits that they have, and some may not be aware that they have retirement benefits, which results in a high number of unclaimed benefits. It is argued that this trend in the retirement fund industry contributes to poverty in the South African economy to a large extent and places a burden on the government of having to provide pension grants to citizens without sufficient retirement savings or without retirement savings.

Research identified that these inefficiencies in the retirement fund industry are caused by improper remuneration on the retirement products (commonly referred to as "financial products"), complexities of retirement products, lack of sufficient and simplified disclosures to retirement fund customers and improper governance of

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retirement funds. It is also suggested that some of the inadequacies may have resulted from early withdrawals of retirement savings, unsuitable financial products and financial laws that do not provide sufficient protection to retirement fund customers. It is also believed that the inadequacies may have resulted from defective market conduct regulation of financial institutions, lack of knowledge of financial products by financial customers (given the complexities of financial products), lack of guidance to retirement fund customers and lack of harmonisation of laws governing private and government retirement funds.

Due to these reasons, the South African government set objectives to commence regulatory reforms in the financial industry, which comprises the retirement fund industry, the insurance and investment industry and the banking industry. The objectives identified for the retirement fund industry include, *inter alia*, a strong market conduct regulation to monitor the conduct of retirement fund stakeholders (such as insurers, financial advisors, principal officers, board of trustees of retirement funds and participating employers in the retirement funds), the enhancement of the protection of retirement fund customers and the support of fair outcomes for customers. Other objectives are regulatory reforms which will implement sufficient disclosures to retirement fund customers, the enhancement of governance of retirement funds, data requirements, to achieve better communication with retirement fund customers, financial literacy programmes, and harmonisation of retirement fund laws for private and government retirement funds. The objectives are intended to alleviate poverty, achieve financial inclusion, and ensure efficiency and stability in the retirement fund industry.

The study finds that the twin peaks financial regulation which introduces market conduct regulation for retirement funds has been adopted by many countries, such as Australia, Canada and the Netherlands. The comparative analysis of the twin peaks financial regulation in South Africa and Australia found similarities between the regulatory models. The study established that the introduction of the twin peaks regulatory model in each country was motivated by the need to ensure sufficiency and stability in the financial industry, including retirement funds and the need to advance the protection of retirement fund customers. The study also identified similarities in the twin peaks regulatory structures of South Africa and Australia and their market conduct

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regulatory frameworks, but also identified differences in the laws which establish the market conduct regulators in the respective countries and the laws that regulate market conduct regulation.

The study also finds a similarity in some of the types of the Australian and South African retirement funds, but there is a major difference on the other categories of the South African retirement funds which provide retirement benefits to a group of employees. The failures experienced under the Australian twin peaks regulation is a significant indicator that the twin peaks financial regulation and the market conduct regulation laws should be constantly monitored to assess their efficiencies and areas that may pose risks to efficient regulation. The study finds that South Africa adopted international best practices in the new and reformed laws and in the objectives to promote the protection of retirement fund customers. It is established that South African regulators under the twin peaks adopted the strategies of the international best practices in its models of regulation, such as the outcome and risk-based principles of regulation.

The research finds that the new and reformed market conduct laws in the retirement fund industry are strong and incorporate international best practices. The introduction of the new and reformed market conduct laws has, to a certain extent, achieved and set the standards for the provision of proper disclosures to retirement fund customers, changes on data requirements, the governance of retirement funds, and financial literacy programmes. However, the shortcomings identified by the study include the fact that there are challenges for insurers and retirement funds to obtain the required data for retirement fund customers. To name two such challenges: there is still a lot of data missing, and insurers and retirement funds are still not able to communicate with all retirement fund customers to provide them with the required disclosures on their benefits, and for the regulators to provide them with financial literacy programmes.

There is still a long road ahead to achieve financial inclusion, as there a high number of South Africans that do not have access to retirement fund benefits. Laws prohibiting retirement fund members from withdrawing their retirement fund benefits before reaching retirement have not been promulgated. Laws obliging customers to contribute to a retirement fund, and the still National Social Security Fund ("NSSF")

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need to be implemented. The harmonisation of the market conduct laws in the retirement fund industry is still in its initial stages and has yet to be achieved. The delays in finalising COFI can cause delays in achieving the objective of market conduct regulation to monitor the conduct of financial institutions. The laws that will be amended through the COFI also imply that there is still a long way to go to achieve harmonisation of the market conduct laws, given that they are largely segmented. The recommendations posed by this study aim to enhance the existing framework and provide guidance to legislators in respect of those market conduct areas that require focused intervention.

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KEY TERMS

Market conduct regulation, South Africa, financial regulation, financial industry, financial institutions, twin peaks, objectives, retirement fund industry, twin peaks financial regulation, twin peaks regulatory model, economy, financial inclusion, efficiency, stability, financial service provider, product provider, pension benefits, retirement benefits, retirement savings, income, members of the fund, retirement fund members, members, beneficiaries, board members, trustees, governance, data, data protection, employer, high fees, abuses, treating customers fairly, fair customer outcomes, fair treatment of customers, Authority, regulation, regulator, regulatory gaps, regulatory reforms, regulatory functions, regulatory framework, regulatory regime, regulatory structures, regulatory overlaps, financial literacy, programmes, protection of customers, fair treatment of customers, financial customers, financial industry, financial institution, objectives, remuneration, fund, retirement fund members, member data, support, enhance, disclosures, benefit projections, administrator, retirement fund administrator.

LIST OF ACRONYMS AND ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AFCA	Australian Financial Complaints Authority
APRA	Australian Prudential Regulation Authority
APRC	Australian Prudential Regulation Commission
ASIC	Australian Securities and Investments Commission
ASISA	Association for Savings and Investment South Africa
CCA	Competition and Consumer Act 2010 (no. 51 of 1974)

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CFSC	Corporations and Financial Services Commission
COFI	The Conduct of Financial Institutions Bill
CFR	Council of Financial Regulators
EAC	Retirement Fund Standard on Effective Annual Cost
ESG	Environmental Social and Governance
EU	European Union
FAIS	Financial Advisory and Intermediary Services Act 37 of 2002
FIDO	Financial Information Directory
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSOS	Financial Services Ombud Schemes Act 37 of 2004 [now repealed]
FSRA	Financial Sector Regulation Act 9 of 2017
FST	Financial Services Tribunal
G20	Group of 20 – an intergovernmental forum comprising 19 countries and the European Union (EU)
GRI	Global Reporting Initiative

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IAS	International Association of Insurance Supervisors
ISSB	International Sustainability Standards Board
ITA	Income Tax Act 52 of 1968
LTIA	The Long-term Insurance Act 52 of 1998
LTIA Regulations	Regulations under the Long-term Insurance Act 52 of 1998
NFLS	National Financial Literacy Strategy
NFSC	National Financial Capability Strategy
NSSF	National Social Security Fund
OECD	Organisation for Economic Co-operation and Development
PA	Prudential Authority
PFA	Pension Funds Act 24 of 1956
PAJA	Promotion of Administrative Justice Act 3 of 2000
POPIA	Protection of Personal Information Act 4 of 2013
PPRs	Policyholder Protection Rules under the Long-term Insurance Act 52 of 1998
RAF	Retirement Annuity Fund

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RBA	Reserve Bank of Australia
RDR	Retail Distribution Review
SADC	Southern African Development Community
SASB	Sustainability Accounting Standards Board
TCF	Treating Customers Fairly
UK	United Kingdom
USA	United States of America

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CHAPTER 1: INTRODUCTION

1.1. Introduction to the retirement fund industry in South Africa

Retirement funds are vital to a country's economy, and they make a significant contribution to the growth of the economy, nationally and internationally.[1] If properly managed and invested, retirement funds provide retirement savings and a source of income to members when they reach retirement or when they retire from their employment due to ill-health. It is by virtue of the income they provide to members that retirement funds promote economic growth.[2] The retirement fund industry has enabled South Africa to contribute to international economic growth.[3] Mhango notes that retirement funds have continuously grown in their complexity and financial value.[4] The author also notes that retirement funds offer "social protection to citizens" and promote economic growth in various countries.[5] For these reasons, many countries have realized that it is necessary to rigorously supervise retirement funds, which has resulted in the promulgation of far-reaching laws in the Southern African Development Community ("SADC") region, like South Africa, Zimbabwe, Botswana, Swaziland and Malawi.[6]

South Africa's retirement fund industry is one of the biggest industries in the world, boasting 9 million members and assets exceeding R2 trillion.[7] Retirement funds are regarded as a vital investment channel locally and internationally.[8] They provide a combined income, contributed to by the employers and employees, to the members of the retirement funds when they retire or in the event of disability, and provide an

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[1] National Treasury *A safer financial sector to serve South Africa better* 2011 at 49.
[2] *Ibid.*
[3] *Ibid.*
[4] Mhango "Constitutional Challenges in the Implementation of a Compulsory Pension Fund: The Case of Lesotho" 2014 *SALJ* 408 at 408.
[5] *Ibid.*
[6] *Idem* at 409.
[7] National Treasury *A safer financial sector to serve South Africa better* 2011 at 49.
[8] *Ibid.*

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income to their beneficiaries upon their death.[9] This may assist to reduce poverty and reduce the necessity for the government to provide pensions to retirees.[10]

The assets of retirement funds in South Africa are 100% GDP,[11] which puts South Africa among the greatest ranked non-OECD countries and above more advanced countries ranked non-OECD[12] countries, and exceeding the retirement fund industries of the more advanced countries.[13] About two-thirds of employees in the formal industries are members of retirement funds in South Africa and it is the highest occupational retirement fund in the world.[14] "The total industry assets amount to about R3.8 trillion, with 489 commercial umbrella funds in 2019 accounting for R1.07 trillion of these industry assets under management."[15] South Africa's model is founded on the "Anglo-American"[16] model with important variations.[17]

Retirement funds should be properly managed due to their complex nature and vital income they provide to their members and their members' families.[18] The South African retirement fund industry comprises occupational umbrella funds, which includes stand-alone funds, umbrella funds, sectoral funds, trade unions, bargaining councils and commercial umbrella funds, preservation funds and retirement annuity funds.[19] South Africa's "Anglo-American" model has low barriers to entry, a common

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[9] *Ibid.*
[10] *Ibid.*
[11] GDP means Gross Domestic Product.
[12] OECD means the Organization for Economic Cooperation and Development. OECD is a unique forum where the governments of 37 democracies with market-based economies collaborate to design international economic policies and standards to enhance stable economic growth.
[13] National Treasury Governance of Umbrella Funds December 2022 at 1.
[14] National Treasury Governance of Umbrella funds at 2: According to World Bank analysis, key features of this model include the following:

- Employers are permitted, but not required by law, to establish retirement funds;
- These funds take the form of not-for-profit trusts governed by trustees as agents for the members; and
- Conditions for registration of new funds are minimal with the result that too many funds are established making it difficult for the supervisor to supervise them effectively. Reliance is placed on the supervision of financial services and professionals involved in the funds and on disclosures to members. Supervision is reactive, remedial and punitive rather than interactive and preventative.

[15] National Treasury "Governance of Umbrella funds" 2021 at 2.
[16] *Idem* at 3.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

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feature of this type of model, and allows for numerous registered funds.[20] While South Africa has arguably too many registered retirement funds, the number of active funds (that is, funds in regular receipt of contributions and/or regularly paying benefits to members) has substantially decreased over the last thirty years.[21]

According to South African Revenue Service ("SARS") IRP5 certificate data, in 2017–18 there were about 6.8 million individuals who contributed to a pension fund, provident fund, or retirement annuity fund, with about 2.9 million contributing to a pension fund, 2.7 million to a provident fund, and 1.7 million contributing to a retirement annuity fund.[22] The statistics reflect that R246 billion was contributed into these retirement funds in 2017–18.[23] The largest contributions to pension funds were made by employers, close to R100 billion, with R53 billion in contributions by employees.[24] Provident fund employer contributions were around R44 billion with employee contributions at R19 billion.[25] Retirement annuity fund contributions were around R32 billion.[26]

1.2. Introduction to the challenges relating to market conduct regulation of retirement funds

Research has shown that the financial services industry is subject to various abuses such as multiple fees, high costs, and poor financial advice to customers.[27] These abuses pervade the retirement fund industry as well as affecting members of retirement funds and employer group schemes.[28] Other forms of abuses include the design and sale of unsuitable products to member-based customers, such as retirement fund members.[29] Mismanagement of retirement funds, fraud, theft, misrepresentation, commission-driven transactions, and poor service to financial

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[20] *Ibid*.
[21] *Ibid*.
[22] National Treasury "Two-pot system retirement proposal and auto-enrolment" December 2021 at 3-4.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.
[27] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 6.
[28] *Ibid*.
[29] *Ibid*.

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customers are further abuses found in the retirement fund industry.[30] Poor service may include post-sales barriers such as delays in processing claims and paying benefits, difficulties accessing the financial institution, and delays in addressing clients' queries.[31] It is logical that these abuses present great risks and challenges to the customer, the retirement fund industry, and the broader domestic economy. Misconduct results in poor retirement savings and investments and incorrect or inadequate retirement benefits for consumers, and it impedes the objective of enhancing financial inclusion in South Africa.[32] The abuses may result in financial losses where, for example, the representatives of a retirement fund select poor investment portfolios or mismanage retirement funds.[33]

The abuses in the financial industry (including the retirement fund industry) are believed to be caused by improper remuneration structures and gaps in the current regulatory regime.[34] Regulatory gaps in the financial industry (including the retirement fund industry) are highlighted by ineffective regulatory structures that are inadequate, disseminated, and irregular—which hampers the regulators' ability to adequately monitor the conduct of financial institutions, resulting in poor customer outcomes.[35] Other regulatory gaps are regulatory structures which allow intermediaries to represent both the client and the financial institution, which may cause conflict of interest.[36] Where, for example, an advisor represents the financial institution on the one hand and the fund and its members on the other hand, the advisor may not be able to promote the interests of the members of the fund.[37] This could result in poor customer outcomes or the abuses referred to above.[38] Irregular regulatory structures on fees for financial products are indicative of regulatory gaps on investment fees and risk products, including risk products offered to retirement fund members.[39] This may

30 *Ibid*.
31 *Ibid*.
32 *Ibid*.
33 *Ibid*.
34 *Ibid*.
35 *Ibid*.
36 National Treasury *A safer financial sector to serve South Africa better* 2011 at 44.
37 *Ibid*.
38 *Ibid*.
39 *Ibid*.

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be prejudicial to the retirement fund members and financial customers as their interests may not be adequately protected at large.[40]

The significance of the financial sector to South African economic growth, the presence of the abuses discussed above, the gaps in the current regulatory regime, and the catastrophes exhibited by the 2008 financial global crisis, motivated the South African government to initiate enormous regulatory reforms in the financial industry.[41] The National Treasury commenced formal financial regulatory reviews through financial regulation in 2007, and expanded it in 2008 after the global crisis.[42] This led to the twin peaks regulatory reforms.[43] The twin peaks regulatory model implements prudential and market conduct regulation.[44] Prudential regulation regulates the financial soundness and stability of financial institutions such as retirement funds, long-term insurers, and financial service providers, whilst market conduct regulation supervises the conduct of financial institutions (including retirement funds) and oversees the protection of financial customers.[45]

It is argued that the financial services industry should be properly regulated in order to maintain the stability necessary to continuously contribute to economic growth.[46] Financial regulation is perceived to be most effective if its powers, in addition to regulating stability, are also expanded to regulate high and obscured fees in the financial sector.[47] It is believed that this will enhance transparency, competitiveness and cost-effectiveness.[48] Financial regulation promotes access to financial services for many South Africans who currently do not have such access.[49]

The government's principal objective was to separate prudential and market conduct regulation through the twin peaks model of financial regulation, with the goal

[40] *Ibid.*
[41] *Idem* at 2.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Idem* at 1.
[47] *Ibid.*
[48] *Ibid.*
[49] *Idem* at 1-2.

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of making the financial sector safer.[50] The retirement fund industry is subsequently also regulated by the market conduct regulator.[51] These objectives are linked to the G20[52] commitments for South Africa, as evidenced by the implementation of some regulatory tools by South Africa's G20 international peers.[53]

Market conduct regulation focuses on the protection of financial customers by ensuring that financial institutions conduct themselves in a manner that guarantees that customers are treated fairly.[54] This is accomplished by implementing regulatory requirements that require financial service providers — and retirement funds — to conduct their business on a culture centred on the Principles of Treating Customers Fairly ("TCF").[55] This was to be achieved by supervising and monitoring the conduct of financial service providers and retirement funds.[56]

It is contended that regulatory reforms are vital to award greater protection to financial customers and oblige financial service providers to treat their customers fairly.[57] The regulatory reforms are also essential to address the abuses and risks stated earlier, in order to achieve outcomes which promote the fair treatment of customers such as members of retirement funds.[58] Market conduct regulation is necessary to protect customers from risks which they may be exposed to when dealing with financial service providers due to the expert knowledge that such providers have

[50] *Ibid*.
[51] *Ibid*. See further the provisions relating to the scope of application, establishment and functions (to name but a few) of the market conduct regulator, as per the Financial Sector Regulation Act 9 of 2017.
[52] The Group of 20 ("G20") is an international forum for the governments and central bank governors from Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union. Founded in 1999, the G20 aims to discuss policy pertaining to the promotion of international financial stability. It seeks to address issues that go beyond the responsibilities of any one organization. The G20 heads of government or heads of state have periodically conferred at summits since their initial meeting in 2008, and the group also hosts separate meetings of finance ministers and foreign ministers due to the expansion of its agenda in recent years.
[53] *Ibid*.
[54] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 8.
[55] *Idem* at 18.
[56] *Ibid*.
[57] *Idem* at 6.
[58] *Ibid*.

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on the products and services they render.[59] The advantage that financial service providers have over their customers may result in abuses like poor service, inefficient financial advice, fraud and misrepresentation.[60]

South Africa has based its culture of customer welfare and protection on the TCF model—a set of principles that financial institutions must adhere to when dealing with financial customers. The former Financial Services Board ("FSB") implemented the fair treatment of financial customers through TCF prior to the introduction of the twin peaks model, and the principles had to be adhered to by financial service providers.[61] TCF was the centre of the legislative reforms in the financial services sector (as well as the retirement fund industry).[62]

South Africa's market conduct regulatory system for retirement funds and consumer protection was initially implemented through various substantive laws such as Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS"), the Long-term Insurance Act 52 of 1998 ("the LTIA"), the Pension Funds Act 24 of 1956 (" the PFA") and the Income Tax Act 58 of 1962 ("ITA").[63] However, the regulatory reforms aim to reform existing legislation on market conduct regulation of the retirement fund industry, and will introduce various streamlined and harmonised laws to implement the objectives of market conduct regulation.[64] Over and above streamlining the regulatory framework to allow for a dedicated market conduct regulator and given the segmented market conduct laws in the financial industry at large—and the retirement fund industry which is currently regulated by the PFA, FAIS, the LTIA and the ITA—the regulatory reforms aim to introduce consolidated and strong market laws to implement the government's objectives on market conduct regulation.[65] The objective is to introduce significant changes in the retirement fund industry as the regulatory changes will implement a market conduct regulation era which empowers the regulators to oblige

[59] *Ibid*; Millard and Maholo "Treating Customers Fairly: A New Name for Existing Principles" 2016 *THRHR* 594 at 594.
[60] *Ibid*.
[61] National Treasury *A safer financial sector to serve South Africa better* 2011 at 39.
[62] *Ibid*.
[63] *Idem* at 41.
[64] *Idem* at 6.
[65] *Ibid*.

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retirement funds, and the product and service providers to account for their conduct and implement measures to protect customers of retirement funds.[66] The reformed market conduct regulatory regime will assist customers of retirement funds to get value for their benefits and mitigate the risks of unclaimed benefits by providing customers with adequate disclosures and financial literacy.[67]

Even though market conduct regulation for retirement funds was part of existing legislation in South Africa, there were numerous gaps and discrepancies that undermined the efficiency of the regulatory and legislative framework. For example, the previous framework did not equip the regulators with enough powers to exercise their authority over offenders, which may have contributed to poor customer outcomes prior to the twin peaks.[68] Unfortunately, it does not seem that the amendments have been extensive enough to address all the gaps and discrepancies, and improve the regulation of the retirement fund industry in the desired manner. As will be shown in this thesis, the singular focus on the industry, without due cognisance of the position of the customer, has been one of the downfalls of the new framework.

The dangers inherent to the retirement fund industry are characterised by unique circumstances such as loss of savings in a retirement annuity, which affects the individual as well as the economy at large.[69] The underperformance or even failure of financial products such as retirement annuities may impose considerable hardship on consumers.[70] Consequently, it has always been important to implement legislation that adequately protects retirement fund members and to ensure efficient governance of retirement funds, to properly monitor investment portfolios and protect the members' benefits.[71]

Retirement funds in South Africa are expensive to administer and also have costs associated with the investment of the retirement benefits.[72] There are also

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66 *Ibid.*
67 *Ibid.*
68 *Idem* at 41.
69 National Treasury *A safer financial sector to serve South Africa better* 2011 at 42.
70 *Ibid.*
71 *Ibid.*
72 *Idem* at 56.

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differences between forms of funds—for example, research has found that retirement annuities are more costly to administer and to invest in, compared to other types of retirement funds such as umbrella funds.[73] These costs affect the members' retirement savings over the time that a member contributes to the retirement fund.[74] As such, it becomes the government's objective (and arguably its responsibility) to mitigate and monitor the costs incurred by members through the administration and investment of retirement funds by consolidating retirement funds and encouraging smaller retirement funds to join umbrella funds (which have proved to be less costly to administer and invest in).[75] However, this is one area of regulatory reform which is still lacking; the government aims to address this issue through "…auto-enrolment or mandatory system of retirement saving for all employed and self-employed persons, to widen and deepen coverage," in addition to the consolidation of retirement funds discussed above.[76]

One of the government's objectives is to reform retirement funds and increase retirement savings for retirement fund members to have sufficient savings available when retiring.[77] However, the employer negotiates the retirement fund benefits on behalf of their employees and decides the percentage that a member and the employer should contribute to the retirement fund—this decision is governed by the employment contract, as participation in a retirement fund is voluntary in South Africa.[78] This may result in a member contributing a lesser percentage which, in turn, may result in insufficient retirement savings by a member, thereby hindering the government's objective to alleviate poverty.[79] The law to oblige employers or individuals to participate in a retirement fund is yet to be designed and implemented, whereas countries like Malawi, Swaziland and Lesotho have compulsory retirement fund structures.[80] Despite the amendments to the FAIS General Code of Conduct for

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[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*.
[76] National Treasury "Two-pot system retirement proposal and auto-enrolment" December 2021 at 3-4.
[77] National Treasury *A safer financial sector to serve South Africa better* 2011 at 49.
[78] Mhango "Constitutional Challenges in the Implementation of a Compulsory Pension Fund: The Case of Lesotho" 2014 *SALJ* 408 at 409.
[79] National Treasury *A safer financial sector to serve South Africa better* 2011 at 56.
[80] Mhango "Constitutional Challenges in the Implementation of a Compulsory Pension Fund: The Case of Lesotho" 2014 *SALJ* 408 at 409.

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Authorised Financial Services Providers and Representatives ("FAIS General Code of Conduct"), on identifying the needs of retirement fund members when rendering advice, the employer still decides the percentages to be contributed for the member.[81] This may impede the objectives of the government to ensure sufficient retirement savings by retirement fund members.[82]

The government's objectives to encourage the preservation of retirement benefits may be impeded by a lack of legislation that obliges a member to preserve their retirement benefits when a member withdraws from a retirement fund before reaching retirement.[83] According to the National Treasury Policy Paper, a survey conducted revealed that 52% of 91 survey respondents who resigned from their employment and exited their retirement funds withdrew their benefits in cash, 25% transferred their benefits to the fund under the new employer, 18% retained their benefits in their previous fund, 3% invested in a retirement annuity fund, and 4% preserved their benefits.[84] According to Anderson, due to retrenchments that occurred between January 2009 and August 2010, only 10.2% of retirement fund members preserved their benefits, and 89.8% opted to take their benefits in cash.[85] "During the same years, 2.4% of divorce claimants preserved their retirement benefits versus the 97.6% of the claimants who opted for cash payments."[86] This reflects a high percentage of withdrawals and insufficient retirement savings and may continue to contribute to poverty for individuals and the economy at large.[87]

Member education and enhanced disclosures to retirement fund members were put in place to assist members to make informed choices on their benefits and to inform members of their benefit projections on reaching retirement.[88] Research has nevertheless identified that there are many retirement fund members that financial service providers and retirement funds cannot contact to provide the necessary

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[81] Financial Services Board "Proposed Amendments to the General Code of Conduct" at 3, Financial Services Board "Retail Distribution Review" (November 2014), Proposal C at 30.
[82] National Treasury *A safer financial sector to serve South Africa better* 2011 at 56.
[83] *Idem* at 51.
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid*.
[88] *Idem* at 53-55.

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disclosures and benefit projections.[89] It is a challenge for retirement funds and financial service providers to provide disclosures and communicate with these members.[90] This necessitates rigorous regulatory intervention to reach out to the public and encourage members to provide the required data to achieve the objectives of protecting members and increasing financial inclusion.[91]

Retirement benefits are complex in nature, being financial products, and members may still find it difficult to understand the features of the products and fees, despite disclosures.[92] It is alleged that many retirement fund members are not aware of the 3% per annum charge on their retirement benefits, which can reduce their retirement savings by half.[93] It is therefore vital for the legislation to provide requirements for members to understand the disclosures provided to them and for legislation to address complex areas in the financial literacy programmes.[94]

Tougher regulations on the payment of contributions to a retirement fund are part of market conduct regulatory reforms.[95] However, there is a high number of employers who fail to pay contributions due to financial distress and thus opt to liquidate the retirement scheme.[96] This is a market regulatory challenge which places the insurer, the employer and the regulator in a difficult position, as this results in members having to exit the retirement fund and provides members with an opportunity to withdraw their benefits from the fund.[97] This may also impede the objectives of protecting members of retirement funds from poverty and/or insufficient savings on reaching retirement and the objective of providing access to retirement funds (financial inclusion).[98]

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89 *Ibid*.
90 *Ibid*.
91 *Ibid*.
92 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 11.
93 *Ibid*.
94 *Ibid*.
95 *Idem* at 39-43.
96 *Ibid*.
97 *Ibid*.
98 *Ibid*.

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The regulatory reforms include objectives to further governance of retirement funds through advanced education programmes for trustees and reformed governance regulations for retirement funds.[99] Research has nevertheless revealed that market conduct laws on governance of retirement funds are segmented and should be properly harmonised to achieve efficient market conduct regulation on the governance of retirement funds.[100] An example is the fit and proper requirements under the FAIS Fit and Proper Requirements, the PFA, and in future COFI[101]. Education programmes currently under the PFA may also need to be aligned with COFI.[102] Another example is the governance requirements for retirement funds under the King IV Report, which have been incorporated into PF Circular 130 and will also need to be incorporated and aligned with COFI.[103]

1.3. Research questions

The main research question for the thesis is: Does the legal framework pertaining to market conduct regulation of the retirement fund industry in South Africa endorse regulation that enhances the protection of customers in the retirement fund industry in an internationally acceptable manner?

In answering this question, the following questions are asked:

1. Which market conduct laws regulate the retirement fund industry in South Africa and how do these laws apply to retirement funds and customers of the retirement fund industry in South Africa?

2. How does the legal framework enable market conduct regulation of the conduct of financial institutions in the retirement fund industry?

3. Which international best practices and practices in foreign jurisdictions enable proper market conduct regulation of retirement fund industries?

[99] *Idem* at 40.
[100] *Idem* at 78.
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*

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4. How does the South African regulation of its retirement fund industry compare to international standards and practices?

5. How can the South African position be enhanced to align with international standards and practices?

1.4. Focus of the study

This study is motivated by the regulatory reforms that affect the retirement fund industry and will focus on market conduct regulation of the retirement fund industry in South Africa. It is one of the first of its kind in South Africa — a doctoral study founded in law that assesses selected aspects of the regulatory regime for the market conduct regulation of the retirement fund industry and evaluates the framework on newly developed standards, intended outcomes, and international practices. The study analyses the framework through the lens of market conduct regulation and provides detailed recommendations to enhance the framework to integrate regulatory principles and standards and meet the intended outcomes. The main aspects that are assessed include:

- the integrity of the financial industry in light of the challenges that customers face;
- market conduct regulation of retirement funds prior to the introduction of the twin peaks model of regulation (hereafter referred to as the "twin peaks");
- market conduct regulation of retirement funds under the twin peaks model of regulation,[104] including considerations relating to COFI that will implement a consolidated market conduct regulation and supervision of retirement funds;[105]
- international best practices and how they compare to the South African regulatory regime in the retirement industry, including a comparison of the Australian and South African twin peaks financial regulatory framework and the market conduct regulation of the retirement industries of Australia and South Africa; and

[104] *Ibid*
[105] National Treasury "Implementing the Twin Peaks model of financial regulation" December 2013 at 15.

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- proposed regulatory reforms to address regulatory misalignments and enhance consumer protection, conduct of business, and the regulation of the retirement fund industry.

The study will not discuss market conduct regulation of state-owned retirement funds, such as the Government Employee Pension Fund ("GEPF") and the Transnet Retirement Fund, as these funds are currently regulated by their own statutes which do not form part of the regulatory framework for the retirement funds analysed in the study. The study will only refer to these funds insofar as they relate to the objectives of the government on harmonising the regulation of these funds to close the regulatory gaps. The South African financial industry includes the long-term and short-term insurance industry, the banking industry and investment schemes. The study will not discuss these industries, as the focus is on the market regulation of the retirement fund industry in South Africa and will refer to the financial industry and long-term insurance products only insofar as they relate to retirement funds. The study will also only analyse the Prudential Authority ("the PA") as far as it is necessary to discuss the structure of the twin peaks in relation to the topic of the thesis.

The objectives of market conduct regulation are *inter alia* to protect consumers, such as customers of retirement funds, to implement a regulatory framework that focuses on the fair treatment of customers and to improve customer experience to promote growth in the financial industry.[106] Market conduct regulation also aims to promote competence and consistency in the financial system, customer education and access to financial products.[107] However, the study will only focus on the objectives of market conduct regulation on the protection of retirement fund customers. Retirement funds form part of the market conduct regulation as they are regulated on how they conduct retirement fund business and treat retirement fund members and stakeholders.[108]

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[106] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 10.
[107] *Ibid.*
[108] See the PFA, FAIS and LTIA.

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1.5. Contribution of the study

As indicated above, this study is the first of its kind. It will contribute to the body of knowledge by analysing the existing market conduct legislation governing retirement funds, namely, the PFA, FAIS, the LTIA, and COFI, and benchmarking it against contemporary national and international market conduct regulation requirements. The aim, as is the case with market conduct regulation itself, is to determine the extent to which these regulations enhance the protection of consumers. The study concludes with recommendations based on the findings to contribute to consumer protection in the retirement fund industry.

The study will make recommendations on how South Africa's regulatory regime can be aligned with international best practices and select foreign jurisdictions to provide an internationally acceptable regulatory framework in the context of this study.

1.6. Methodology and choice of comparative jurisdiction

The study will be limited to desk-based research and will comprise of an analysis of South African statutes, government policy papers, textbooks, case law, and journal articles. Comparative analyses of international jurisdictions and international best practices are undertaken. The comparative jurisdiction is Australia and is selected for purposes of this study due to its similar financial regulatory regime.[109] Australia adopted the twin peaks regulatory model, which also implements prudential supervision and business conduct regulation.[110] The Australian Prudential Regulation Authority ("APRA") regulates banks and insurers, whereas the Australian Securities and Investments Commission ("ASIC") regulates financial services and corporations laws.[111] This is similar to South Africa's twin peaks regulatory model.[112]

Consumer protection laws in Australia are regulated by the Australian Competition and Consumer Commission ("ACCC") and ASIC.[113] ASIC is the law

[109] National Treasury *A safer financial sector to serve South Africa better* 2011 at 30.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Idem* at 40.

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enforcement agency for consumer protection for financial products and services, including credit and aspects of the payments system.[114] The ACCC and ASIC are the Australian market conduct regulators, which can be compared to the Financial Sector Conduct Authority ("the FSCA"), despite the fact that our market conduct regulator is a single regulator.[115] The regulation of financial products under ASIC includes retirement funds and the administration thereof, which is comparable to the regulation of retirement funds, administrators and all other financial institutions by the FSCA.[116]

The study will analyse the following international best practices: the OECD Recommendation on Core Principles of Occupational Pension Regulation; the G20 High-Level Principles on Financial Consumer Protection; and the 2017 World Bank Good Practices for Financial Consumer Protection. TCF is endorsed as an international best practice by organisations such as the World Bank.[117] For example, the World Bank Good Practices for Financial Consumer Protection stipulates that regulatory market monitoring and off-site and on-site inspections are significant for achieving consumer protection.[118] The same principles are adopted by the United Nations guidelines on consumer protection.[119] The G20 High-Level Principles state that a regulatory and supervisory framework is a major objective of regulatory bodies, as it promotes consumer protection.[120] These objectives are similar to South Africa's objectives on market conduct regulation, including the regulation of retirement funds.[121]

1.7. Structure of the thesis

The thesis is structured as follows:

Chapter 1

Chapter 1 is the introduction to the thesis. It provides a background to the nature and complexity of the financial industry in South Africa at large, including the retirement industry. The chapter discusses the significance of the financial sector and the

[114] *Ibid.*
[115] *Ibid.*
[116] *Idem* at 4.
[117] World Bank *Good Practices for Financial Consumer Protection* 2017.
[118] *Idem* at 14.
[119] Consumers International *Consumer Protection: Why it matters to you* (2016).
[120] OECD *G20 High-Level Principles on Financial Consumer Protection* October 2011 at 4.
[121] National Treasury *A safer financial sector to serve South Africa better* 2011 at 6.

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retirement fund industry to the South African and the global economy. The chapter also discusses the need to reform the financial sector regulatory laws, and the reasons for introducing the twin peaks and market conduct regulation, to achieve efficiency, stability and consumer protection. It deals with some of the various abuses in the retirement fund industry and the impact that these abuses have on the members' retirement benefits. The chapter highlights some of the regulatory gaps and how these regulatory gaps may have caused the abuses in the financial industry and the retirement fund industry. The chapter further outlines the purpose and focus of the study, the contribution of the study to the retirement fund industry, and the methodology and layout of the subsequent chapters of the thesis.

Chapter 2

Chapter 2 discusses the different types of retirement funds in South Africa which are commonly referred to as occupational funds and retirement annuity fund, but this excludes government regulated retirement funds such as the GEPF and the Transnet Retirement Fund. The retirement funds analysed in this section are pension fund, provident fund, pension and provident preservation fund, retirement annuity fund, beneficiary fund, umbrella fund, unclaimed benefit fund, defined benefit fund, defined contribution fund and stand-alone fund. The section also discusses how these retirement funds provide and pay benefits to the members under the PFA and the ITA, how the benefits are taxed and the payment of benefits when a member reaches retirement.

Chapter 2 also analyses the stakeholders of retirement funds namely, the fund, the employers the members of the fund, the insurer or service provider, administrator of the retirement fund and the intermediary. This section illustrates the significance and the role of the employer who negotiates the benefits on behalf of the members. The role of insurer/service provider to retirements funds is discussed to outline the various services provided by an insurer in providing the retirement benefits and the services to the retirement funds and their members. The section also outlines the role of the intermediary/broker on the selling and distribution of retirement benefits, the provision of advice to retirement funds and their members and the rendering of intermediary services to retirement funds and their members. The regulators of retirement funds namely the FSCA, SARS and the Pension Funds Adjudicator ("the

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Adjudicator"), the powers and how they regulate retirement funds are also analysed in this chapter. Chapter 2 also evaluates the meaning of market conduct regulation and why it was introduced by the government and how it applies to retirement funds. This chapter also discusses the objectives of the regulatory reforms for retirement funds, and the successes and failures of the proposed regulatory reforms for retirement funds.

Chapter 3

Chapter 3 analyses the appointment, powers and duties of board members of the fund (trustees) prior to the twin peaks. This chapter outlines the obligations of the board members of retirement funds on the governance of retirement funds under the PFA and the requirements of the King IV Report on Corporate Governance for Southern Africa ("the King IV Report") on the fiduciary duties of the board members to manage the retirement funds similar to the obligations of directors of a company. Chapter 3 also analyses the administration of retirement funds, payment of contributions, appointment of and duties of a principal officer and the auditor before and after the twin peaks under the old PFA directives/circulars and the new FSCA conduct standards under the twin peaks and the regulatory reforms.

This chapter also explains the administration of retirement funds, namely the collection and investment of contributions by an administrator, the payment of benefits, and handling of complaints lodged by retirement fund customers. (This includes members, potential members, beneficiaries and dependants of members). Chapter 3 also discusses the regulation and adjudication of complaints, before and after the twin peaks. The discussion on complaints outlines the adjudication of complaints under the PFA and the regulatory changes introduced by the twin peaks, as well as the proposed regulatory reforms on the consolidated ombuds system to promote efficiency and reformed alternative dispute resolution platforms for customers, with the purpose of achieving better customer outcomes.

Chapter 4

Chapter 4 discusses the regulation of retirement funds under FAIS before and after the twin peaks. This chapter illustrates how FAIS regulates the market conduct regulation of retirement funds through the regulation of the sale and distribution of

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retirement fund benefits, rendering of advice and by stipulating skills, competence and proficiency requirements. Chapter 4 also analyses the RDR and its objectives as part of the twin peaks on the regulation of the sale and distribution of financial products (including retirement products). The discussion on the RDR outlines the amendments to the FAIS General Code of Conduct to regulate remuneration of financial products (such as retirement and insurance risk benefits provided to retirement funds and their members) and to ensure that retirement funds and their members are provided with adequate and appropriate advice. The discussion on the FAIS Fit and Proper requirements outlines the reformed fit and proper requirements for financial advisers on the necessary skills, competence, and proficiency requirements to implement the RDR proposals to achieve better customer outcomes. This section on the FAIS Fit and Proper Requirements outlines the fit and proper requirements for financial service providers such as governance requirements, risk management, compliance, technological systems to process and store data and provide financial services, and adequate and appropriate human resources to provide financial services.

Chapter 4 also analyses market conduct regulation of retirement funds under the LTIA before and after the twin peaks. The section outlines how the LTIA regulates the conduct of business of some of the activities of insurers and intermediaries as service and product providers of retirement funds. Chapter 4 also discusses TCF Principles applicable to retirement funds before and after the twin peaks. This includes handling of a discussion on the six TCF Principles which apply to retirement funds before and after the twin peaks. Chapter 4 also analyses the regulatory reforms introduced by Regulation 28 of the PFA and the application of POPIA to retirement funds. Chapter 4 also examines the provisions POPIA and how POPIA applies to retirement funds.

Chapter 5

Chapter 5 discusses the objectives of COFI which are to advance the market conduct regulation of the financial industry and enhance the protection of consumers through market conduct regulations. The section also analyses how COFI will replace existing conduct legislation through the principles-based, outcomes-based, activity-based, and risk-based and proportionate regulatory methods, and how COFI will codify TCF Principles. This chapter also analyses how COFI will apply to retirement funds and

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how it will implement market conduct laws. These market conduct laws will stipulate requirements on governance and culture for retirement funds, licensing requirements for retirement funds, and provisions on product design, sale, and distribution of retirement products. The chapter also discusses the COFI provisions for trustees and principal officers in relation to their conduct and their obligations to act in the best interest of customers to ensure their fair treatment. The chapter also evaluates the successes and failures of COFI in respect of retirement funds.

Chapter 6

Chapter 6 analyses international best practices related to market conduct regulation of the retirement fund industries. The chapter discusses the 2017 World Bank Good Practices for Financial Consumer Protection in respect of Insurance and private Pensions, the OECD Recommendation on Core Principles of Occupational Pension Regulation, and the G20 High-Level Principles on Financial Consumer Protection. The chapter analyses the market conduct regulation principles under these international best practices in respect of retirement funds and how they are incorporated in the South African retirement fund market conduct laws. The purpose is to determine the extent to which the South African framework aligns with these international principles. The analysis is undertaken against the background of the discussion of the South African position and constitutes a high-level evaluation of the framework.

Chapter 7

Chapter 7 analyses the twin peaks regulatory model in Australia and compare it to South Africa, to the extent that it relates to market conduct regulation of the retirement fund industry in South Africa. An analysis of the introduction of the twin peaks regulatory model in Australia is conducted. Chapter 7 also discusses the evaluation of the Australian financial system by the Financial System Inquiry ("FSI"), its findings and recommendations to reform the Australian financial regulatory system. The objectives of the FSI to recommend a suitable financial regulatory system to ensure an efficient, sound and fair financial industry in Australia, to provide consumers with products that are cost effective are discussed.

Chapter 7 also discusses the recommendations of the FSI to establish a separate market conduct regulator to address regulatory gaps in the Australian

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financial industry, to regulate the sale and distribution of financial products and the handling of complaints. The discussion outlines the recommendations of the FSI to establish a prudential regulator to regulate prudential regulation and licensing of financial institutions. The discussion also outlines how the FSI recommendations led to the establishment of the Australian twin peaks financial regulation, the Australian statutes which implemented the twin peaks and established APRA and ASIC, and their regulatory functions.

Under the regulatory framework, the Australian market conduct regulation framework under ASIC and the ASIC Act is analysed. This includes the definition of financial products and financial services under the ASIC Act. The discussion also includes ASIC's powers to regulate the conduct of financial institutions, its powers to investigate such conduct and to monitor the protection of financial customers. ASIC's risk-based regulatory method to identify regulatory risks and conduct that is in contravention of legislation is also analysed.

Chapter 7 also discusses ASIC's financial literacy and information gathering programmes. This includes the objective to enhance integrity and financial literacy of consumers in the financial industry by providing sufficient information to financial customers, dispute resolution platforms, comprehensive regulation in the financial industry, thorough market conduct regulation, and financial literacy programmes to enhance the protection of financial customers. The discussion also includes ASIC's on-line education programmes, financial literacy strategy to assist customers to protect their money and to make sound financial decisions in savings and investments, to identify customer needs and the risks that customers face.

The legal framework of the ASIC Act is also discussed. This includes the prohibition of offering financial services in an unethical or dishonest manner, or contrary to the legislative requirements. The analysis also includes prohibitions on conduct which is false or misleading in respect of financial products on the price, services, or false products or services. The analysis also includes the provisions of the ASIC Act on jurisdiction outside the borders of Australia and to institute claims for damages on transactions done outside Australia, including the recovery of commission on financial products.

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Under the comparative analysis, a comparison of the Australian twin peaks financial regulation model with that of South Africa is analysed. The comparison includes the evaluations conducted in the financial industries of both countries to identity the regulatory gaps and recommendations to address the regulatory gaps and inefficiencies. The objectives of the regulatory reforms in Australia and South Africa and the statutes which established the twin peaks in Australia and South Africa, the prudential regulators, market conduct regulators of both countries and their powers under the twin peaks statutes is discussed.

In the later part of chapter 7 the regulation of retirement funds in Australia is analysed. This analysis outlines the laws which regulate retirement funds in Australia, the definition of retirement funds and the structure and purpose of retirement funds in Australia. The discussion also includes regulation retirement funds in Australia which includes payment of contributions, payment of retirement fund benefits, data requirements, keeping of records and complaints procedures. This also includes the regulations on the taxation of retirement fund benefits, the protection of retirement benefits and reporting requirements to the regulators by retirement funds.

A comparative analysis on the regulation of retirement funds and the market conduct regulation of retirement funds in Australia and South Africa is discussed. This comparison includes the definition of retirement funds under the South African laws and those of Australia, payment of benefits, data requirements, payment of contributions, complaints management and taxation of retirement fund benefits. The analysis also includes a comparison of the regulators' powers in Australia and South Africa, which includes supervision of retirement funds, reporting requirements and keeping of records.

Chapter 8

Chapter 8 is the conclusion of the thesis, wherein an overview of the thesis, the central findings of this research, and the recommendations for reform are presented. Special attention is paid to the discussion of the reforms needed in the South African retirement fund industry.

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CHAPTER 2: MARKET CONDUCT REGULATION AND ITS APPLICATION TO RETIREMENT FUNDS

2.1. Introduction

In chapter 1, the various abuses in the retirement fund industry were highlighted as well as the significance of the retirement industry in the South African economy. The introduction showed why it is necessary for the financial industry, especially the retirement fund industry, to be properly regulated.

In this chapter, I discuss the different types of retirement funds in South Africa which are commonly referred to as occupational funds and retirement annuity fund, but this excludes government regulated retirement funds such as the GEPF and the Transnet Retirement Fund. The retirement funds analysed in this section are pension fund, provident fund, pension and provident preservation fund, retirement annuity fund, beneficiary fund, umbrella fund, unclaimed benefit fund, defined benefit fund, defined contribution fund and stand-alone funds. In this section I also discuss how these retirement funds provide and pay benefits to the members under the PFA and the ITA, how the benefits are taxed and the payment of benefits when a member reaches retirement age. As such, this chapter provides background to the next chapter and in relation to the first two research questions.

Stakeholders of retirement funds

In this part of chapter 2, I analyse the stakeholders of retirement funds namely, the fund, the employers and the members of the fund, which are the main stakeholders of a retirement fund. This is because the retirement fund is the one that provides the benefits to the members, the employer is the one that negotiates the benefits on behalf of the members and the members are the ones who contribute to the retirement fund and are recipients of the benefits. The members' dependants and nominees are beneficiaries who are nominated to receive the benefits on the death of a member or under the spouse's or children's benefits provided by the fund.

The insurer or service provider, administrator of the retirement fund, and the intermediary/broker are significant stakeholders who are the service providers of the retirement funds and their members. The insurer/product provider underwrites and

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provides the retirement and risk insurance benefits provided to the members. The administrator is a significant stakeholder who administers the fund. The administrator collects the and invests the contributions paid by the members, manages the investments on behalf of the fund and pays the benefits to the members on behalf of the fund. The intermediary/broker is responsible for selling and distributing the retirement benefits; and for rendering intermediary services such as collecting premiums, lodging claims, queries or complaints on behalf of the members, and providing financial advice to the fund and its members. The fund officers namely the board members, principal officers, valuator and auditor are important stakeholders as officers of the fund who manage the affairs of the fund. The board members have a fiduciary duty to manage the affairs of the fund on behalf of the members and act in the best interests of the fund and the members.

Regulators of retirement funds

In this part of chapter 2, I discuss the regulators of retirement funds namely the FSCA, SARS and the Adjudicator, who regulate and monitor retirement funds. The FSCA is the market conduct regulator of retirement funds, whose functions are to monitor the conduct of retirement funds, administrators of retirement funds, insurers, service and product providers, employers, intermediaries, and relevant stakeholders of retirement funds. SARS is the income tax regulator that regulates the tax on retirements benefits. The Adjudicator is responsible for adjudicating complaints lodged by members and their dependants or beneficiaries.

Market conduct regulation and retirement funds

In this section of chapter two, I analyse the meaning of market conduct regulation and reasons why it was introduced by the government. The discussion highlights the objectives of introducing the twin peaks regulatory reforms to ensure efficiency in the South African financial sector and the retirement fund industry. I also analyse how market regulation was introduced through the twin peaks and the market conduct regulation of retirement funds before and after the introduction of the twin peaks. I also discuss the proposed market conduct regulatory reforms for retirement funds, the government objectives of the regulatory reforms for retirement funds. I highlight that these objectives are to promote the fair treatment of members by enhancing

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preservation of benefits, governance of retirement funds, providing adequate disclosures to members, harmonising the laws of public and private sector retirement funds and encouraging good value for benefits. I also evaluate the successes and failures of the proposed regulatory reforms for retirement funds.

2.2. Overview of the various retirement funds related to the retirement fund industry

2.2.1. Introduction

The South African retirement fund industry comprises of different types of retirement funds.[1] A large number of retirement funds in South Africa are regulated by the PFA and the ITA.[2] However, some of the retirement funds such as the GEPF and the Transnet Pension Funds are not regulated by the PFA.[3]

The study will focus on retirement funds regulated by the PFA and the ITA. For purposes of this research, the term "retirement funds" denotes the different types of retirement funds that are generally referred to as "pension funds", to differentiate the types of retirement funds under these statutes.[4]

2.2.2. Retirement funds

A retirement fund is a savings instrument where employees or individuals save a portion of their income on a regular basis, usually on a monthly basis, during the term of their employment or active service, to provide an income to the respective individuals when they reach retirement or are unable to earn an income due to ill health, or to provide an income to an individual's dependants or beneficiaries upon their death.[5] A retirement fund is defined as "a pension fund organisation under the PFA".[6] It is defined as a group of people or scheme arrangement designed to offer

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[1] Section 1 of the ITA and section 1 of the PFA.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] Section 1 of the PFA; section 1 of the ITA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.2.2; Geral *Pensions* (2009) at 208.
[6] Section 1 of the PFA; section 1 of the ITA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.2.2; Geral *Pensions* (2009) at 208.

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annuities or lump sum benefits to its members or former members when they attain retirement or offer death benefits to the dependants of the members on the death of the members.[7]

2.2.3. Pension funds

A pension fund organisation is also defined as a group of persons or scheme arrangement (a beneficiary fund) designed to "receive, administer, invest" and pay benefits to beneficiaries of members, paid to the beneficiaries after the death of the members.[8] There are different types of retirements funds under the PFA and the ITA, with the objective of providing retirement or death benefits to the members.[9] Benefits provided by a retirement fund are classified as financial products under the FSRA.[10] The PFA defines a pension fund as a "pension fund organisation".[11] The ITA defines a pension fund as a pension fund or scheme, or a pension or provident fund established for municipal employees (but excludes GEPF), which is registered under the PFA and is approved for tax by the Commissioner on condition that it provides annuities to its members on their retirement or provides benefits to the dependants of its members.[12]

The tax approval is also contingent on several conditions being met: that the fund rules should specify the retirement contribution scales which should be paid regularly; that the employer should ensure that membership to the fund is a condition of employment and is compulsory for all employees who qualify to join the fund from the date that the employer participates in the fund.[13] The requirement for compulsory membership classifies a pension fund as an occupational fund, as employees become eligible to join the fund by virtue of their employment.[14] The other condition of the tax approval is that members are required to withdraw one third of their total retirement

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[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] Section 2(d) of the FSRA.
[11] Section 1 of the PFA.
[12] Section 1 of the ITA.
[13] *Ibid.*
[14] Section 1 of the ITA; section 1 of the ITA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.5.

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savings on reaching retirement and purchase an annuity with two thirds of the benefit.[15] The only exceptions are if the member's benefit is R165,000 on reaching retirement, if the member dies, or if the member chooses to transfer the benefit to a pension preservation fund or a retirement annuity.[16] A pension fund is a retirement fund in terms of the definition of "pension fund organisation" under the PFA.[17]

2.2.4. Provident funds

The definition of a provident fund is included under the definition of "pension fund organisation" in the PFA.[18] The ITA defines a provident fund as a fund which is not a pension fund, pension preservation fund or retirement annuity fund, approved for tax by the Commissioner and registered under the PFA, on condition that the fund is designed to provide annuities and benefits to its members on retirement and provides benefits to the members' dependants.[19] It is also a condition that, with effect from 1 March 2021, the fund rules should specify the retirement contributions scales which should be paid regularly, and that the employer should ensure that membership to the fund should be compulsory and a condition of employment for all employees who qualify to join the fund from the date that the employer participates in the fund.[20] Due to this requirement, a provident fund is also commonly referred to as an "occupational fund."[21] The tax approval is also on condition that members can only withdraw one third of their total retirement savings on retirement and should purchase an annuity with two thirds of the benefit.[22] These conditions will not apply if the member's benefit is below R165,000 when a member reaches retirement, if the member dies or if the member transfers the benefit to a pension preservation fund or a retirement annuity.[23]

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[15] Section 1 of the ITA.
[16] *Ibid.*
[17] Section 1 of the PFA.
[18] *Ibid.*
[19] Section 1 of the ITA.
[20] *Ibid.*
[21] Section 1 of the ITA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.5.
[22] Section 1 of the ITA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.1.
[23] *Ibid.*

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Prior to 1 March 2021, members of a provident fund could withdraw their full benefits in cash on retirement.[24] The ITA was amended effective 1 March 2021, to prohibit members from withdrawing their full benefits when they retire, requiring them to withdraw one third of the benefit and purchase annuities with two thirds of the benefit, in the same manner as under a pension fund.[25] This provision imposes a restriction that for members who were 55 years and above on 1 March 2021, the retirement benefits should not include amounts contributed or transferred to a provident fund before, on or after 1 March 2021.[26] This must also not include amounts credited to the member's individual account or minimum individual reserve of the provident fund or provident preservation fund before, on or after 1 March 2021, as well as any fund return as defined in the PFA.[27]

In respect of any individual who was a member of a provident fund or provident preservation fund on 1 March 2021, the retirement benefit should not include any amount contributed to a provident fund or transferred to a provident preservation fund before 1 March 2021 and any amounts credited to the member's retirement savings account on 1 March 2021; as well as any fund return, as defined in the PFA.[28]

2.2.5. Pension preservation funds

The ITA defines a pension preservation fund as a "pension fund organization" registered under the PFA and approved for tax by the Commissioner.[29] This is on condition that its members are previous members of a pension or provident fund from which the member withdrew his/her membership.[30]

The withdrawal from the fund is through resignation, retrenchment, dismissal from employment or liquidation/partial liquidation of a fund, or transfer of business of the employer through section 197 of the Labour Relations Act 66 of 1995 (the LRA),

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[24] *Ibid.*
[25] *Ibid.*
[26] Section 1 of the ITA.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*

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in terms of which a member transfers his benefit from the previous fund.[31] A pension preservation fund is also defined as a fund to which members of a previously dissolved pension/provident preservation fund transfer their benefits.[32] It is also a fund that a non-member spouse who was awarded a benefit in terms of section 7(8) of the Divorce Act 70 of 1979 transfers their benefit, and a fund to which a previous member, nominee, or dependant transfers an unclaimed benefit that they received.[33]

This is all on condition that a member can withdraw their benefit from the fund only if they immigrated from South Africa before 28 February 2021, or if a member is a non-resident of South Africa for an uninterrupted period of 3 years or longer, on or after 1 March 2021, or if a member is a foreign resident in South Africa and their visa expired.[34] A member of a pension preservation fund cannot withdraw one-third of the benefit on attaining retirement age and is required to purchase an annuity with two-thirds of the benefit, unless the benefit is less than R165,000 or if the member dies before the payment of the benefit.[35] This is on condition that in respect of members who were 55 years and above on 1 March 2021, the retirement benefits should not include amounts contributed or transferred to a provident fund before, on or after 1 March 2021.[36]

This should not also include amounts credited to the member's individual account or minimum individual reserve of the provident fund or provident preservation fund before, on or after 1 March 2021, as well as any fund return as defined in the PFA.[37] In respect of any other person who was a member of a provident fund or provident preservation fund on 1 March 2021, the retirement benefit should not include any amount contributed to a provident fund or transferred to a provident preservation fund before 1 March 2021.[38] It cannot also include any amounts credited to the

[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

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member's retirement savings account on 1 March 2021, or any fund return, as defined in the Pension Funds Act.[39]

2.2.6. Retirement annuity funds

A retirement annuity fund ("RAF") is a fund which is not a pension, provident or benefit fund, designed and approved by the Commissioner for the purpose of providing life annuities to its members, and the dependants and nominees of its members.[40] The fund rules of an RAF are required to stipulate the members' contributions, including contributions transferred from other approved pension funds, pension preservation funds, provident funds, provident preservation funds or other retirement annuity funds.[41] On reaching retirement, members of an RAF can only withdraw one third of their retirement fund savings and are required to purchase an annuity with two thirds of their benefit, unless the benefit is less than R165,000 or the member is deceased before the payment of the benefit.[42]

The members' retirement benefit for members who were 55 years and above on 1 March 2021 should not include amounts contributed or transferred to a provident fund before, on or after 1 March 2021.[43] This prohibition includes amounts credited to the member's individual account or minimum individual reserve of the provident fund or provident preservation fund before, on or after 1 March 2021, as well as any fund return as defined in the PFA.[44] In respect of any other individual who was a member of a provident fund or a provident preservation fund on 1 March 2021, the retirement benefit should not include any amount contributed to a provident fund or transferred to a provident preservation fund before 1 March 2021.[45] This should also not include

[39] *Ibid.*
[40] Section 1 of the ITA, Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.2.6.
[41] *Ibid.*
[42] Section 1 of the ITA.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

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any amounts credited to the member's retirement savings account on 1 March 2021, or any fund return, as defined in the PFA.[46]

From 1 March 2021, a member is not allowed to receive a lumpsum annuity amount, as set out in paragraph 2(1)(a) of the Second Schedule of the ITA, before attaining normal retirement age.[47] A member who terminates his membership from an RAF can be reinstated to the fund or is entitled to withdraw an amount below the threshold determined by the Minister, which is currently R15,000.[48] A member can also withdraw their benefit from an RAF if they immigrated from South Africa before 28 February 2021, if the member is a non-resident of South Africa for an uninterrupted period of 3 years or longer, on or after 1 March 2021, or if the member is a foreign resident in South Africa and their visa has expired.[49]

When an RAF is dissolved, the fund is required to purchase annuities for members who became annuitants under the fund before the dissolution of the fund.[50] For all the other members, the benefits should be paid into any other RAF.[51]

2.2.7. Beneficiary funds

A beneficiary fund is defined under "pension fund organisation" in the PFA.[52] It is defined as an association, scheme or arrangement designed to receive, administer, invest, and pay the benefits which a member became entitled to through his/her employment on behalf of beneficiaries, upon the death of a member of a pension fund.[53] A beneficiary fund is a retirement fund established to receive, administer, and pay employment related death benefits distributed under a retirement fund in terms of

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[46] *Ibid.*
[47] *Ibid*
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] Section 1 of the PFA, Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.4.
[53] *Ibid.*

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section 37C of the PFA and benefits due to a member under an insurance policy, for the benefit of a deceased employee's beneficiaries/nominees, usually minor children.[54]

Retirement funds were required to pay benefits to a registered beneficiary fund with effect from 1 January 2009 and can only pay to an umbrella trust nominated by a member or a beneficiary.[55] The regulator has not yet prescribed regulations for the transfer of benefits which were paid to a trust prior to 1 January 2009.[56] It is presumed that the regulator is contemplating whether to issue prescribed regulations for the transfer of the benefits to a beneficiary fund.[57] Beneficiary funds are believed to be secure, appropriate and cost effective.[58]

Regarding the payment of benefits to a beneficiary fund, the Adjudicator noted the following in *Ramanyelo v Mine Workers Provident*:

> [T]here is a very onerous duty on the board to carefully consider the facts of each case before depriving the guardian of the right to administer the moneys on behalf of his or her minor child.[59]

The Adjudicator noted further that payment can only be paid to a beneficiary fund if the parent's circumstances are not favourable for the payment of the benefit to the parent.[60] The Adjudicator also noted the following:

> From the above cases it appears as if the factors to be considered by the board in determining whether a guardian should administer moneys on behalf of his or her minor child may be summarised as follows: … the amount of the benefit … the ability of the guardian to administer the moneys … the qualifications (or lack thereof) of the guardian to administer the moneys; and … the benefit should be

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[54] *Ibid*.
[55] Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.4.
[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] [2005] 1 BPLR 67 (PFA) para 17; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.4.
[60] *Ibid*.

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utilised in such a manner that it can provide for the minor until he or she attains the age of majority.[61]

2.2.8. Umbrella funds

An umbrella fund is a scheme-type arrangement where a group of employers negotiate retirement benefits with an underwriter (who is usually an insurer and retirement fund administrator), for the benefit of the employees.[62] The underwriter of an umbrella fund is also generally referred to as a "commercial sponsor."[63] This is referred as a "type A umbrella fund."[64] An umbrella fund can also be industry specific.[65] This is referred to as a "type B umbrella fund."[66] A trade union or an affinity group is usually a sponsor of an industry-specific umbrella fund.[67]

The employers are generally referred to as "participating employers".[68] An umbrella fund can either be a pension or a provident fund registered under the PFA.[69] It has one set of fund rules, usually referred to as "general rules," which *inter alia* prescribe the operation of the fund, the eligibility of employees, the benefits provided by the fund and the duties and responsibilities of the trustees and other officers of the fund.[70] In respect of type A umbrella funds, each participating employer is issued a set of special rules which specify benefits applicable to that employer and its employees; the special rules are designed from the general rules and are part of the general rules.[71] A Type B umbrella fund only has one set of rules which apply to all participating employers.[72]

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[61] *Ramanyelo v Mine Workers Provident* [2005] 1 BPLR 67 (PFA) para 16.
[62] Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.2.
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*

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2.2.9. Unclaimed benefit funds

The PFA defines an unclaimed benefit fund as a fund designed to receive unclaimed benefits from a retirement fund, and includes benefits from a pension and/or provident preservation fund.[73] According to the PFA, an unclaimed benefit is a benefit that a fund did not pay to a member, former member or beneficiary withing 24 months from the date that the benefit was due and payable.[74] It is also a benefit which was payable to a beneficiary in terms of section 37C of the PFA and was not paid by the fund within 24 months from the death of the member.[75]

"Unclaimed benefit" also denotes any annuity or pension benefit which was not paid by the fund to a beneficiary within 24 months from the guarantee period or from the date that it became due and payable, and a surplus apportionment benefit for a member who cannot be traced.[76] It is also defined as an unclaimed or unpaid benefit which became payable to a member as a result of the liquidation of a fund, and is any unclaimed or unpaid benefit due to a non-member spouse in terms of section 37D of the PFA.[77] However, it does not include a benefit due and payable to a member under section 14 of the PFA to purchase an annuity for a pensioner as prescribed by the PFA.[78]

2.2.10. Defined benefit funds

A defined benefit fund is a fund which specifies the retirement benefit amount payable on retirement, by means of a defined formula.[79] The formula comprises the member's years of service in their employment and their remuneration before retirement.[80] The employer bears the risk of low returns on investments on the members' retirement

[73] Section 1 of the PFA.
[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*.
[78] *Ibid*.
[79] Section 1 of the PFA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.8.9.
[80] *Ibid*.

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benefits in the event that the investment portfolios perform poorly due to inflation and will be obliged to contribute the shortfall amount to achieve the required amount.[81]

2.2.11. Defined contribution funds

A defined contribution fund is a fund which states the contributions paid by the employer and the member, but does not stipulate the retirement or withdrawal benefit amount payable.[82] The benefits payable are subject to features such as contributions paid by the employer and the member, investment returns, and the costs related to the administration and management of benefits.[83] The benefit payable on retirement can only be projected on retirement, due to the fact that it is dependent on the employer and member contributions and investment returns, less the costs.[84]

2.2.12. Stand-alone funds

A stand-alone fund can either be a pension or provident fund established by the employer for the benefit of the employees.[85] A stand-alone fund can be administered by the employer or an insurer, as long as the employer or insurer is registered to administer the fund in terms of section 13B of the PFA.[86] A stand-alone fund can either be a defined contribution or defined benefit fund.[87] A stand-alone fund is required to be registered by the FSCA in terms of the PFA and approved for tax in terms of the ITA, which may cause the legal requirements to be challenging.[88] Many small to medium-sized employers with a stand-alone retirement scheme may be disadvantaged in respect of obtaining high cover for their members and cost-effective rates for administration costs, asset management and fund expenses.[89]

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[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] Section 1 of the PFA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.2.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid*.

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2.3. Overview of the stakeholders of retirement funds

2.3.1. The fund

The fund is the pension fund organisation as defined above.[90] The purpose of the fund is to provide benefits to its members, its former members and the beneficiaries/nominees of its members.[91] In order to be established, the fund is required to apply for registration with the FSCA in terms of section 4 of the PFA by compiling a set of fund rules which sets out *inter alia,* the operation of the fund and the registered office of the fund.[92] The fund rules should also outline the benefits provided by the fund, eligibility requirements, payment of contributions, investment of contributions, asset management, withdrawal of membership, amalgamation and transfers, liquidation of the fund, appointment of trustees and the principal officer and their duties, appointment of the valuator and the auditor, and surplus apportionment, among other things.[93]

Once a fund is registered, the fund rules will be binding on the fund and its members, shareholders, officers, and any person who claims from the fund.[94] Upon registration, the PFA makes a distinction of the legal status between a fund established by an association of persons and a scheme arrangement (an RAF).[95] Once registered, a fund that is an association of persons becomes a body corporate which can sue and be sued in its own capacity.[96] In respect of a scheme arrangement, the assets and liabilities of the fund are held to the exclusion of any other person.[97] In respect of a scheme arrangement, a person can only claim any assets or liabilities against the fund if it is in respect of the business of the fund.[98]

[90] Section 1 of the PFA.
[91] *Ibid.*
[92] *Ibid*
[93] *Ibid.*
[94] Section 13 of the PFA.
[95] Section 5 of the PFA; Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.2.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*

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2.3.2. The employer

The employer negotiates benefits with the fund, the underwriter and the administrator on behalf of its employees, in respect of occupational funds, or free-standing funds, and is the party that participates in the fund.[99] In respect of pension and provident funds, it is a condition of tax approval that the employer must ensure that membership to the fund is a condition of employment and compulsory for all employees.[100] The employer is therefore responsible for ensuring that all its employees who qualify for membership under the fund are added to the fund, and to ensure that members do not withdraw from the fund during their employment unless it is through resignation, dismissal, liquidation of the fund, or retrenchment.[101] The employer also pays a portion of the contributions to the fund on behalf of each employee.[102] According to the provisions of the PFA, the employer is responsible for paying contributions to the fund as set out in the fund rules, deducted from the member's salary and contributions that the employer is responsible to pay according to the fund rules.[103]

According to section 13A of the PFA, each director is the responsible person for the payment of contributions on behalf of the employer.[104] In the case of a company, the responsible person is each member of a close corporation who consistently engages in the administration of the close corporation.[105] In respect of any other juristic persons, each person who acts on behalf of the employer or consistently administers the company is a responsible person.[106] The principal officer and any authorised persons are responsible for monitoring the payment of contributions and to report any non-compliance by the employer or other responsible persons to the FSCA.[107]

[99] Section 1 of the PFA; Section 1 of the ITA, Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.5.
[99] *Ibid.*
[100] *Ibid*
[101] *Ibid.*
[102] *Ibid.*
[103] Section 13A(a) and (b) of the PFA.
[104] Section 13A(8) of the PFA.
[105] *Ibid.*
[106] Section 13(8) of the PFA.
[107] Section 13(6) of the PFA

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2.3.3. Members of the fund

The PFA defines "member" as a member of a pension fund organisation under a fund established for association of persons or a member of an RAF, but it excludes from this definition, a member whose membership terminated under the fund.[108] In respect of occupational funds, umbrella funds or free-standing funds, a member is the employee who joins the fund that is negotiated by the employer.[109] The employee becomes a member of the fund through their employment and contributes to the fund each month, from deductions from their remuneration.[110] In respect of a RAF, a member is the individual who contributes to the RAF.[111]

2.3.4. The Intermediary

FAIS regulates the rendering of certain financial advisory and intermediary services to clients.[112] An "authorised financial services provider" is defined as a person who is authorised to render financial services in terms of section 8 of FAIS.[113] A "client" is defined as a specific person or group of persons who is offered financial services by an authorised financial services provider.[114] "Financial services provider" ("FSP") is defined as a person who furnishes advice or renders intermediary services.[115] An intermediary is an FSP who furnishes advice to the fund and its members or to the employer and its employees, who are its clients.[116]

An intermediary can also be a consultant of the employer and employee or of the fund and its members, and also furnishes advice to the fund and its members or to the employer and its employees.[117] An intermediary is required to conduct a needs analysis of the members and the fund in order to provide the members with proper

[108] Section 1 of the PFA.
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] FAIS Act.
[113] Section 1 of FAIS.
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*

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advice and benefits.[118] An intermediary is also required to ensure that the distribution of the benefits to the members achieves fair outcomes, to disclose all fees payable to the members and not to charge exorbitant fees, and must mitigate conflict of interest.[119]

2.3.5. The administrator

A person can only administer a retirement fund if they are authorized to do so in terms of section 13B of the PFA.[120] The administration of a pension fund is also regulated by section 13B of the PFA.[121] A section 13B administrator should be authorised to administer retirement funds if they are authorized to do so in terms of section 13B of the PFA.[122] An administrator of a retirement fund is required to enter into an agreement with the fund to administer the fund and manage and invest the fund benefits on behalf of the fund and its members, and to protect the fund's and the members' confidential information.[123]

A retirement fund administrator is also subject to monitoring by the trustees of the fund, who need to ensure that the administrator administers the fund in a responsible manner.[124] The administrator is also responsible for monitoring the payment of contributions and to report any non-payment of contributions by the employer.[125] The administrator is also required to communicate with members on changes which affect their rights under the benefits provided by the fund and to process withdrawal and death claims for the fund members.[126] The administrator is also required to keep proper records of the members' and the fund's information, to investigate complaints lodged by the members, to provide responses on complaints to the Adjudicator, and, where necessary, to resolve the complaints by, for example, paying a benefit to the member in respect of a member who lodges a complaint due

[118] Section 3A of the FAIS General Code of Conduct.
[119] *Ibid.*
[120] Section 13B of the PFA.
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*

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to delayed payment of the benefit.[127] The administrator must comply with the order issued by the Adjudicator on complaints lodged by the members.[128]

2.3.6. The underwriter/insurer

An underwriter of a retirement fund is the insurer, who can also be the administrator.[129] An insurer can only provide benefits to a retirement fund if they are licensed to conduct insurance business under the Insurance Act 18 of 2017.[130] An insurer is required to be financially sound and to conduct its business with "integrity, due skill, care and diligence", to operate cautiously, and to run its affairs in a reliable and effective manner.[131] A licensed insurer under the Insurance Act is authorised to conduct insurance business under the class and sub-classes of insurance business set out in Schedule 2 of the Insurance Act.[132] These classes of insurance business include benefits offered to the fund and its members, such as an investment policy, funeral policy, lumpsum death benefit policy, and lumpsum disability benefit policy.[133] These benefits are referred to as "fund risk" benefits.[134] An insurer is required to provide benefits that meet the needs of its customers, to treat its customers fairly and to provide benefits that perform as the insurer led the customers to believe.[135]

An insurer is also required to implement processes in place to communicate with members on changes that affect their rights under the policies and to provide disclosures to members on their benefits, before and after entering the policy, on an ongoing basis, when changes are made to their benefits, and when premiums are reviewed.[136] The insurer is also required to ensure that members are provided with appropriate advice.[137]

[127] *Ibid.*
[128] *Ibid.*
[129] Section 5 of the Insurance Act.
[130] *Ibid.*
[131] Section 4 of the Insurance Act.
[132] Schedule 2 of the Insurance Act.
[133] *Ibid.*
[134] *Ibid.*
[135] Rule 1.4 of the PPRs.
[136] Rule 1.6 and 11 of the PPRs.
[137] Rule 1.9 of the PPRs.

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2.3.7. The board members (trustees)

A retirement fund is required to appoint a board which comprises of four board members, of which 50% shall have the right to elect.[138] A board member is required to report to the Registrar any inconsistencies or substantial affairs that may adversely affect the financial stability of the fund.[139] The purpose of the board is to monitor, manage and supervise the conduct of the fund.[140] The board is required to protect the interests of the fund members at all times, but especially on mergers or transfer of funds in terms of section 14 of the PFA which governs the "splitting of a fund, termination or reduction of contributions by the employer, increase of contributions of the members and withdrawal of a participating employer from the fund".[141]

The board must "act with due care, diligence and good faith, avoid conflict of interest, act impartially towards all members and beneficiaries, act independently."[142] The board owes a fiduciary duty to the members, to the members' beneficiaries and to the fund, in respect of the benefits held by the fund. Thus, the board must warrant that the fund continues to be financially sound, managed effectively and governed according to the fund rules and the PFA.[143] The function of the board is to maintain appropriate registers, books, and records of the operation of the fund, including minutes of meetings and resolutions adopted by the board, and, to this end, it is responsible for ensuring that appropriate management systems are implemented on its behalf.[144] The board is required to provide adequate and appropriate information to the members and beneficiaries, informing them of their rights, benefits and duties as set out in the fund rules.[145] The board is also required to ensure that contributions are

[138] Section 7A of the PFA.
[139] *Ibid.*
[140] Section 7C of the PFA.
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
[144] Section 7D of the PFA.
[145] *Ibid.*

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paid on time.[146] The board is responsible for the distribution of benefits to the members' to identify the members' dependants and/or nominees to pay the benefits to them.[147]

2.3.8. The principal officer

Each registered fund is required to appoint a principal officer and a deputy principal officer who is resident in RSA.[148] A fund is required to notify the FSCA of the appointment of a principal officer within 30 days of the appointment.[149] A deputy principal officer acts as the principal officer in the absence of the principal officer.[150] A principal officer is required to notify the FSCA of any matters which may be prejudicial to the fund.[151] A principal officer works hand in hand with the board, to oversee the affairs of the fund and to report any misconduct by the board members or any inconsistencies in the financial affairs or the board's decision making to the FSCA.[152]

2.3.9. Auditors

Each retirement fund is required to appoint an auditor, in accordance with the provisions of its fund rules, within 30 days of registration and apply for approval of the auditor from the FSCA.[153] An auditor of a fund is not an officer of the fund.[154] An auditor is responsible for auditing the affairs of the fund and is required to submit their findings to the trustees of the fund and to the FSA.[155] An auditor is required to provide reasons of termination to the FSCA if his appointment is terminated, and should also submit the fund's audit report.[156] An auditor is also required to report any matters of the fund which may be prejudicial to the fund.[157]

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[146] *Ibid.*
[147] Section 37C of the PFA.
[148] Section 8 of the PFA.
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] Section 9 of the PFA.
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*

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2.3.10. The valuator

Each registered fund which is required to have its financial status investigated is required to appoint a valuator.[158] The valuator is required to be a natural person.[159] Should the valuator resign from his or her position, the fund is required to appoint another valuator.[160] A valuator is responsible for investigating the financial status of the fund and for submitting the report to the Registrar.[161] A valuator is also responsible for calculating the surplus apportionment of the employer and the fund, for distribution to the employer, the fund, and the members, and for certifying that the surplus apportionment complies with the PFA.[162]

2.3.11. The Financial Sector Conduct Authority

The FSCA is the market conduct regulator that regulates retirement funds.[163] The FSCA regulates the registration of retirement funds under the PFA, through the rules of the fund.[164] The FSCA also regulates the conduct of the board, requiring the board to fulfil its duties with due care, skill and diligence, and the governance of retirement funds and fiduciary duties towards the fund and its members.[165] The FSCA supervises the payment of contributions by the employer and requires the benefits of the members to be properly managed and invested.[166] It also oversees the conduct of the principal officer and requires them, as an officer of the fund, to advise the board on any matter that may be prejudicial to the fund.[167] The FSCA also regulates the transfer and amalgamation of retirement funds as well as the liquidation and distribution of benefits to members.[168] The FSCA supervises the conduct of retirement funds, administrators, participating employers and intermediaries.[169]

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[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] Section 7A of the PFA.
[162] Section 15B of the PFA.
[163] Section 1 of the PFA.
[164] Section 4 of the PFA.
[165] Section 7 of the PFA.
[166] Section 13A of the PFA.
[167] Section 8 of the PFA.
[168] Section 14 and 28 of the PFA.
[169] *Ibid.*

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2.3.12. The South African Revenue Service

The SARS is the tax regulator, that regulates the taxation of retirement funds, fund members, and the benefits paid to the members, dependants and nominees.[170] SARS requires each fund be approved for tax, on condition that membership to the fund is compulsory and becomes a condition of employment.[171] The commissioner has the right to cancel the tax approval of a fund if the employer does not comply with the requirement of enrolling all employees who qualify to be members of the fund.[172] The contributions paid by the employer and the members are taxable in terms of Schedule 2 of the ITA, as well as the benefits paid on the withdrawal, retirement or death of the member.[173] Each member is required to register for tax in order for the contributions and the benefits to be taxable in respect of each member.[174]

2.3.13. The Pension Funds Adjudicator

The Adjudicator is established by the PFA.[175] The objective of the Adjudicator is to resolve complaints lodged by pension fund members or customers in terms of section 30A of the PFA.[176] The Adjudicator is required to resolve complaints by applying principles of equity, where necessary, and after considering both the legal arrangements between the complainant and the financial institution, and the requirements of the PFA.[177] The Adjudicator must act fairly and resolve the complaints promptly and efficiently.[178] The Adjudicator must investigate complaints and issue an order which has the same impact as an order of any court of law.[179] A complainant is required to first refer the complaint to the financial institution to try and resolve the complaint.[180]

[170] Section 1 of the ITA.
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] Section 30D of the PFA.
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] Section 30E of the PFA.
[180] *Ibid.*

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2.3.14. The beneficiary, nominee or dependant

"Beneficiary" is defined in the PFA as a nominee of a member or a dependant who is eligible to receive benefits in terms of the rules of the fund.[181] "Dependant" is defined as a person that the member is responsible for maintaining, a person who in the opinion of the board was dependant on the member for maintenance, such as a spouse or child of the member (including an illegitimate or adopted child of the member).[182] A dependant is also a person that the member would have been responsible for maintaining if the member had not died.[183] A dependant or nominee receives benefits from the fund if the board is satisfied that they meet the requirements of the PFA.[184]

2.4. The rationale for market conduct regulation

The global crisis revealed the consequences of ineffective financial regulation (including retirement funds), its negative impact on retirement savings, as well as its contribution to financial constraints.[185] Although South Africa's financial sector appeared to be generally stable, it was indirectly affected by the global crisis, as supported by a large number of job losses.[186] The government was already contemplating financial regulatory reforms prior to the global crisis, due to "market failures" in the quality of financial services rendered in the industry.[187] The purpose of the regulatory reforms is to make South Africa's financial sector "[a] safer financial sector to serve South Africa better" by separating prudential and market conduct regulation.[188] The government's financial regulation focuses on maintaining financial stability, consumer protection and the provision of appropriate, accessible, and

[181] Section 1 of the PFA.
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] National Treasury *A safer financial sector to serve South Africa better* 2011 at 2.
[186] *Ibid.*
[187] *Idem* at 23.
[188] *Ibid.*

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affordable financial services and benefits such as retirement benefits or long-term insurance benefits.[189]

The regulatory reforms were achieved by establishing a prudential regulator under the Reserve Bank and consumer protection by extending the former Financial Services Board's ("FSB") mandate to include market conduct of retail banking.[190] The provision of access to financial services will also be promoted by means of various laws and regulations, such as the FAIS and the PFA (which currently regulates retirement funds).[191] In order to prioritise and strengthen both prudential and market conduct supervision and regulatory powers, South Africa introduced the "twin-peak model" of financial regulation.[192] The objective of this model are to ensure regulatory consistency in the financial industry and retirement fund industry, jurisdictional clarity, information efficiency, and that the conflicts between prudential supervision and market conduct regulation are addressed.[193]

The proposed twin peaks system is designed to strengthen the protection of financial customers, including retirement fund customers in South Africa.[194] Although South Africa's financial industry and the retirement fund industry are resilient, they can be more efficient by providing fair outcomes to their customers.[195] It is suggested that a large number of financial customers and retirement fund customers are not treated fairly and are provided with products and services that are complex and do not meet their needs or expectations.[196]

The twin peaks objectives indicated above are linked to the G20 commitments for "global financial regulatory reforms" for South Africa made by the former President Zuma, designed to promote financial solidarity.[197] The G20 commitments are focused

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[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Idem* at 28.
[193] *Ibid.*
[194] National Treasury "Twin Peaks in South Africa: Response and explanatory document accompanying the second draft of the Financial Sector Regulation Bill" December 2014 at 4.
[195] *Idem* at 5.
[196] *Ibid.*
[197] National Treasury *A safer financial sector to serve South Africa better* 2011 at 27.

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firstly on “a stronger regulatory framework”, with the objective to refine ineffective laws in the global financial regulatory system.[198] Secondly, on “effective supervision”, aimed to intensify efficiency, governance and collaboration of our regulators, both locally and internationally.[199] Thirdly, “crisis resolution and addressing systemic institutions”, in order to mitigate financial crises for financial institutions and protect the financial system at large.[200] Fourthly, “international assessment and peer review”, with the objective to constantly measure our standards against international standards.[201] The G20 commitments apply to retirement funds, as they form part of the financial sector, and relate to regulatory reforms in the retirement fund industry.[202]

The objectives of the twin peaks extend to retirement funds, its members, retirement fund administrators, brokers and financial institutions, in that the FSRA regulates retirement funds and financial service providers as well as ensures the protection of retirement fund customers.[203] The market conduct regulatory reforms form part of the twin peaks and introduce reformed market conduct regulation for retirement funds.[204]

2.5. The meaning of market conduct regulation

Prudential regulation is part of a regulatory structure which regulates the safety, financial soundness and solvency, licensing, and amalgamation and transfers of financial institutions and retirement funds.[205] The object of prudential regulation is to regulate the prudential supervision of financial institutions to ensure that they remain financially sound.[206] Market conduct regulation is a regulatory framework which enables the regulators to monitor the conduct of financial institutions (such as retirement funds and long-term insurers) on how they conduct their business, in order

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[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] National Treasury *A safer financial sector to serve South Africa better* 2011 at 47.
[204] *Ibid.*
[205] National Treasury *A safer financial sector to serve South Africa better* 2011 at 28, the Insurance Act 18 of 2017.
[206] *Ibid.*

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to achieve fair customer outcomes and to protect the interests of financial customers.[207]

The objectives of market conduct regulation are to *inter alia* protect consumers such as customers of retirement funds, to implement a regulatory framework which focuses on the fair treatment of customers, and to improve customer experience.[208] Market conduct regulation also aims to promote competence and consistency within the financial system, customer education and access to financial products.[209] However, the study will only focus on the objectives of market conduct regulation on the protection of retirement fund customers. Retirement funds form part of the market conduct regulation, as they are regulated on how they conduct retirement fund business and treat retirement fund members and stakeholders.[210]

Millard defines market conduct as that "in which financial services providers conduct their business, design and price their products, and treat their customers".[211] The author also notes that market conduct entails business rules, ethics, and principles on the protection of customers.[212] It is evident that market conduct regulation applies to retirement funds in respect of the conduct of service providers, officers of retirement funds, and designing and pricing of retirement fund benefits.[213]

2.6. Market conduct regulation and retirement funds

Market conduct regulation is perceived to address the abuses in the financial industry and the retirement fund industry and to harmonise prudential regulation.[214] It is believed that, to offer better protection to consumers, the financial services industry requires stricter market conduct laws than other industries, due to the complex nature of financial products (such as financial losses on retirement savings, investments,

[207] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 10.
[208] *Ibid.*
[209] *Ibid.*
[210] The PFA, FAIS and LTIA.
[211] Millard "The Impact of the Twin Peaks Model on the Insurance Industry" 2016 *PELJ* 1 at 5.
[212] Millard "Further along the Road to Twin Peaks and a Fair Insurance Industry" 2018 *THRHR* 374 at 379.
[213] *Ibid.*
[214] National Treasury *A safer financial sector to serve South Africa better* 2011 at 47.

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penalties and costs for cancelling products).[215] It has been suggested that financial regulation should not only focus on maintaining and preserving financial stability, but should also address the needs of financial customers and retirement fund customers and regulate and monitor the conduct of the financial service providers and retirement fund administrators.[216]

South Africa's financial regulation substantiates this with its objectives to focus on streamlining market conduct, consumer protection and financial inclusion, and to provide financial access to individuals at large.[217] This also distinguishes the role of market conduct regulation from prudential regulation.[218] The FSCA is the market conduct regulator which was established by the FSRA.[219] While the FSRA established a strong market conduct regulator (the FSCA), the Conduct of Financial Institutions Bill ("COFI") will consolidate and strengthen conduct laws and improve market conduct in the financial sector.[220] The objectives of the market conduct regulator are *inter alia* to promote the fair treatment of financial services customers, promote financial awareness literacy of financial customers, as well as protect and enhance efficiency and integrity of our financial markets.[221] These objectives apply to retirement funds, administrators, financial service providers and retirement fund customers, as the FSCA regulates the retirement fund industry.[222]

Following its primary principles, the market conduct regulator seeks to be transparent, comprehensive and consistent.[223] These rules will enable the market conduct regulator to monitor the conduct of retirement funds, administrators and relevant stakeholders and oversee the protection of retirement fund members.[224] The

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215 *Idem* at 41.
216 *Idem* at foreword.
217 *Ibid.*
218 *Idem* at 41.
219 Section 56 of the FSRA.
220 *Idem* at 3-4.
221 Section 57 of the FSRA and National Treasury "Implementing a twin peaks model of financial regulation in South Africa: published for public comment by the Financial Regulatory Reform Steering Committee" (2013) at 47 and 48.
222 *Ibid.*
223 National Treasury "Implementing a twin peaks model of financial regulation in South Africa: published for public comment by the Financial Regulatory Reform Steering Committee" (2013) at 16-17.
224 *Ibid.*

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FSCA's regulatory strategy is stipulated in section 70 of the FSRA.[225] Sections 98 to 104 stipulate provisions on regulatory instruments.[226] The FSCA's strategy document sets out that its main obligations are to the financial customer and to ensuring that financial institutions conduct business in a manner that achieves the fair treatment of customers.[227] It is also responsible for educating the customers on financial products in order for them to understand the products and to enable them to dispute the conduct of financial institutions where they are treated unfairly.[228]

2.7. The general position prior to the introduction of the twin peaks model

Prior to the introduction of the twin peaks model of regulation, retirement funds were regulated by the PFA, ITA, LTIA and FAIS.[229] The regulators of retirement funds were the former FSB and SARS.[230] The PFA established and regulated pension funds through registration, incorporation, regulation and dissolution of pension funds.[231] The PFA regulated retirement funds, except for the GEPF, Transnet Pension Fund and other state-owned funds.[232] Prior to the regulatory reforms, the FAIS General Code of Conduct regulated the distribution of retirement fund benefits to the direct client, being the retirement fund, while certain sections of the LTIA regulated the disclosures of fund policies and stipulated provisions on non-payment of premiums.[233]

Prior to the twin peaks, the former FSB was the regulator of retirement funds. The Registrar of pension funds regulated and supervised retirement funds through the powers entrusted in the PFA, under the former FSB.[234] The Registrar's powers included monitoring the conduct of the officers of retirement funds (board members

[225] Section 70 of the FSRA.
[226] Sections 98 to 104 of the FSRA.
[227] Regulatory Strategy of the Financial Sector Conduct Authority October to September (2021) at 5.
[228] *Ibid.*
[229] The PFA, FAIS General Code of Conduct, the LTIA.
[230] *Ibid.*
[231] Section 4 and 4B of the PFA.
[232] *Ibid.*
[233] Section 8 of the FAIS General Code of Conduct, the LTIA.
[234] Section 2, and Section 7A of the PFA.

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and principal officers), the retirement fund administrators, the financial service providers, and the employers of retirement funds.[235]

Retirement funds were (and are still) established through the registration and approval of the fund rules and issuance of a certificate by the Registrar of pension funds.[236] In *Pepcor Retirement Fund v the Financial Services Board*, the court noted that the objectives of the PFA are among other things to regulate pension funds.[237] The court also highlighted that the Registrar is entrusted with this function and his office is responsible for the supervision of pension funds.[238] Upon registration in terms of section 4 of the PFA, a pension fund becomes a juristic person.[239] It becomes a corporate body and acquires rights to sue and to be sued in its personal capacity.[240] The registered fund rules of a pension fund stipulate the benefits provided by a pension fund and are binding on the fund, the members, the board and any person who claims a benefit under the fund.[241]

In this regard, the court noted the following in *Tek Corporation*:

> The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of the fund, relevant legislation and the common law. The fund is a legal persona and owns its assets in the fullest sense of the word 'owns'. (Sec 5(1)(a) and (b) of the Pension Funds Act 24 of 1956.) The object of the fund is 'to provide retirement and other benefits for employees and former employees of the employers in the event of their death'.[242]

[235] *Ibid.*
[236] Section 4 of the PFA.
[237] *Pepcor Retirement Fund and another v Financial Services Board and another* [2003] 3 All SA 21 (SCA) at paragraph 11.
[238] *Ibid.*
[239] Section 4b(1) of the PFA; *Tek Corporation Provident Fund and Others v Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) at paragraph 15.
[240] Section 5(a) of the PFA; *Tek Corporation Provident Fund and Others v Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) at paragraph 15.
[241] Section 13 of the PFA; *Tek Corporation Provident Fund and Others v Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) at paragraph 15.
[242] *Tek Corporation Provident Fund and Others v Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) at paragraph 15.

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The requirement for a fund to be registered and incorporated is a market conduct regulatory tool in that the fund becomes a juristic person which can sue and be sued and can hold assets and benefits on behalf of its members.[243] The purpose is also to enable the Registrar to monitor the conduct of the officers of the fund, being the trustees, principal officers, valuators, asset managers and administrator, as they have to conduct themselves in accordance with the requirements of the PFA.[244]

The ITA regulates the taxation of retirement funds and the taxation of retirement fund members, beneficiaries and nominees.[245] As discussed earlier, the ITA stipulates definitions of various different retirement funds, including a pension fund, a provident fund, a pension preservation fund, a provident preservation fund, an unclaimed benefit, and an RAF.[246] The commissioner approves tax for a pension and provident fund on condition that membership should be a condition of employment for all employees eligible to join the fund and should be compulsory for such members.[247] This is because, currently, there is no law in South Africa which obligates an employer to join a retirement fund. However, once the employer elects to join the fund, membership becomes compulsory for all employees and the employer is required to ensure that employees remain under the fund for the duration of their employment.[248]

Prior to the twin peaks, members of a provident fund could withdraw their full benefits on retirement and could purchase an annuity by choice, whereas members of a pension fund were required to only withdraw one third of their benefit and purchase an annuity with the remaining two thirds.[249] The requirement for a fund to be registered for tax is also a market conduct regulation instrument; the employer has a responsibility to ensure that eligible employees should be members of the fund and should remain under the fund for the duration of their service.[250]

[243] Section 4 of the PFA.
[244] *Ibid.*
[245] Section 1 of the ITA.
[246] *Ibid.*
[247] *Ibid.*
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*

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The LTIA and FAIS will be discussed in the sections below.

2.8. The general position after the introduction of the twin peaks model

As outlined earlier, the twin peaks legal framework was established by the FSRA which also established the PA, housed under the South African Reserve Bank ("SARB") and the FSCA, which is the market conduct regulator.[251] Both the PA and the FSCA are regulators of retirement funds and are referred to as "the Authorities".[252] The "Authority"[253] under the PFA replaced the Registrar of pension funds.[254] Section 1A of the PFA stipulates that reference to the Registrar refers to the Authority and that "except as otherwise provided by this Act or the Financial Sector Regulation Act, the powers and duties of the Authority in terms of this Act are in addition to the powers and duties that it has in terms of the Financial Sector Regulation Act."[255] The PFA will be amended to replace term "Registrar" with the term "Authority" wherever it appears, including section 1A of the PFA, once COFI is promulgated.[256] The position is different from the former position before the twin peaks, as there were only two regulators of retirement funds, namely the former FSB and SARS, and prudential regulation was not under SARB.[257]

Retirement funds are still registered and regulated by the PFA, and regulated for tax by the ITA, but the FSRA is the financial sector law responsible for setting the regulatory framework.[258] The Insurance Act regulates the prudential supervision of retirement funds to ensure that they remain financially sound.[259] The legislation is also different as there is now the FSRA, which is the twin peaks, the Insurance Act, FAIS, the PFA, the ITA, the LTIA and COFI, which will be the market conduct law for financial institutions.[260] The FSCA will be the regulator of COFI, which will also regulate

[251]Section 32 and 56 of the FSRA.
[252] Section 1 of the FSRA.
[253] "Authority" means the Financial Sector Conduct Authority established in terms of section 56 of the Financial Sector Regulation Act (section 1(1) of the PFA).
[254] Section 1A(1) of the PFA.
[255] Section 1A(1) and (2) of the PFA.
[256] Schedule 2 of COFI.
[257] The PFA and the ITA.
[258] Section 1 of retirement Funds.
[259] Section 1 of the Insurance Act.
[260] The FSRA, the PFA, ITA, LTIA, FAIS and the Insurance Act.

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retirement funds.[261] There is also the Protection of Personal Information Act 4 of 2013 ("POPIA"), enacted on 1 July 2021, which requires retirement funds, administrators and stakeholders to protect the personal information of their clients and of the fund.[262] Personal information includes a client's name, identity number, financial information, medical information, education etc.[263] In terms of POPIA, the fund or the administrator can only process the clients' information with their consent and for the purposes of which the information was collected.[264] This legislative framework may potentially conflict with the information needs of retirement funds to properly execute their functions.

The FSRA is deemed to be regulator-facing.[265] As the FSCA is the market conduct regulator of the financial sector, including retirement funds, the PFA renders additional powers to the FSCA, in addition to the powers conferred to it under the FSRA.[266] The FSRA renders powers to the FSCA.[267] In terms of the FSRA, the FSCA has powers to issue conduct standards for or in respect of financial institutions such as retirement funds.[268] A retirement fund is a financial institution under the FSRA, and retirement fund benefits are defined as financial products.[269] The purpose of the conduct standards is to *inter alia* ensure efficiency in the financial industry and to ensure that financial customers are treated fairly.[270] The FSCA issued a number of conduct standards on retirement funds through its powers under the FSRA.[271] Some of these conduct standards include payment of contributions by an employer, communication with retirement fund members, smooth bonus policies, section 14 transfer, and a draft conduct standard for administrators on section 13B of the PFA.[272] The study will discuss these conduct standards while illustrating, in the sections that

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[261] Section 1 of the COFI Bill.
[262] Section 1 of POPIA.
[263] *Ibid.*
[264] Section 9 to 12 of POPIA.
[265] National Treasury "Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 21.
[266] Section 1A of the PFA.
[267] *Ibid.*
[268] Section 106(1) of the FSRA
[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*

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follow, the position before and after the twin peaks. In respect of the operation of a provident fund, as of 1 March 2020, members of a provident fund are no longer allowed to withdraw their full benefits on reaching retirement.[273]

2.9. General successes of market conduct regulation for retirement funds

The FSCA is the market conduct regulator of retirement funds, retirement fund administrators and long-term insurers — regulating the conduct of retirement funds and financial service providers — and is responsible for educating retirement fund customers on their products and benefits.[274] The FSCA is a functional, activity-based market conduct regulator which overseas and supervises the conduct and activities of the financial institutions and retirement funds.[275] It performs ongoing supervision of the business conduct of retirement funds, and of financial service providers, including financial products under retirement funds.[276] In order to achieve the above-mentioned principles, market conduct regulation requires financial institutions to be properly licensed and compliant with high standards of fit and proper requirements.[277] These requirements also apply to retirement fund administrators, the product suppliers, and financial advisors.[278]

Retirement funds are classified as financial institutions and are required to be licensed to conduct retirement fund business and provide benefits to customers.[279] Their conduct will be monitored similarly to other financial institutions, to enable the regulator to exercise its powers and safeguard the fair treatment of retirement fund customers.[280] The above mentioned regulatory approach seems rigorous and appears to favour the fair treatment of retirement fund customers by requiring TCF principles

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273 Section 1 of the ITA.
274 *Idem* at 11.
275 *Idem* at 26 to 27.
276 *Idem* at 72.
277 *Idem* at 17.
278 *Ibid.*
279 *Ibid.*
280 *Ibid.*

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to be applied in all areas and by preventing unfair treatment of customers through pre-emptive and proactive approaches.[281]

Implementing measures to require retirement funds, administrators and advisors to focus on the outcome of their activities will assist them to assess whether they are conducting themselves in line with the legislation and in a manner that achieves fair customer outcomes.[282] The activity-based principle and outcome-based approach of the FSCA will also help identify and address weak/harmful market practices in support of transformation, financial inclusion, and the protection of retirement fund customers.[283] Market conduct regulation will also enhance financial literacy of retirement fund members in respect of their benefits and the services that they receive.[284] Market conduct regulation will also promote effective dispute resolution for retirement fund customers.[285]

Market conduct regulation achieves its objectives by implementing TCF Principles in the financial industry.[286] TCF principles were implemented by the former FSB and have been imbedded into the various regulatory reforms.[287] Market conduct regulation will also enhance governance of retirement funds, administration of retirement funds, payment of contributions, the duties of trustees, duties of a principal officer, market conduct regulation of retirement funds under FAIS and the LTIA, and TCF as they pertain to retirements.[288]

Millard highlights that the twin peaks regulatory model is a conversion from a "silo" regulatory regime to that which "focuses on supervision according to function" such as risk management and treatment of customers.[289] This conversion will achieve fair outcomes for retirement fund customers through market conduct regulation, by

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[281] *Idem* at 48 to 49.
[282] *Ibid.*
[283] National Treasury "Media statement Invitation for public comments on the draft Conduct of Financial Institutions Bill" (December 2018) at 3 to 4.
[284] *Ibid.*
[285] *Ibid.*
[286] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework December* 2014 at 51.
[287] *Ibid.*
[288] *Ibid.*
[289] Millard "The Impact of the Twin Peaks Model on the Insurance Industry" 2016 *PELJ* 1 at 2.

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ensuring that retirement fund customers are provided with adequate and appropriate advice and proper disclosures in respect of their benefits.[290]

According to the Financial Regulatory Reform Steering Committee Policy Paper, the primary objectives of the twin peaks regulatory reforms are to, *inter alia*,[291] introduce a stronger and more effective market conduct regulation in the financial industry, (including the retirement fund industry), higher disclosure standards to financial customers and retirement fund members, and to equip regulators with powers to act swiftly, fearlessly, impartially and independently.[292] This will promote efficiency in the retirement industry, as the twin peaks will empower the regulators to exercise their powers.[293] A strong and effective market conduct regulation will substantiate the protection of retirement fund customers by monitoring the conduct of retirement funds and financial service providers.[294]

2.10. General shortcomings of market conduct regulation for retirement funds

Godwin notes that the twin peaks regulatory model can present disadvantages, such as regulatory overlap, and that the dual regulation may pose "considerable burden on regulated entities and lead to poor information-sharing and coordination".[295] Dual regulation maybe onerous on retirement funds, administrators and financial service providers, and may present gaps and inefficiencies where the regulators do not properly collaborate with each other to clarify their respective roles.[296]

The objective of the twin peaks to introduce a strong market conduct regulation for retirement funds is a long journey which is yet to be completed. COFI, being the market conduct regulation statute, still needs to be promulgated. The amended laws

[290] National Treasury "Implementing a twin peaks model of financial regulation in South Africa: published for public comment by the Financial Regulatory Reform Steering Committee" (2013) at 15.
[291] National Treasury "Implementing a twin peaks model of financial regulation in South Africa: published for public comment by the Financial Regulatory Reform Steering Committee" (2013) at 15, Godwin *et al* "Twin Peaks: South Africa's financial sector regulatory framework" 2017 *SALJ* 665 at 670-671.
[292] National Treasury "Implementing a twin peaks model of financial regulation in South Africa: published for public comment by the Financial Regulatory Reform Steering Committee" (2013) at 15.
[293] *Ibid*.
[294] *Ibid*.
[295] Godwin *et al* "Twin Peaks: South Africa's financial sector regulatory framework" 2017 *SALJ* 665 at 670-671.
[296] *Ibid*.

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that must be aligned with COFI also need to be finalised and promulgated. This includes the amendment of laws to align the different types of retirement funds discussed in the previous sections. These amendments will introduce further regulatory changes in the retirement fund industry which retirement funds ought to comply with. The twin peaks and market conduct regulation of retirement funds are more than a dual regulation as argued by Godwin; they are arguably a multiple regulation, as there are various statutes which will regulate the conduct of retirement funds: the FSRA, COFI, the PFA, the ITA, the LTIA, FAIS, POPIA, the Competition Act 89 of 1998, the Companies Act 71 of 2008, etc. This is because in each of these statutes there are market conduct provisions which apply to retirement funds, their officers, and stakeholders such as the product providers and the administrators of retirement funds.

The regulatory changes introduced by the twin peaks have resulted in the implementation of various financial laws and related statutes, indicated above, that need to be aligned with the market conduct laws of retirement funds. I am of the view that there are too many laws that have been introduced by the twin peaks and, consequently, by the market conduct laws, which may be burdensome for retirement funds and their stakeholders (such as product providers, insurers, administrators, intermediaries, participating employers, members and their beneficiaries), and are difficult to comply with. This aggravates the complexity of retirement funds as they may become over-regulated. These laws may be difficult for the stakeholders to keep up with and for the retirement fund members to comprehend. The regulatory changes have also resulted in high costs for retirement funds, product providers, insurers, administrators and intermediaries to comply with, and they have led to changes in the administration processes and systems, which will result in high costs to administer the retirement funds, in addition to the existing costs. Some of these costs will be borne by the members and will reduce their retirement savings, consequently impeding the objectives of financial inclusion, high retirement savings and the eradication of poverty.

The regulatory framework and its various laws create larger regulatory functions and more powers for the regulators. They also call for the regulators and their employees to properly familiarise themselves with the market conduct laws and the relevant statutes for them to be able to execute their regulatory functions efficiently.

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This necessitates the regular monitoring of the regulatory framework and its functions to assess the risks and regulatory gaps which may arise from the market conduct regulation of retirement funds and their stakeholders, as well as the consistent assessment of whether market conduct regulation is achieving its objective of protecting retirement fund customers. The regulatory reforms also necessitate regulator industry consultations on areas of concern to identify gaps.

2.11. Proposed market conduct regulatory reforms for the retirement fund industry

2.11.1. Introduction

TCF supports the government's objective of strengthening market conduct regulation.[297] International standards require that clear, enforceable rules and regulations must be implemented in order to achieve TCF outcomes.[298] These standards are to be developed together with the TCF principles, which will guide the regulators in monitoring the conduct of the financial institutions.[299] In order to achieve the objectives of market conduct regulation of the fair treatment of customers and to address the abuses, risks, complexities and regulatory gaps indicated in the preceding chapters, various laws have been amended and introduced by incorporating TCF.[300] As indicated above, TCF is the centre of the legislative reforms in the financial services sector.[301]

The retirement fund industry contributes to the development and growth of the economy through investments in pension funds and by providing income to customers when they retire.[302] The government is implementing various regulatory reforms in the retirement industry as part of its strategy to provide pension, life and disability benefits to retirement fund members.[303] The objectives of the regulatory reforms in the

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[297] National Treasury *A safer financial sector to serve South Africa better* 2011 at 43.
[298] *Ibid.*
[299] *Ibid.*
[300] *Idem* at 39.
[301] *Ibid.*
[302] National Treasury *A safer financial sector to serve South Africa better* December 2013 at 49.
[303] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 40.

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retirement industry are to enhance savings, protect consumers and alleviate poverty.[304] The government is in the process of establishing the NSSF aimed at securing affordable retirement and life insurance benefits.[305] In order to achieve the objectives of the NSSF, the government is proposing a number of retirement fund reforms to grow retirement savings, to increase consumer protection and to eradicate financial distress, specifically for elderly persons.[306] The government proposes the following retirement fund reforms set out below, (encourage preservation of accumulated savings, enhance governance of retirement funds, provide guidance to members exercising choice, facilitating the payment of pensions by the funds, encourage good value retirement products and services, and harmonising rules and regulations for private and public sector retirement funds) in line with the NSSF objectives.[307]

2.11.2. Encourage preservation of accumulated savings, especially during employment changes

The current regulatory regime does not prohibit fund members from withdrawing their benefits when they exit retirement funds while they are still employed.[308] This lack of prohibition results in inadequate retirement savings, places a burden on the economy as the government has to pay out grants to citizens, and contributes to poverty.[309] The government proposes regulatory reforms to require fund members to leave their benefits in the fund when they exit the fund, to preserve the benefits, or to transfer their benefits to another fund, until such time that they go on retirement.[310] Such measures will contribute to economic growth, financial stability and the protection of the interests of retirement fund members.[311]

[304] *Ibid.*
[305] *Idem* at 39.
[306] *Ibid.*
[307] *Idem* at 40.
[308] *Ibid.*
[309] *Ibid.*
[310] *Ibid.*
[311] *Ibid.*

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2.11.3. Enhance governance of retirement funds

The FSCA will review the fit and proper standards for trustees of retirement funds to ensure that they are able to exercise discretion independently, without unwarranted influence from financial service providers, participating employers or other stakeholders.[312] This is also to ensure that board members are "diligent and ethical", and possess the skills and expertise required for the appropriate and efficient governance of retirement funds.[313] The FSCA also anticipates implementing tougher regulatory requirements to advance compliance measures for board members to fulfill their fiduciary duties for retirement funds and their members.[314] This will drive efficiency in monitoring the conduct of board members and will support the protection of retirement fund customers through streamlined compliance and governance principles.[315]

2.11.4. Provide guidance to members exercising choice, facilitating the payment of pensions by the funds

The purpose of this proposed regulatory reform is to require trustees to ensure that retirement fund members receive sound and adequate advice to help them make informed decisions on their benefits.[316] It is also designed to implement means to encourage retirement funds to provide their own living annuity products to their members and to level the market field, expanding the market for more players to provide annuity products to retirees.[317]

2.11.5. Encourage good value retirement products and services

This proposed regulatory reform is intended to implement stronger market conduct regulation and supervision to enhance clarity and coordination in the drafting of retirement fund rules.[318] Its purpose is also to promote the amalgamation of retirement

[312] *Ibid.*
[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.*
[318] *Ibid.*

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funds in order to enhance efficiency in the management and administration of retirement funds to achieve fair outcomes for retirement fund customers.[319] Another goal of the proposal is to mitigate the purchase of bundled financial services by retirement funds, to streamline disclosures of fees and costs for retirement fund products, thereby increasing product choices and preventing poor customer outcomes.[320] A further purpose of this regulatory reform is to introduce stronger remuneration conditions for intermediaries to balance their interests with those of the financial customers, in order to achieve effective intermediation.[321]

The purpose of the proposed retirement fund reforms is to stimulate sound and prolonged lifetime retirement savings and financial adequacy.[322] The proposed governance reforms aim to achieve consistency between the trustees of retirement funds and the service providers and/or administrators of retirement funds.[323] The proposed reforms are also intended to promote competition in the investment market, to monitor the conduct of financial institutions on disclosures to financial clients, and to strengthen consumer protection.[324]

The government also aims to achieve better outcomes for retirement fund members by introducing various requirements with respect to free-standing funds: requirements for a sound, independent board of trustees who are adequately trained; "clear fiduciary duties" for trustees, to prevent conflict of interest; and stricter regulatory requirements for service providers and administrators of retirement funds, with streamlined obligations to prevent conflicts of interest.[325] For umbrella funds, the government proposes the enhancement of member representation, the removal of compulsory service providers, the mitigation of conflict of interest by improving governance, reporting obligations for sponsored services, regular review and

319 *Ibid.*
320 *Ibid.*
321 *Ibid.*
322 *Idem* at 41.
323 *Ibid.*
324 *Ibid.*
325 *Ibid.*

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assessment of governance and regulatory reforms that govern the remuneration practices on retirement funds.[326]

2.11.6. Public sector pension funds: harmonising rules and regulations

Public sector pension funds such as GEPF are self-regulated and are not properly regulated in the same manner as the pension funds, which are regulated by the Pension PFA.[327] As an example, the PFA affords the following allowances to the pension fund members, which are not provided under some of the public sector pension funds:[328] a non-member spouse is entitled to receive a portion of their benefit once the divorce order is granted, and not at the time that the member retires;[329] and members are able to lodge complaints with the Adjudicator.[330]

There are a number of rules that members are dissatisfied with, such as the restrictions around accessing a portion of one's contributions upon resignation from employment, which has resulted in the need to review the rules of GEPF.[331] The government intends to align the regulatory requirements for all types of retirement funds to ensure that they are governed by the same principles.[332] This will ensure that there are no discrepancies among the different types of retirement funds.[333] The regulatory reforms will also implement market conduct regulations to regulate retirement funds, including their licensing.[334]

2.11.7. Reforming market conduct regulation with TCF Principles in the retirement fund industry

The implementation of TCF Principles is an on-going programme of the FSCA, with the objective of achieving better customer outcomes in the financial industry through

[326] *Ibid.*
[327] *Idem* at 57.
[328] *Ibid.*
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*
[334] *Ibid.*

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product design, disclosures, distribution, advice and complaints management.[335] Although TCF was specifically incorporated into the new market conduct regulations, it had, in actual fact, already been incorporated into the existing legislation and was being implemented by financial institutions.[336] TCF must nevertheless be aligned with the current subordinate legislation to enhance further TCF outcomes.[337]

To enhance TCF, the FSCA is in the process of identifying areas to strengthen and align with existing subordinate legislation.[338] Examples of these areas are highlighted below and include reforms on sales and distribution requirements aimed at progressing the protection of financial customers, including retirement fund members.[339]

2.11.8. Implementing a harmonised disclosure framework[340]

This requirement proposes that customers should be provided with vital information which is not deceptive, misleading or confusing.[341] Due to the complexity of financial products, it is believed that customers should be provided with information that they can understand, to enable them to compare products and make informed decisions.[342] The provision of insufficient information to clients results in poor customer outcomes.[343] This is highlighted in the wholesale markets where, for example, members of the retirement funds are the end customer.[344]

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335 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 50.
336 *Idem* at 51.
337 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 54; Financial Services Board Retail Distribution Review November 2014.
338 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.
339 *Ibid.*
340 *Ibid.*
341 *Ibid.*
342 *Ibid.*
343 *Ibid.*
344 *Ibid.*

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2.12. Discussion on the successes of the proposed regulatory reforms for retirement funds

It is important to note that the above proposed regulatory reforms are also aimed at implementing the objectives of the NSSF.[345] The purpose of the proposed NSSF is to limit the discrepancies in the South African public retirement system.[346] The objective of the NSSF is to supplement the social security funds and private retirement funds, which provide retirement fund benefits to members when they retire, and to provide an income to their dependents.[347] Contributions to the pension and risk benefit components of the NSSF will be combined to distribute the risk of all members and life insureds.[348]

The government has, to date, issued various regulatory changes through amendment laws, conduct standards and guidance notices to achieve the above objectives of providing adequate disclosures and proper advice to retirement fund members, reforming market conduct regulation of retirement funds through TCF Principles, and enhancing governance of retirement funds. Some of these regulatory reforms are Guidance Notice No. 2 of 2018 on Directive 8, on the prohibition of acceptance of gratification by board members.[349] The Guidance Notice forms part of the regulatory reforms to enhance governance of retirement funds.[350] Another example is Guidance Notice No. 4 of 2018, on exemptions under section 7B(1)(b), issued to implement the government objectives to promote efficiency in the governance of retirement funds.[351] The FSCA Guidance Notice 2 of 2020, on the board's fiduciary duties in terms of section 7(c)(f) of the PFA on the payment of a portion of unpaid surplus, was also issued to support efficiency in the governance of retirement funds.[352] Another regulatory reform for retirement funds achieved to date is the amendments to

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[345] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 40.
[346] FSCA and National Treasury "Economies of Scale" Pillay and Fedderke (April 2021) at 20.
[347] *Ibid.*
[348] *Ibid.*
[349] FSCA Guidance Notice 2 of 2018.
[350] *Ibid.*
[351] Clauses 2.2 to 2.4 of the FSCA Guidance Notice 4 of 2018.
[352] Clause 1 of Guidance Notice 2 of 2020.

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regulation 28 of the PFA, whose objective is to provide guidance to members exercising choice and facilitate the payment of pensions by the funds.[353] These new developments are aligned with the objectives of the twin peaks and reflect the regulators' commitment to implement the government's objective of promoting the fair treatment of customers of retirement funds.[354]

One of the successes of the proposed regulatory reforms for retirement funds is the proposed two-pot retirement system. The National Treasury issued a paper on its proposals to introduce a two-pot system for retirement savings, to restrict pre-retirement withdrawals and to encourage preservation of accumulated retirement savings.[355] The paper notes that many South African households do not save enough money for urgent circumstances or financial difficulties, and they do not have enough retirement savings when they retire or leave their jobs due to ill-health or retrenchment.[356] In addition, the challenges with the current retirement system are that members do not preserve enough retirement savings, and when in financial difficulties they can withdraw their retirement savings.[357] Despite that retirement savings must be utilised to provide income to members on retirement, death or ill-health, the government acknowledges that it is necessary to allow members to access a portion of their retirement savings to help mitigate financial difficulties, such as those presented by the Covid-19 global pandemic.[358] For these reasons, the National Treasury announced in the 2021 budget speech that it proposes to introduce the two-pot retirement savings system to allow members to access a portion of their retirement savings on condition that the members will be obliged to preserve their benefits on resignation or retrenchment.[359]

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[353] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 40, and National Treasury "Explanatory Memorandum Revised Draft Regulations 37, 38 and 39 issued in terms of section 36(1)(c) of the Pension Funds Act, 24 of 1956" (December 2016) at 1.
[354] *Ibid.*
[355] National Treasury "Two-pot system retirement proposal and auto-enrolment" December 2021 at 3 to 1.
[356] *Ibid.*
[357] *Idem* at 5.
[358] *Idem* at 7.
[359] *Ibid.*

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The two-pot retirement system will comprise of two types of retirement contributions, namely the savings component which will allow a member to withdraw a portion of their retirement savings any time during employment without withdrawing from the fund, and the retirement component which can only be accessed by a member on retirement.[360] The proposed effective date of the two-pot retirement system is 1 March 2024.[361] The minimum withdrawal from the savings component will be R2,000 per tax year, but there is no limit on the maximum amount that a member can withdraw.[362] A proposed seed capital will allow members to access a portion of their retirement benefits on 1 March 2024, which will be "ten percent of the benefit accumulated in the "vested component" as at 29 February 2024, limited to R25,000, whichever is the lesser", and will be taxed.[363] It is anticipated that this will help citizens in time of financial distress without having to resign to access and deplete their retirement savings, but members are encouraged to access the savings component as a last resort and to keep it as a cash component for retirement.[364] This means that if a member withdraws the full one third of his benefit from the savings component, they will not have the one third cash component on retirement.[365] However, if a member reserves the full one third of the benefit, the member will have a full one third cash component on retirement.[366] The National Treasury issued revised 2023 Draft Revenue Laws Amendment Bill and 2023 Draft Revenue Administration and Pension Laws Amendment Bill on the two pot retirement system for public comment on 9 June 2023.[367]

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[360] National Treasury "Two-pot system retirement proposal and auto-enrolment" December 2021 at 1 to 5 and National Treasury "Media Statement publication of the draft legislation for the two-pot retirement system for public comment" (June 2023) at 1, National Treasury *Draft Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023* at 5.
[361] National Treasury Media Statement "Publication of the draft legislation for the two-pot retirement system for public comment" (June 2023) at 1.
[362] *Draft Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023* at 5.
[363] National Treasury "Media Statement publication of the two-pot retirement system for public comment" at 1.
[364] *Idem* at 2 and *Draft Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023* at 8.
[365] *Draft Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023* at 5.
[366] *Ibid.*
[367] National Treasury "Media Statement publication of the two-pot retirement system for public comment" at 1, and Draft Revenue Laws Amendment Bill (9 June 2023) [Bxx-2023] at 2 and Draft Revenue Administration and Pension Laws Amendment Bill [Bxx-2023] at 2.

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In order to achieve the proposed regulatory reforms discussed above, the government also proposes to design laws to implement "automatic/mandatory" enrolment for retirement funds to provide retirement benefits to contract and temporary employees like domestic employees, seasonal workers and uber drivers.[368] A large number of formal employees and those represented by labour unions belong to retirement funds, but the employees in the informal sector indicated above do not belong to retirement funds.[369] Auto-enrolment entails "making the employer enrol all employees in a workplace pension scheme or another approved scheme, to which the employer must make a minimum contribution; employees have the option of opting out of the scheme".[370] The purpose of auto-enrolment is to mitigate the insufficient retirement savings for many employees in the informal sector who do not belong to a retirement fund, mostly because they are not members of labour unions or are temporary or contract workers, as discussed above.[371] This oversight is due to the current retirement system which allows voluntary participation in a retirement fund.[372]

Due to these reasons, the government plans to implement auto-enrolment to provide retirement benefits and risk benefits to all employees, including informal employees.[373] It is believed that the auto-enrolment will address the gaps in the current retirement system and will help alleviate poverty.[374] It is also believed that merging small retirement funds can reduce costs for retirement fund members, improve economies of scale, enhance management of retirement funds and streamline disclosures for members.[375]

2.13. Shortcomings of the proposed regulatory reforms for retirement funds

The process of implementing the NSSF may result in prolonging the achievement of its objectives of providing citizens with an income on retirement or disability, alleviating poverty, and achieving financial inclusion. This also means that the government will

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[368] National Treasury "Two-pot system retirement proposal and auto-enrolment" December 2021 at 1.
[369] *Ibid.*
[370] *Idem* at 23.
[371] *Ibid.*
[372] *Ibid.*
[373] *Ibid.*
[374] *Ibid.*
[375] *Idem* at 1.

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continue to be burdened by citizens with insufficient income upon retirement and those dealing with financial hardships, which may impact the efficiency and stability of the economy. Despite the fact that the current retirement fund industry provides an income to retirement fund members and their beneficiaries, there is a need to implement the NSSF to bridge the discrepancies and the inefficient retirement savings under the current retirement system. The NSSF is needed to achieve bigger objectives and provide a better income to the citizens.

The current laws which allow retirement fund members to withdraw their full benefits on resignation or retrenchment aggravates the risk of future financial difficulties and insufficient retirement savings and "low replacement rates and poor outcomes on retirement".[376] The high tax rates implemented on retirement withdrawals are not enough to discourage members from withdrawing their benefits.[377]

Notwithstanding the above, the following three main areas for retirement fund reforms still need to be addressed by the government:

- "**Coverage**: Whilst the current retirement system covers many workers, there remain significant categories of workers who are not participating in any retirement scheme;"[378]
- **"Preservation:** Many members of retirement funds do not preserve their savings, tending to cash out every time they change jobs. Whilst the default regulations do assist with preservation, significant loopholes remain;"[379]
- **"Costs:** Whilst the costs applying to retirement funds might be made more transparent, most of the cost structure of retirement funds relates to the size and number of funds, which are not economical."[380]

[376] *Idem* at 5.
[377] *Ibid.*
[378] *Idem* at 3.
[379] *Idem* at 4.
[380] *Ibid.*

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Despite the fact that there are many medium- and large-sized employers who participate in retirement funds, there are many low-income employees in the informal sector, namely "seasonal workers, part-time workers, informal sector workers, independent contractors, sole proprietors, probationary employees" (commonly classified as "vulnerable workers"), who are employed by small entities that do not belong to retirement funds.[381] It is a common global challenge to provide retirement benefits to the employees in the informal sectors due to their variable income, compared to the formal and government employees who earn their income on a monthly basis and can contribute to retirement funds each month.[382] As a result, several countries prefer not to provide retirement benefits to "vulnerable workers" under the auto-enrolment system, whereas other countries, such as Kenya and Rwanda, use the FinTech micro-pensions technology.[383] Although the employees in the formal sectors can contribute to their retirement funds on a regular basis, they may not be able to afford to continue contributing the fund when their employers are liquidated and can no longer afford to employ them. The National Treasury Policy Paper on umbrella funds notes that there are many inactive employers who are no longer contributing to retirement funds.[384] This means that the employer, though obliged to continue paying contributions on behalf of its employees, cannot continue to pay the contributions due to financial difficulties.

Where an employer fails to add an employee who qualifies for benefits under a fund that the employer participates, the member will not have access to retirement benefits. This will result in the member not having retirement benefits or deprive the member's family access to the death benefits on the member's death. This may contribute to the obstruction of achieving the objectives of the twin peaks and market conduct regulation, to achieve fair treatment of members or providing financial products to customers, and financial stability in the financial industry. If an employer fails to add an eligible employee timeously to the fund, the impact is that the member or his family will have lessor benefits and may result in unfair outcomes for the member and his family. In other instances, an employer can pay contributions for a member based on

[381] *Idem* at 23.
[382] *Ibid.*
[383] *Ibid.*
[384] National Treasury "Governance of Umbrella funds" (2021) at 3.

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a lower pensionable salary. In some instances, an employer can erroneously remove an employee who is ill, from the fund, when the employee should be on break in service. Should the employee die after the employer exited them from the fund, they will not be covered for risk death benefits provided by the fund or self-standing risk benefits that members qualify for by virtue of their membership to the fund. This is because the employer will not have paid the risk premiums and the member's cover will have been terminated by the insurer. This can be prejudicial to the member and his family and can result in unfair outcomes for the member and their family.

2.14. Conclusion and preliminary views

Retirement funds in South Africa are dominated by occupational funds which provide retirement and risk benefits to the employees. The employer is an important stakeholder who negotiates retirement benefits to the employees. Retirement benefits can assist the employer to attract good employees, if the employer negotiates goods benefits for its employees. Risk benefits are important to employees as they provide cover to the lives of the employees in the event of death and disability, and they also provide funeral benefits, spouses' and children's benefits. I am of the view that the government should also include employers in the financial literacy programmes to enlighten them on the importance of risk benefits, and to encourage employers to include risk benefits for their employees when negotiating retirement benefits. If employers know the importance of risk benefits for their employees, it will encourage them to negotiate the risk benefits for their employees to cover their lives.

I am further of the view that, if many employers provide risk benefits to their employees, it will help to achieve the government's objectives of financial inclusion. Members of retirement funds will have an income should they be disabled, and will be able to provide an income to their families when they die. I am of the view that the risk benefits will help to achieve the objectives of financial inclusion and to alleviate poverty as some risk benefits such as lumpsum death and disability benefits can pay very high benefits. The risk benefits will also help some members who do not have enough retirement savings because they withdrew their benefits during employment or because they earn a low income. If such a member is disabled and is covered for disability, the disability benefit will provide an income to the member. A lumpsum death benefit will also provide an income to a member's when a member dies, and the

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member's family will not be in financial difficulty if the member did not have enough retirement savings. I am of the view that individual members with retirement annuity benefits who do not belong to an occupational fund should also be encouraged to have risk benefits to achieve the same purpose discussed above.

The insurer or product provider or administrator of the retirement fund is a significant stakeholder who provides the products and administration services to retirement funds. It is therefore important for administrators to create proper channels for the members to contact them in respect of queries, complaints and their claims. Even though there are many new and reformed laws for retirement funds, it is important for the insurers and administrators to regularly review their products and services, to achieve fair customer outcomes. The administrators and product providers should be encouraged to train their staff on the regulatory reforms and TCF Principles to ensure efficiency in handling claims, queries or complaints, and to provide appropriate products to the members. Financial advisers play an important role in selling and distributing retirement and risk benefits to the employers to negotiate the benefits on behalf of the employees. I am of the view that the financial advisers should encourage employers to negotiate risk benefits for their employees, to provide risk cover to the employees for death, disability, funeral, spouses' and children's benefits, to achieve the objectives of financial inclusion and alleviate poverty, as discussed earlier.

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CHAPTER 3: SPECIFIC CHANGES TO COMPONENTS OF FRAMEWORKS AS A RESULT OF THE INTRODUCTION OF TWIN PEAKS

3.1. Introduction

In this chapter, I discuss the appointment, powers and duties of the board members of retirement funds before and after the implementation of the twin peaks. I analyse the governance of retirement funds under PF circular 130 and the powers and functions of the board members of retirement funds. I further analyse the governance of retirement funds under the King IV Report in relation to retirement funds. I discuss the powers and functions of the board members of retirement funds, and the governance of retirement funds after the twin peaks under the FSCA guidance notices and directives on fund governance. I analyse how the guidance notices and directives prohibit board members from being unduly influenced by administrators or stakeholders to prevent corruption. I further analyse how the guidance notices and the directives require board members to fulfil their fiduciary duties as required by the PFA, to comply with the fit and proper requirements, and to implement governance processes on of behalf of the retirement funds and their members. This chapter therefore deals with the first two research questions.

Administration of retirement funds and payment of contributions, appointment of and powers of the principal officer and auditor

In this part of chapter 3 I outline the administration of retirement funds, payment of contributions, appointment and duties of a principal officer and auditor before and after the twin peaks under the old PFA directives/circulars and the new FSCA conduct standards under the twin peaks and the regulatory reforms. I also discuss the obligations of an administrator to collect contributions, invest, administer and pay the benefits to the members, to implement a claims and complaints process and to manage the clients' data. I analyse the obligations of an administrator on governance processes for the administration of the benefits, claims and complaints process, and data management processes. I also analyse the duties of the board members to oversee and manage the administrator's duties on behalf of the fund and its members. I discuss the obligations of the administrator in respect an administration agreement

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with the fund, and the obligations of the board members to enter into an agreement on behalf of the fund. I also evaluate the successes and failures of the regulatory reforms in relation to the administration of retirement funds, payment of contributions, appointment of and duties of the principal officer and an auditor.

Adjudication of complaints

In this section, I outline the regulation and adjudication of complaints before and after the twin peaks. I also examine the proposed consolidated ombuds system under the FSRA which is aimed at promoting transparency and accountability, and at enhancing consumer protection. I also evaluate the successes and failures of the regulatory reforms in respect of the adjudication of complaints.

Juristic nature of a retirement fund

A retirement fund becomes a juristic person upon its registration.[1] When registered, a fund becomes a body corporate under its name and it acquires rights to sue and to be sued in its corporate name and to use of its powers and conduct its business according to its fund rules.[2] A registered fund's "assets, rights, liabilities and obligations pertaining to the business of the fund are deemed to be those of the fund".[3] The officers of a retirement fund are the board members and the principal officer.[4] The officers of the fund are responsible for the management of the fund, its assets and business, including providing benefits to the members, making decisions in respect of distribution of benefits under the fund, ensuring that contributions are paid and invested, and protecting the assets and benefits of the fund.[5] The officers of the fund play a significant role on the governance of the fund.[6]

Common law fiduciary obligations in respect of a director and a company apply to retirement funds and the board members and extend beyond the obligations

[1] Section 4B(1) of the PFA.
[2] Section 5(1)(a) of the PFA.
[3] Section 5(1)(b) of the PFA.
[4] Section 7A, 8, 9 and 9A of the PFA.
[5] Sections 6 to 9 of the PFA.
[6] *Ibid*.

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imposed by the PFA.[7] These fiduciary duties include the duty of the board members "to meet the object of the fund, which is to provide benefits for members".[8] The decisions of the board and any failure to comply with relevant laws can be reviewed by the High Court.[9] If a board has exercised its powers properly, any application to get the decision revoked by the court will not be successful, as stipulated in section 6(2) of the Promotion of Administrative Justice Act ("PAJA").[10] The requirements of PAJA include the provisions that the board should, in exercising its discretionary powers, consider relevant factors, discarding irrelevant factors, and must reach its resolutions prudently.[11] The fund rules must not incorporate any provisions which are discriminatory in respect of the business of the fund.[12]

3.2. Powers and officers of retirement funds

3.2.1. Appointment, powers and duties of Board Members prior to twin peaks

The PFA provides various provisions on market conduct regulation, such as governance of pension funds by board members, collection of contributions, administration of pension funds, and complaints adjudication by the Adjudicator.[13] The board members are entrusted with fiduciary duties and powers to manage the operation of the fund and the assets held in the fund.[14] The board is also responsible for ensuring that members are provided with appropriate and adequate information, informing members of their rights and duties, and ensuring that benefits under the fund are properly distributed.[15] Section 7 of the PFA regulates the conduct of the board members and their responsibilities under the fund.[16]

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[7] *Manual on retirement funds and other employee benefits* (2020) at 4.2.2; Geral *Pensions* (2009) at paragraph 208.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] Sections 7, 13A, 13B, 30AA to 30V of the PFA.
[14] Section 7 of the PFA; *Tek Corporation Provident Fund and Others v Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) at paragraph 15.
[15] *Ibid.* See also *Rodseth v Dynamique SA Umbrella Provident Fund* (2015) PFA/GP/00012135/2014/TD.
[16] Section 7 of the PFA.

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The PFA requires the board to protect the interests of the members, specifically in amalgamation and transfers, the splitting of a fund, the termination or reduction of contributions by an employer, the increase of contributions of members and the withdrawal of an employer from the fund.[17] The board is required to act with due care, diligence and in good faith, to act impartially and independently, and it owes a fiduciary duty to the fund members, beneficiaries and the fund.[18] The board is responsible for ensuring that the fund remains financially sound, in respect of accrued benefits or any amount accrued to provide a benefit, and it has a fiduciary duty to the fund, to ensure that the fund is financially sound, is properly managed and is governed in compliance with the fund rules.[19]

Section 7 is an integral part of the market conduct regulation in the pension funds industry, as it monitors the conduct of trustees to ensure that assets held under a fund are properly managed, invested and distributed, and that members and beneficiaries receive the benefits that they are entitled to.[20] Section 7 also implements market conduct regulation by placing fiduciary duties on trustees to ensure that the interests of members are protected at all times and the fund remains financially sound.[21]

(i) Pension Funds Circular 130: governance of retirement funds

PF Circular 130 ("the Circular") sets out principles on good governance of retirement funds.[22] The fiduciary duties of trustees, which require them to conduct themselves with integrity in managing the affairs of the fund, and the discretionary powers entrusted to them require their conduct to be monitored.[23] According to the Circular, the fundamental principle of good governance requires the board members to conduct themselves with the highest good faith toward the fund and for the benefit of the

[17] Section 72(a) of the PFA.
[18] Section 2(b) to (e) of the PFA.
[19] Section 2(f) of the PFA.
[20] Section 7 of the PFA.
[21] *Ibid*.
[22] FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007).
[23] *Idem* at paragraph 1. See also *Hoosen NO & others v Deedat & others* [1999] 4 All SA 139 (A); *Sentinel Retirement Fund v C V Bold and Others* (80105/2015) [2017] ZAGPPHC 83 (7 March 2017).

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members.[24] The Circular notes that the board must conduct itself in accordance with the rules of the fund and address all matters in respect of the fund and its members, in terms of their fiduciary obligations, fairly and respectfully.[25] The Constitutional Court noted in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* that the board's principal objective is the duty of good faith that it owes to the fund and its members.[26]

The Circular stipulates that there are three stakeholders in the governance of a retirement fund: its members (including pensioners, former members and deferred members); members' dependants; and nominees of the members (beneficiaries).[27] The participating employers, the sponsors of the fund and the Registrar of pension funds are also party to fund governance.[28] The Circular stipulates the following main objectives of good governance: the fund should provide benefits according to the fund rules; the risks associated with fund benefits should be mitigated and balanced against the benefits to ensure that they continuously earn good returns;[29] and administration fees/charges should be adequately disclosed to all stakeholders under the fund.[30] The Circular further stipulates that the trustees of the fund, assisted by the principal officer, are responsible for the governance of the fund.[31] While the principal officer is accountable to the board, the trustees are accountable to the members of the fund, the beneficiaries and the FSCA.[32]

The Circular specifies that it is the obligation of the board to ensure that the fund is properly administered, to invest the fund's assets, and to report the affairs of the fund to the members.[33] According to the Circular, the board can delegate some of its powers to the employer or service providers, among others, if the fund rules allow

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24 *Idem* at paragraph 2.
25 *Ibid*.
26 *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC) at paragraph 41.
27 *Idem* at paragraph 3.
28 *Ibid*.
29 *Ibid*.
30 *Idem* at paragraph 4.
31 *Idem* at paragraph 5.
32 *Idem* at paragraph 6.
33 *Idem* at paragraph 13.

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it.[34] The board is required to act jointly, and its decisions should be taken by the majority of the board members.[35] The chairperson of the board is the head of the board and is required to *inter alia,* lead the fund impartially in respect of the conduct of the sponsor, employer or service provider.[36]

The principal officer is responsible for the proper performance of the fund, and their duties include, among others, safeguarding the execution of decisions by the board,[37] and interacting with service providers on behalf of the fund.[38] The primary function of the board is to ensure that it implements a diligent oversight on the fund,[39] by *inter alia*, assessing the performance of service providers regularly,[40] and protecting the confidential information of the fund.[41] The board is also responsible for the risk management of the fund:[42] identifying, assessing and monitoring any risks against the fund;[43] monitoring the investment performance of the fund's assets;[44] safeguarding the confidential information of the fund and its members; protecting the rights of the members; and ensuring compliance with legislation, handling regulatory queries efficiently and timeously.[45]

The provisions of the Circular are a significant market conduct regulatory tool, in that they set out standards that trustees should adhere to in executing their fiduciary duties and help monitor them to account for their conduct.[46] The requirements of the board to act in the best interest of the members — to protect their rights and identify, assess and monitor risks and the performance of fund assets — is a fundamental market conduct regulation tool which supports the protection of members/beneficiaries.[47] The fund has recourse against the trustees in the event that

[34] *Idem* at paragraph 14.
[35] *Idem* at paragraph 15.
[36] *Idem* at paragraph 17.
[37] *Idem* at paragraph 18.
[38] *Idem* at paragraph 18.4.
[39] *Idem* at paragraph 35.
[40] *Idem* at paragraph 38.1.
[41] *Idem* at paragraph 38.5.
[42] *Idem* at paragraph 44.
[43] *Idem* at paragraphs 44.1 and 44.2, and 44.4.
[44] *Idem* at paragraph 49.
[45] *Idem* at paragraphs 56-71.
[46] FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007).
[47] *Ibid.*

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they contravene the legislation.[48] The trustees are required to obtain fidelity/indemnity cover for losses incurred by the fund.[49]

(ii) The King IV Report on Corporate Governance for Southern Africa in relation to retirement funds

This section discusses corporate governance principles in relation to retirement funds outlined in the King IV Report on Corporate Governance in South Africa (the King IV Report, henceforth "the Report") and, how the Report interrelates to the PFA and the Circular on governance of retirement funds and how it implements market conduct regulation. The Report was drafted by the Institute of Directors in Southern Africa ("IODSA") and was published in November 2016.[50] The Report stipulates principles on corporate governance in South Africa, and it also sets out corporate governance principles for specific sectors such as small business enterprises and retirement funds.[51] The report applies to pension funds, provident funds, preservation funds and retirement annuity funds.[52] It is a market conduct regulatory tool as it sets out principles on the proper management and supervision of retirement funds, as well as the conduct of board members and the principal officers.[53]

The Report defines corporate governance as the implementation of proper and efficient leadership by the governing body to achieve governance outcomes such as ethical culture, good performance, effective control and legitimacy.[54] According to the Report, efficient and proper leadership correlate with and support each other.[55] The Report highlights that efficient leadership is characterised by integrity, "competence,

[48] *Idem* at paragraph 44.

[49] *Ibid.*
[50] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 1.
[51] *Idem* at 95.
[52] *Ibid.*
[53] *Ibid.*
[54] *Idem* at 20.
[55] *Ibid.*

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responsibility, accountability, fairness and transparency".[56] Effective leadership is outcome-driven and it focuses on accomplishing profitable results.[57] The Report notes that the governing body's primary roles and responsibilities are to direct a purposeful leadership, implement effective goals, supervise and oversee management duties and decisions, and ensure proper reporting and disclosures.[58] Governing body members are required to conduct themselves, individually and collectively, in accordance with underlying principles which denote integrity, competence, responsibility, accountability, fairness and transparency.[59]

The above-mentioned principles are deemed to guide effective leadership that attains strategic objectives and desired solutions.[60] The above-mentioned principles apply to the board members of the retirement funds in so far as they oversee the management of the fund and owe fiduciary duties to the fund and its members.[61] Their leadership roles in the management of the affairs of the fund are based on corporate governance principles.[62] Retirement funds play a significant role in the economy, especially in the investment industry, by virtue of the assets invested on behalf of their members.[63] Retirement fund members are deemed to have rights similar to the shareholders of a company.[64] These rights and fiduciary duties owed to members are similar to the rights of shareholders of a company, and they necessitate proper governance to ensure that retirement funds are properly managed, and the benefits are protected.[65]

The Report outlines a supplement for retirement funds to require the governance outcomes and principles to apply to retirement funds.[66] The supplement states that it should be applied together with sector-specific codes and guidelines and

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[56] *Ibid.*
[57] *Ibid.*
[58] *Idem* at 21.
[59] *Ibid.*
[60] *Ibid.*
[61] *Idem* at 95.
[62] *Idem* at 96.
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*

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the Circular.[67] The supplement draws a distinction of the terms used between the shareholders of a company and a retirement fund, which must be used interchangeably.[68] "Organisation" refers to retirement fund, "governing body" to trustees of the fund, "CEO" to principal officer, and "shareholders" to members of the fund.[69]

The Report notes that the governance principles apply to retirement funds in the same manner as they would apply to a company and sets out similar principles (some of which are stated below).[70] Principle 1 stipulates that the board should lead ethically and effectively.[71] This principle requires board members to conduct themselves with integrity, competence, responsibility, accountability, fairness and transparency.[72] Principle 2 states that "the board should govern the ethics of the fund in a way that supports the establishment of an ethical culture".[73] According to this principle, board members should properly govern the ethics of the fund and ensure that service providers adopt the same ethics.[74] Principle 5 stipulates that "the board should ensure that reports by the fund enable stakeholders to make informed assessments of the fund's performance and its short, medium and long-term prospects".[75] The principle notes that reports are an essential tool in keeping stakeholders well informed of the fund's performance.[76]

Principle 10 states that "the board should ensure that the appointment of and delegation to management contribute to role clarity and the effective exercise of authority and responsibilities".[77] This principle requires board members to exercise proper governance for outsourced administration and investment services, managing conflicts of interest around the management and investments of the fund's assets.[78]

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[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] *Idem* at 97.
[76] *Ibid.*
[77] *Idem* at 100.
[78] *Ibid.*

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The principle further highlights that the board members remain accountable for outsourced services.[79] The principle also notes that the board members are responsible for the appointment of the principal officer who is accountable to the board, while the board is accountable to the members of the fund.[80]

The Report endorses the governance principles set out in the Circular as well as the provisions of section 7 of the PFA, such as the requirements on the board to conduct themselves with integrity, good faith, due diligence, skill and care and to prevent conflict of interest.[81] The Report is a fundamental tool of market conduct regulation that incorporates the outcome-based principles.[82] Some of the pertinent features of the outcome-based approach of the Report are an apparent distinction between principles and practices, a comprehensive consolidation of governance, a process that focuses on transparency, and a regime that applies and explains principles and practices.[83] The objective of the Report is that "the practices associated with a particular principle should be applied so that they support and give effect to the aspiration as expressed in that principle"[84] and "to reinforce governance in a holistic integrated set of arrangements".[85] This also supports the government market conduct regulation objectives, which are outcome-based, and enhance consumer protection in the retirement fund industry.[86]

The Report's outcome-based principles — namely, requiring board members to make disclosures that help stakeholders make informed assessments of the fund's performance — assist retirement fund members to be well informed of their benefits, and supports financial literacy and financial inclusion.[87] The principle requiring the board to adopt a stakeholder-inclusive approach that balances the interests of the

[79] *Ibid*.
[80] *Ibid*.
[81] Section 7 of the PFA, FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007).
[82] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 27.
[83] *Ibid*.
[84] *Idem* at 36.
[85] *Idem* at 27.
[86] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.
[87] *Idem* at 97.

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stakeholder, assists in monitoring the conduct of the board and enables them to account for their conduct.[88]

3.2.2 Powers and functions of board members and fund governance: position after the twin peaks

(i) Guidance Notice No. 2 of 2018: Directive 8: prohibition on acceptance of gratification

On 27 June 2018, the FSCA issued a guidance notice on Directive 8 to provide guidance and interpretation.[89] Directive 8 requires all persons regulated by it to report any contravention with Directive 8.[90] The guidance notice stipulates that the fund should cover the costs of training, travel and accommodation for its board members to mitigate corruption and undue influence over board members.[91] If training is provided for free by a service provider, the fund is required to cover travelling costs and accommodation.[92] If the service provider wishes to provide training for free, including beverages, it should open the training to the public.[93]

A service provider is allowed to pay for business-related meals, if they are genuinely for business purposes, and the fund officers declare such meals in a gift register.[94] Retirement fund officers are not allowed to accept any entertainment invitations, including, but not limited to, breakfasts, lunches, dinners, coffees, drinks, sporting events, hunting, and jazz festivals.[95] Service providers are required to refrain from attempting to disguise an entertainment event and justify it as being legitimate to avert the provisions of Directive 8.[96] Tokens and gifts awarded to fund officers, such as pens, diaries, calendars, mugs and other indulgences like chocolates, biscuits or beverages, cannot exceed R500, to prevent goodwill being converted to corrupt

[88] *Idem* at 102.
[89] Clause 2 of the FSCA Guidance Notice 2 of 2018.
[90] Clause 3.1 of the FSCA Guidance Notice 2 of 2018.
[91] Clause 3.2 of the FSCA Guidance Notice 2 of 2018.
[92] *Ibid*.
[93] *Ibid*.
[94] *Idem* at clause 3.3.
[95] *Idem* at clause 3.4.
[96] *Ibid*.

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activities.[97] Where a fund officer is required to conduct due diligence, the fund is required to cover all the costs.[98]

(ii) PFA Guidance Notice No. 4 of 2018: exemption under section 7B(1)(b)

On 5 October 2018, the FSCA issued a guidance notice for retirement funds that are exempted from the requirement that each fund should have a board with at least 4 members, of which 50% must be elected by members.[99] The FSCA noted that retirement funds were encountering challenges to renew the exemption applications, some of which included the costs for such renewals and the failure by some funds to renew the exemption application on time.[100] For this reason, the FSCA issued the guidance notice to remove the expiry of exemptions issued under section 7B(1)(b) of the PFA.[101] The purpose of the guidance notice is to promote compliance by retirement funds and protect members of these retirement funds, to ensure that the members' benefits can be paid timeously and that the board is properly constituted.[102]

However, the guidance notice requires retirement funds to apply for renewal of the non-expired exemption and imposes conditions such as that at least 50% of the board members must be independent.[103] Each board member should demonstrate the ability to act independently without undue influence, should be able to provide ample time, expertise and resources as agreed by the fund, and must not have been convicted of a crime.[104] The fund rules must stipulate the process to remove a board member who no longer complies with the requirements and the process to replace the board member.[105] The fund is required to provide the FSCA with, *inter alia,* the names, contact details and employment history of the board members within 30 days of being awarded the exemption.[106]

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[97] *Ibid* at clause 3.5.
[98] *Ibid*.
[99] Clause 1.2 of the FSCA Guidance Notice 4 of 2018.
[100] *Idem* at clauses 2.2 to 2.4.
[101] *Ibid*.
[102] *Ibid*.
[103] *Ibid*.
[104] *Idem* at clause 3.2.
[105] *Ibid*.
[106] *Idem* at clause 4.

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(iii) FSCA Guidance Notice 2 of 2020

On 10 December 2020, the FSCA issued Guidance Notice 2 of 2020, in terms of section 141 of the FSRA, to provide guidance on the requirements of the Financial Institutions Protection of Funds) Act, 28 of 2001 (" the FI Act") with regard to the board's fiduciary duties, in terms of section 7C(2)(f), on the payment of a portion of unpaid surplus.[107] This was because the Supreme Court of Appeal in the matters of *Hortors Pension Fund v Financial Sector Conduct Authority and Another, Southern Sun Group Retirement Fund v Registrar of Pension Funds and 3 Others* and *Vrystaatse Munisipale Pensioenfonds v Minister of Finance and 3 Others* held that regulation 35(4) of the PFA was invalid.[108]

Regulation 35(4) stipulated that board members could establish the surplus growth of a member but should deposit it into a contingency account and only pay it out when they have traced the member, or into a Guardian Fund or any fund recognized by law.[109] The court held that regulation 35(4) infringed on the board's wide discretionary powers by requiring it to deposit the full amount into a contingency reserve account indefinitely.[110] The FSCA held the view that retirement funds owe a duty to former members who have been apportioned surplus amounts and should not pay out those amounts.[111] However, this does not imply that board members should hold these amounts in the contingency reserve accounts indefinitely, and such amounts must only be paid out responsibly to ensure that the fund remains solvent.[112] It was for these reasons that the FSCA issued the Guidance Notice to protect the interests of the former members with surplus amounts.[113]

Section 7C(2)(f) of the PFA stipulates that the board owes a fiduciary duty to its fund members and beneficiaries on their benefits and to ensure that the fund remains financially sound and is properly managed in terms of the fund rules and the PFA.[114]

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[107] Clause 1 of Guidance Notice 2 of 2020.
[108] *Idem* at clause 2.
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Idem* at Clause 3.

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Further, in terms of section 2 of the FI Act, any natural or juristic person who holds, invests, controls or manages funds on behalf of the financial institution is required to do so with the utmost good faith and is not required to transfer or pledge any of the amounts.[115] The Guidance Notice sets out that the board members should fulfill their fiduciary duties at all times and act in the interests of the members, taking into account the risks of the fund in releasing the surplus funds.[116] The board is required to demonstrate measures implemented to identify and trace former members within a satisfactory time before paying the surplus.[117] The board is also required to demonstrate the projections used in calculating the assets for the surplus distributions and show that there will be sufficient funds to pay future members.[118]

3.2.2. Discussion: the successes and failures of the amendments to enhance the protection of retirement funds and their members

The Guidance Notices discussed above implement the government's objectives to enhance the governance of retirement fund.[119] Guidance Notice 2 of 2020 is a market conduct regulatory tool which mitigates corruption and prevents fund officers from being unduly influenced by service providers.[120] It helps mitigate corruption by board members, protects retirement funds and their members, and enhances the fit and proper requirements for board members.[121] The Guidance Notice contributes to the protection of retirement fund assets and the benefits of members by prohibiting board members from receiving any gifts other than those prescribed by the Guidance Notice.[122]

Guidance Notice 4 of 2018 is a market conduct regulatory instrument that protects the interests of the retirement fund members by ensuring that the fund appoints fit and proper board members and is compliant with the requirements of

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[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] National Treasury *A safer financial sector to serve South Africa better* 2011 at 43.
[120] FSCA Guidance Notice 2 of 2018.
[121] *Ibid.*
[122] *Ibid.*

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ensuring, *inter alia* that board members act independently, without undue influence.[123] The Guidance Notice promotes compliance by retirement funds who are not properly constituted and protects members by helping them to get their benefits paid on time and ensuring that the board is properly constituted.[124]

Guidance Notice 2 of 2020 is a market conduct regulatory instrument that requires board members to continue to commit themselves to the fiduciary duties that they owe to their fund and its members, to ensure that assets are managed properly, and to act in the best interests of the fund's members.[125] The Guidance Notice will, in the long-run, help mitigate a high number of unclaimed benefits.[126] The requirement for the board to demonstrate measures implemented to identify and trace former members within a satisfactory time before paying the surplus will also, in the long-run, help mitigate the high number of unclaimed benefits.[127]

Despite the few regulatory reforms on fund governance discussed above, there are many areas that still need to be addressed to achieve better customer outcomes and promote the protection of retirement fund members and their beneficiaries. The regulations on governance of retirement funds are still largely segmented, and it is difficult, not only for the fund officers but for stakeholders, such as participating employers, retirement fund members, employees of the administrators, and financial advisors, among others, to identify and understand the regulations on the governance of retirement funds, as they are contained in different pieces of various regulations.

The King IV Report depicts a retirement fund similar to a company with directors and shareholders.[128] If retirement fund members are deemed to be shareholders, it is important for them to understand the laws that regulate the fund officers who manage their benefits.[129] It is also crucial for participating employers who negotiate the

[123] *Idem* at clause 3.2.
[124] *Ibid.*
[125] Guidance Notice 2 of 2020.
[126] *Ibid.*
[127] *Ibid.*
[128] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 95-96.
[129] *Ibid.*

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retirement benefits on behalf of their employees to understand the regulations on the governance of retirement funds.

I am of the view that the consolidation and streamlining of the regulations and laws on governance of retirement funds will achieve better governance of retirement funds. As an example, the King IV Report stipulates governance requirements for retirement funds which are incorporated in the Circular.[130] The PFA stipulates provisions on governance of retirement funds which include the appointment of the board members, the principal officer, the auditor and the valuator.[131] A number of Conduct Standards and Guidance Notices will be issued on the governance of retirement funds. COFI will also introduce market conduct regulatory requirements.[132]

To achieve efficient regulation and better governance of retirement funds, I recommend that the regulations on governance of retirement funds should be consolidated into a manual which incorporates the King IV Report, the Circular, the provisions of the PFA, the provisions of COFI on governance of retirement funds, a summary of the Conduct Standards and guidance notices on governance of retirement funds, and the references to these. The generic principles and retirement-fund specific desired outcomes should be aligned. This would make it efficient for all stakeholders of the fund to understand the duties of the fund officers, to empower customers to hold the fund officers accountable for their conduct and to promote transparency. If the fund officers understand their obligations and the governing laws better, it will make it easier for them to fulfill their duties, to identify risks and to implement measures to mitigate and address those risks. This would, in turn, enhance efficiency, sound governance of retirement funds. The consolidation of laws on the governance of retirement funds would also help achieve efficient regulation by the market conduct regulator. It would prevent *avoidable* misconceptions and misconduct brought about by different views of the desired implementation of principles in practice – conduct that could have dire consequences for innocents relying on the proper outcomes of good governance.

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[130] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 95-96.
[131] Clause 14 to 16 of COFI.
[132] Sections 6 to 9 of the PFA.

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It is also recommended that the FSCA's strategy on literacy programmes should include the governance of retirement funds, so that the customers can understand what is required to hold the fund officers accountable for their conduct.

The rules of umbrella funds usually stipulate provisions on the appointment of member representatives, which comprises of representatives from the employees of the employer and representatives of the employer. Members should be made aware of these representatives through regular interactions with the body of representatives. Apart from the retirement fund rules, there are currently no regulations on the body of representatives of the members under the participating employer in an umbrella fund. There should also be regulations to regulate the conduct and duties of the body that represents the retirement fund members, as it represents the members on a member level and the board members are responsible for the management of the fund and have minimal interaction with the members. Codifying the rules for these bodies will support good governance of retirement funds and the literacy of its members by requiring the member representative body to regularly engage with the members on such matters. Clear regulations that require regular interactions with members will help implement transparency and an opportunity for members to raise their concerns and channel requests, such as those concerning delays on the payment of benefits or changes to benefit structures.

3.3 The administration of retirement funds

3.3.1. The position prior to the introduction of twin peaks

The administration of pension funds is regulated by section 13B of the PFA and forms part of market conduct regulation as it regulates the conduct of retirement fund administrators.[133] Section 13B requires a person to administer a pension fund only if they have a license granted by the registrar of pension funds.[134] An administrator can only administer a pension fund if they are licensed in terms of section 13B of the

[133] Section 13B of the PFA and FSB Board Notice 24 of 2002 "Conditions Determined in respect of Administrators acting on behalf of Pension Funds".
[134] Section 13B(1) of the PFA.

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PFA.[135] A pension fund administrator is required to comply with fit and proper requirements, such as honesty and integrity,[136] competence and operational ability,[137] and financial soundness.[138] Section 13B of the PFA sets out provisions for an administrator to, *inter alia* avoid conflicts of interest, administer the fund in a responsible manner and keep proper records.[139] Section 13B is a market conduct regulatory tool which helps monitor the conduct of administrators and promotes fair outcomes for the fund and its members.[140]

Board Notice 24 of the PFA stipulates conditions for the administration of pension funds by an administrator who is registered in terms of section 13B of the PFA.[141] Condition 3 of Board Notice 24 requires an administrator to enter into an agreement with the fund before it commences administration and to, *inter alia*,[142] administer the investments and benefits of the fund[143] and stipulate the remuneration of the administrator.[144] The requirements of condition 3 are a significant market conduct regulatory mechanism which ensures that the investments of the fund and the fund members' benefits are properly administered.[145] It also helps monitor the remuneration of the administrator for the administration services by requiring such remuneration to be stipulated in the administration agreement.[146] The administration agreement governs the administration of the fund, its benefits, and its assets, as well as the relationship between the fund and the administrator.[147] This requirement helps mitigate risks such as *mala* administration, to help employers to comply with the provisions of section 13B of the PFA, and to monitor the conduct of the administrator.[148]

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[135] *Ibid*.
[136] Section13(B(1A)(c)(i) of the PFA.
[137] Section13(B(1A)(c)(ii) of the PFA.
[138] Section 13(B(1A)(c)(iii) of the PFA.
[139] Section 13B(5)(a) to (c) of the PFA
[140] Section 13B of the PFA.
[141] FSB Board Notice 24 of 2002 "Conditions Determined in respect of Administrators acting on behalf of Pension Funds".
[142] FSB Board Notice 24 of 2002 "Conditions Determined in respect of Administrators acting on behalf of Pension Funds" at condition 3.1.
[143] *Idem* at condition 3.2(a).
[144] *Idem* at condition 3.2(c).
[145] *Idem* at condition 3.
[146] *Ibid*.
[147] *Ibid*.
[148] *Ibid*.

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3.3.2. The position after the introduction of twin peaks

(i) Draft Conduct Standard — communication of benefit projections to members of Pension Funds

Although the above provisions still apply, the FSCA has taken steps to enhance the protection to members with respect to the administration of retirement funds. On 8 June 2020, the FSCA published a draft Conduct Standard on the communication of benefit projections to members of pension funds.[149] A benefit projection is essential to assess if a member is saving adequately for retirement.[150] Retirement funds and administrators are required to provide members with information on realistic *expectations* on their future retirement benefits and the impact of their retirement decisions.[151] However, there is no law that requires retirement funds and administrators to provide benefit *projections* to members.[152] This has caused inconsistencies for and unfair treatment of members who belong to retirement funds which do not provide members with benefit projections.[153] The FSCA published the draft Conduct Standard on communication of benefit projections to members of pension funds to ensure consistency and fair treatment of members.[154]

A retirement fund is required to provide members with a benefit projection, through its administrator, in a simple language, to help the member make an informed decision on their benefits.[155] A retirement fund should provide the benefit projections when a member joins the fund, as well as on an annual basis, on pre-retirement withdrawal (to compare the impact of preserving retirement benefits versus retirement), and on living annuities (to illustrate whether a member's income is sustainable).[156] In respect of a defined benefit fund, a projected benefit must be

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[149] FSCA "Statement supporting the conduct standard – communication of benefit projections to members of pension funds" (June 2020) at paragraph 2.1.
[150] *Ibid.*
[151] *Ibid.*
[152] *Idem* at paragraph 2.2.
[153] *Ibid.*
[154] *Ibid.*
[155] FSCA "Draft Conduct Standard on communication of benefit projections to members of pension funds" (June 2020) at paragraph 1.
[156] *Idem* at paragraph 3.

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calculated on the benefits that a member is entitled to in terms of the fund rules, the member's pensionable salary and their projected retirement date.[157] For a defined contribution fund, a member's benefit should be calculated on the contribution rate stipulated in the fund rules, less risk premiums and expenses, as disclosed in the pension increase policy of the fund.[158] The real rate of return should be calculated on expected returns from salary increases and inflation.[159]

(ii) FSCA Draft Conduct Standard: conditions prescribed in respect of pension fund benefit administrators

On 29 July 2021, the FSCA issued a draft Conduct Standard on conditions prescribed in respect of pension fund benefit administrators.[160] The conditions regulating retirement fund administrators are outlined in board notice 24 of 2002.[161] However, this regulatory framework is outdated and is not aligned with TCF Principles and the objectives of the RDR which move away from an entirely rules-based compliance approach to an outcomes- and principle-based approach, and the objectives of the twin peaks regulatory framework, which focuses on outcome-based principles.[162] The FSCA issued the draft Conduct Standard to align with the legislative changes.[163]

The draft Conduct Standard will enhance the current regulatory structure for retirement fund administrators, to address the necessary conduct risk.[164] The draft Conduct Standard also align with the other laws that regulate retirement fund administrators in other areas regulated by the FSCA.[165] The draft Conduct Standard strives to match the outcomes-principles and rules-based principles to ensure that retirement fund administrators conduct themselves in a manner that supports fair customer outcomes, and in a systematic and consistent way.[166] The draft Conduct

[157] *Idem* at paragraph 5.
[158] *Ibid.*
[159] *Ibid.*
[160] FSCA "Statement supporting the conduct standard – conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[161] *Ibid.*
[162] *Idem* at paragraph 2.
[163] *Ibid.*
[164] *Idem* at paragraph 3.
[165] *Ibid.*
[166] *Ibid.*

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Standard incorporates new principles dealing with such areas as business, culture and governance.[167] It also stipulates new provisions that are not in Board Notice 24.[168]

The draft Conduct Standard incorporates new principles, such as business principles, cultural and governance principles.[169] These principles require an administrator to conduct its business in accordance with fundamental principles, which include conduct that achieves TCF outcomes.[170] A retirement fund administrator is required to conduct their business in a way that supports the fair treatment of customers and to "conduct its business with integrity, honestly, fairly and with due skill, care and diligence".[171] Fair treatment of customers should be central to the culture of the administrator and should entail, *inter alia*, that the services rendered by the administrator meet the needs of the customers and that customers are provided with the necessary information in a clear and timely manner.[172] The administrator is required to ensure that the services it renders to its customers are satisfactory to them and meet their expectations.[173] The administrator must also ensure that customers do not face unreasonable post-sale barriers to amend products, change to another administrator or to submit complaints.[174]

The governing body of the administrator is responsible for compliance with the Conduct Standard, ensuring that the administrator implements the TCF culture indicated above, and thus must develop, implement and regularly review compliance with governance requirements for the administrator.[175] The governing body of the administrator is also required to ensure that the administrator adopts and implements a governance culture which, *inter alia*, is appropriate for its business, is approved and monitored by the governing body, outlines a business plan that sets out its business

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[167] *Ibid.*
[168] *Ibid.*
[169] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at paragraph 2.
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] *Idem* at paragraph 3.

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strategies, and supports the duties and functions of the governing body.[176] The governing body should also ensure that the governance structure requires directors and senior managers to have the requisite knowledge, skills, expertise, and resources to conduct their duties with "integrity, honesty and due skill, care and diligence".[177]

The governing body should also ensure that the governance structure includes methods for the administrator to identity and mitigate risks, operational risk and compliance management, and effective remuneration structures which balance the interests of the client with the goal of making a profit and promote their fair treatment.[178] An administrator should frequently review the effectiveness of its governance arrangements, including regular, risk-based monitoring and evaluation of the capability of its systems, processes, management and methods to resolve any defects and to record any changes.[179] The draft Conduct Standard requires an administrator to notify the Authority of any changes in its business when it changes its name and contact details, and when it changes directors, senior managers, heads of control functions or shareholders.[180]

An administrator should appoint a "responsible key person" to control and supervise the conduct of the administrator.[181] The notice should include a certificate completed and signed by the key person in the format prescribed by the Authority.[182] The Authority has powers to contest the appointment of the key person by the administrator and to order the administrator to revoke the appointment of the key person.[183] The Authority can revoke the appointment if the responsible key person failed to comply with any provision of the PFA, if they do not meet or no longer meet the fit and proper requirements, or if the appointment of the responsible key person is against public interest.[184] The responsible key person should report to the Authority any conduct of the administrator that may "unduly prejudice a customer or impede fair

[176] *Idem* at paragraph 4.
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*
[181] *Idem* at paragraph 6.
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*

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outcomes to customers" of the administrator.[185] The administrator should notify the Authority, in the manner prescribed by the Authority, when it terminates the appointment of a responsible key person or when the responsible key person resigns.[186]

An administrator, its directors, its senior managers (including the responsible key person) and its head of a control function (where applicable) are required to, at all times, comply with the fit and proper requirements.[187] The fit and proper requirements entail honesty, integrity and to be of good standing.[188] A person does not meet the fit and proper requirements if they have, *inter alia,* committed theft, fraud, forgery, perjury or an offence involving dishonesty, breach of fiduciary duty, dishonourable or unprofessional conduct, or if they have committed an act of corruption under any anti-corruption laws, breached a fiduciary duty or was removed from an office of trust.[189] The administrator's senior managers must comply with competence requirements, namely, they must possess the necessary skills, knowledge and expertise to conduct their duties.[190] If a senior manager does not meet the competence requirements, the FSCA may instruct the administrator to offer the required education and training or to suspend or remove the key person.[191]

An administrator is required to enter into an administration- and service-level agreement with the fund.[192] The administration agreement should stipulate the services to be rendered by the administrator, the functions of the board which will be delegated to the administrator, and the functions of the board to be performed on behalf of the board by the administrator.[193] The agreement should also outline the obligations of the administrator in respect of communicating with the members and the information to be provided to the members, which includes the administrator's complaints process and

[185] *Ibid.*
[186] *Ibid.*
[187] *Idem* at paragraph 10.
[188] *Ibid.*
[189] *Idem* at paragraph 11.
[190] *Idem* at paragraph 12.
[191] *Ibid.*
[192] *Idem* at paragraph 13.
[193] *Ibid.*

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the remuneration structure of the administrator.[194] The remuneration of the administrator should include any compensation that the administrator may earn from rendering other services to the fund, or sections or entities of the administrator from rendering administration or other services to the fund.[195] The administration agreement should also stipulate the format of data, member records, termination provisions, reporting requirements, termination provisions on breach of contract, indemnity, fidelity cover requirements and the obligations of the board, the employers and the administrator.[196]

The service level agreement is required to stipulate, *inter alia*, the payment of contributions, the processing of claims, the section 14 transfer process, the investment and disinvestment of benefits, fees payable, communication and reporting procedures, measures for non-compliance with the agreement and termination provisions.[197] The administrator is required to notify the Authority of the termination of the agreement within 30 days of receiving the notice and to transfer all data and records to the fund or new administrator within 15 days from the date of notice.[198] An administrator can only enter into an outsourcing agreement with a third party if it is stipulated in the administration agreement, but the administrator remains liable for the outsourced functions and for keeping records of the outsourced functions, and should get the consent of the fund to enter into an outsourcing agreement.[199] The administrator cannot enter into an outsourcing agreement unless it has proof that the third party is a section 13B administrator approved by the FSCA, having the capacity and ability to perform the necessary functions.[200]

The administrator should implement governance and oversight processes for the outsourced functions, to ensure that the third party complies with the outsourcing requirements and the relevant legislation.[201] The governance and oversight process

[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*
[198] *Idem* at paragraph 14.
[199] *Idem* at paragraph 15.
[200] *Ibid.*
[201] *Ibid.*

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must include, *inter alia*, allowing the administrator and the Authority to access the third party's premises and any information on the outsourced activities, terms and conditions of confidentiality, privacy and security of information of the administrator and the clients, providing the administrator with access to data on the outsourced activities, and conditions on termination of the outsourcing agreement.[202] An administrator is required to implement measures to monitor the outsourced functions, which includes regularly assessing and mitigating risks related to the outsourced activities, complying with the agreement and all laws, monitoring and assessing the service provider's governance measures, and information technology systems.[203]

The administrator is also required to implement and maintain a contingency plan to back up and recover data in the event of any system failure or data loss, and to ensure that the termination of the outsourcing agreement does not disrupt the provision of its services to its clients.[204] The administrator must implement measures to address non-compliance with the outsourcing agreement.[205] An administrator is required to implement and sustain a conflict of interest management policy.[206] The policy should comply with section 13B(5) of the PFA and should incorporate, *inter alia*, methods to identify conflict of interest and processes to prevent, mitigate, oversee and disclose conflict of interest.[207] The policy should also outline the process for non-compliance by its senior managers, directors and employees.[208] The policy must further outline the third parties that the administrator holds an ownership interest in and the third parties that hold ownership interest in the administrator, and the type and extent of any ownership interest.[209] The administrator should ensure that its employees and associates, where necessary, are properly trained on conflict of interest and should regularly monitor and review its conflict of interest policy and, where necessary, publish the policy in the appropriate media, making it accessible to the public.[210]

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202 *Ibid.*
203 *Idem* at paragraph 16.
204 *Ibid.*
205 *Ibid.*
206 *Idem* at paragraph 17.
207 *Ibid.*
208 *Ibid.*
209 *Ibid.*
210 *Ibid.*

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A director, senior manager, head of a control function (if necessary) or its employees should report to the Authority any instance of a conflict of interest, including where officials of a fund or other officials of the administrator (including their friends and families) conduct business with the fund or administrator.[211] The draft Conduct Standard stipulates that an administrator must make disclosures to the fund before, during and after entering into the agreement and disclose all the essential information that may influence the fund in making its decision to appoint the administrator.[212] This information includes, *inter alia,* the benefits and associated risks, fees and costs for providing the services, the prominent duties of the fund, the members and the administrator under the agreement, the terms of breach of contract, and the remedies for the fund and its members in the event of dispute with the administrator over services rendered.[213]

The draft Conduct Standard also requires the administrator to disclose to the members any essential information that may influence the members on any decisions on their membership to the fund or that enables them to act against the administrator (e.g., by lodging a complaint with regard to their benefits).[214] The administrator must communicate with the fund and its members in clear, plain and unambiguous language. Its communication should be sufficient, relevant, and factually correct, and should enable the fund's members to understand the services and benefits provided to them so that they can compare similar benefits and services in the financial industry. Importantly, the administrator should take the requirements and circumstances of the members into account when communicating with them.[215]

The administrator should also establish and implement an efficient complaints management process, to support the efficient resolution of complaints and fair treatment of customers, that is equivalent to the type of business that it conducts and aligned with the policies, services and retirement funds that it administers.[216] The

211 *Ibid.*
212 *Idem* at paragraph 18.
213 *Ibid.*
214 *Ibid.*
215 *Ibid.*
216 *Idem* at paragraph 19.

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complaints management process should include a process for the administrator to obtain and investigate all relevant information, considering the fair treatment of customers, and should not impose unnecessary obstacles to filing a complainant.[217] The administrator is required to evaluate the complaints management process regularly.[218] A complaints management process should comprise of the following: material goals, main rules, appropriate distribution of duties for handling complaints by the administrator, service standards, remuneration structures, classification of complaints, the time frames for resolving complaints, reporting and escalation methods; risks established, findings on complaints, record keeping, compliance with reporting requirements to the Authority and the public, and the process for outsourced functions.[219]

A complaints process should also include a process to keep complainants adequately informed of the status of their complaints and a process to regularly evaluate the complaints management structure.[220] The governing body and key persons of the administrator are accountable for approving and supervising the complaints management process and for ensuring its efficiency.[221]

A person who makes decisions on complaints must have the necessary skills and expertise on handling complaints, should be well trained, and should not be exposed to any conflict of interest.[222] An administrator is required to implement and maintain a complaints escalation and review process which incorporates an impartial process, fair treatment of customers and a process to escalate unresolved complaints.[223]

The process should also include a procedure to compensate complaints resolved in the clients' favour and a procedure to handle those that are rejected, along with the reasons behind their outcome..[224] All complaints should be properly and

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[217] *Ibid.*
[218] *Ibid.*
[219] *Idem* at paragraph 20.
[220] *Ibid.*
[221] *Idem* at paragraph 21.
[222] *Ibid.*
[223] *Idem* at paragraph 22.
[224] *Idem* at paragraph 23.

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accurately recorded and kept safely.[225] The administrator must keep data relating to complaints, which includes *inter alia*, the number of complaints and the details and nature of complaints.[226] The draft Conduct Standard stipulates requirements on data management and keeping records.[227] The processing of personal information for customers is given the same meaning as in POPIA.[228] An administrator is required to have an efficient data management structure that incorporates relevant policies, systems and procedures to monitor the processing of data, and which should authorise the administrator to access updated, accurate, consistent, safe and absolute data, whenever necessary.[229] The data management process should also authorise the administrator to accurately distinguish, evaluate and monitor the risks related to its business activities, and enable it to comply with legislative requirements in respect of privacy, safety and data storage, efficiently classifying, documenting and accounting for complaints.[230] The administrator is also required to access the data at all times for outsourced services, and to frequently evaluate its data management process and any record changes made.[231]

The draft Conduct Standard also stipulates requirements for an administrator to implement a process to record communication with clients, former members and complainants of the retirement funds that it administers.[232] The process must enable the administrator to keep and save documents relating to communication with clients and all relevant information.[233] The documents should be saved in an electronic format that can be converted to a written or printed format and should be kept for a period of five years after the termination of the administration agreement or communication with the clients, and be easily accessible by the Authority, clients and anyone else who is authorised to access the information.[234] The records to be maintained by an administrator in respect of the members of the fund that it administers should include

[225] *Idem* at paragraph 24.
[226] *Ibid.*
[227] *Idem* at paragraph 26.
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*
[232] *Idem* at paragraph 27.
[233] *Ibid.*
[234] *Ibid.*

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the members' full names and surnames, identity numbers, contact details, proof of payment for benefits paid, benefits transferred, transferee fund from where the member was transferred to another fund.[235] The information must be retained for at least 5 years from the date that the administrator's approval under section 13B(1) is suspended or terminated.[236]

3.3.3. Discussion: the successes and failures of the amendments to enhance the protection of retirement funds and their members

The draft Conduct Standard on communication of benefit projections to members of pension funds is a market conduct regulatory tool in that it places an obligation on retirement funds and administrators to ensure that they provide benefit projections to members to assist members to make informed decisions on their benefits and see their projected benefits.[237] The requirements to provide members with benefit projections will help achieve the government's objective of providing retirement fund members with vital and adequate information.[238] This will, in turn, help achieve the objective of creating awareness and financial literacy and the objective of providing enhanced disclosures to members to assist them to get good value for their benefits.[239] This will also ensure fair treatment of members.[240]

However, the provision of disclosures to members lack some essential requirements, such as the legislative requirements on divorce orders where a member should be informed that their benefits can be deducted to pay a benefit to their spouse in terms of a decree of divorce. Some of the essential requirements relate to the deduction of a member's benefit to pay a maintenance order or to pay the amount that a member will have caused in damages to his employer. Many members are not aware of these requirements, and they provide incorrect divorce or maintenance orders to the administrator of the fund or to the fund, resulting in many delays in the payment of

[235] *Ibid.*
[236] *Ibid.*
[237] FSCA "Draft Conduct Standard on communication of benefit projections to members of pension funds" (June 2020).
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid.*

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their withdrawal benefits or the payment of the benefits to the non-member spouse or an applicant of a maintenance order.

The Conduct Standard Draft on conditions prescribed in respect of pension fund benefit administrators supports the government's objective to strengthen market conduct regulation, which incorporates TCF Principles.[241] It supports the government's objectives, on the proposed governance reforms for retirement funds, to achieve consistency between the trustees of retirement funds and the service providers/and or administrators of retirement funds through the governance requirements.[242] The draft Conduct Standard will help achieve the government's objectives to mitigate conflict of interest by improving governance reporting obligations for sponsored services and to effect the regular review and assessment of governance of retirement funds.[243] This will also help implement the government's objective to "encourage good value retirement products and services."[244] The requirements of the draft Conduct Standard will also help implement the government's objective to provide harmonised disclosures to members, by requiring administrators to provide members with vital information.[245] This will, in turn, help achieve the objective of better fair outcomes for customers.[246]

The draft Conduct Standard on requirements for retirement benefit administrators introduces market conduct requirements for administrators to ensure that they conduct themselves in a manner which promotes the fair treatment of customers.[247] These requirements include disclosures to be made to customers to assist members to make informed decisions.[248] The requirements to communicate with clients on complaints also supports fair customer outcomes as it ensures clients will be kept appropriately informed.[249] Data management requirements, processing of

[241] National Treasury *A safer financial sector to serve South Africa better* 2011 at 43.
[242] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 41.
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[248] *Ibid.*
[249] *Ibid.*

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information, data retention and privacy also align with POPIA and the requirements under the PPRs.[250]

The outsourcing requirements align with the FSCA and PA Joint Standard of 2021 on outsourcing by insurers.[251] An insurer remains liable for the outsourced function in the same manner as the administrator under the draft Conduct Standard.[252] Other similarities are that the insurer or administrator can only enter into an outsourcing agreement with a third party if the insurer or administrator is satisfied that the third party is licensed to conduct administration services and is able to perform the functions.[253] Another similarity is the requirement for the administrator's governing body to implement the governance requirements for outsourcing arrangements and ensure governance and oversight of the outsourced arrangements.[254] The requirements for an administrator to implement and maintain a contingency plan to back up and recover data in the event of any system failure and data loss, are also similar to the requirements of the Joint Standard which require the third party outsourced by an insurer to have a contingency plan.[255]

The draft Conduct Standard supports the objectives of the twin peaks by incorporating TCF Principles and requiring administrators to treat their customers fairly.[256] The provisions on fit and proper requirements for key persons, as well as governance requirements, also align with the objective of the twin peaks to improve efficiency in the financial industry and will ensure consistency of regulatory

[250] *Ibid.*
[251] FSCA and Prudential Authority Joint Standard of 2021 "Outsourcing by Insurers".
[252] *Idem* at 1.
[253] *Idem* at section 8 and FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at paragraph 15.
[254] FSCA and Prudential Authority Joint Standard of 2021 "Outsourcing by Insurers" at sections 5 and 6 and FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at paragraph 15.
[255] FSCA and Prudential Authority Joint Standard of 2021 "Outsourcing by Insurers" at sections 8.5(c) and FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at paragraph 15.
[256] *Ibid.*

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requirements.[257] The governance requirements will also implement the government objectives around enhancing governance of retirement funds.[258]

Despite the achievements discussed above, there are a few shortfalls in respect of the regulatory reforms under the draft Conduct Standards discussed above. The draft Conduct Standard on communication of benefit projections to members of pension funds is a disclosure requirement to provide estimated benefits to members, to inform members of their benefits.[259] The requirements of the draft Conduct Standard for retirement fund administrators to communicate with members and provide them with essential information on their benefits and services provided is also a disclosure requirement.[260] The disclosure requirements apply to retirement fund benefits and risk benefits provided by the fund. However, many members covered for retirement benefits are also covered for risk benefits bundled with the retirement benefits. Some of these risk benefits are provided by the fund, whereas several benefits—namely, lumpsum death benefits, total and permanent disability benefits, income disability benefits, critical illness benefits, spouse's benefits and funeral benefits—are self-standing benefits which are bundled with the retirement benefits provided to the members.

The risk benefits provided by the fund are regulated by the PFA, the ITA, the Insurance Act, FAIS and the LTIA, PPRs, and are paid according to the PFA, the ITA, the Insurance Act and the terms and conditions of the policy documents. Whereas the self-standing risk benefits are regulated by the Insurance Act, FAIS, the LTIA, the ITA and the terms and conditions of the policy documents. The disclosure requirements for the group risk benefits provided by the fund and self-standing benefits are regulated by the PPRs.[261] Apart from the different statutes which regulate the risk benefits provided by the fund and the self-standing risk benefits, the policyholders under the group policies also differ. The retirement fund is the policyholder of the group policies provided by the fund. The participating employer is the policyholder of the self-standing

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[257] *Ibid.*
[258] *Ibid.*
[259] FSCA "Draft conduct standard on communication of benefit projections to members of pension funds" (June 2020) at paragraph 1.
[260] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at paragraph 8.
[261] Rule 11 of the PPRs.

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risk benefits. This creates different regulatory, compliance and payment obligations under these risk policies, which causes a regulatory and an awareness gap.

The fund must provide benefit projections, communication to members on their retirement benefits, and the projections on the risk benefits provided by the fund. This implies that members will have information on their risk benefits provided by the fund and may have more disclosures on the fund benefits than the self-standing benefits. It may help close the regulatory gap if the benefit projections also include all the risk benefits, including the self-standing risk benefits provided to the members. The administrator will also be required to comply with the disclosure requirements of the PPRs in addition to the disclosure requirements under the draft Conduct Standards on benefit projections and requirements for pension fund administrators. This may be onerous for the administrator as there are many compliance obligations in respect of the products and services rendered for retirement funds, which can be magnified by the additional legislative requirements for risk benefits discussed above. These dual legislative requirements should be properly monitored as they can create legislative overlaps and regulatory gaps.

The intervals and requirements to provide disclosures for the benefit projections for retirement funds may differ from those of the risk benefits under the PPRs. It is a common challenge in the retirement fund industry that many members seem to only be aware of the benefits under their retirement funds and are, therefore, not aware of their self-standing risk benefits that they are covered for and the requirements to complete nomination forms for the payment of their risk benefits. The risk benefits provided by the fund are distributed in terms of section 37C of the PFA, whereas the self-standing risk benefits are paid in accordance with the Insurance Act and the policy document, which both require a member to nominate a beneficiary.[262] Section 37C of the PFA does not require the board members to follow the nomination form of the member for the payment of the risk benefits; they only use it as a guidance to see and trace the dependants and nominees of the member.[263] Conversely, the insurer of the

[262] Section 37C of the PFA and Schedule 2 of the Insurance Act.
[263] Section 37C of the PFA.

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self-standing risk benefits is required to follow the nomination form completed by the member, as per the requirements of the Insurance Act and the terms and conditions of the group policy under which the member was covered.[264] Where a member did not complete a nomination for their self-standing risk benefits or if the nomination is invalid, the insurance benefits will form part of the member's estate and must be paid to the deceased member's estate. This results in a discrepancy in the payment of benefits in that the benefits under the retirement funds are distributed and paid faster than the self-standing risk benefits if a member did not complete a nomination. There appears to be more efficiency in the payment of retirement benefits than the payment of self-standing risk benefits due to the different legislative requirements discussed above. There is an imbalance here in respect of the objectives to achieve financial inclusion, the fair treatment of customers and the alleviation of poverty.

A high number of members do not complete nomination forms for the payment of their self-standing risk benefits due to lack of knowledge of this requirement. Many members appear to be under the impression that the nomination form that they complete for the retirement benefits applies to the self-standing risk benefits. Where the member did not complete a nomination form for the self-standing benefits or if the nomination form is invalid, the beneficiaries or heirs must approach the Master of High Court to get an executor or authorised person appointed for the insurer to pay the risk benefits to the deceased member's estate. This is impractical when a funeral benefit is payable, as the benefit is needed to bury a member and should be paid within forty-eight hours for the member's family to finalise the funeral arrangements and bury the member. It is also a challenge if the lumpsum death benefit is as low as R20,000, as an example. It is usually difficult for the member's family to open an estate account for the payment of a low amount, given the complexities of opening a late estate account, unless the member has other assets to accumulate a large estate. In other instances, a member can complete a nomination form and allocate a portion of his self-standing risk benefits to beneficiaries that does not add up to 100%. As an example, if a member completed a nomination form and allocated only 60% of the self-standing risk benefits to the nominated beneficiaries, the remaining 40% must be paid to the deceased member's estate. This creates a challenge where there is no executor or authorised

[264] Schedule 2 of the Insurance Act.

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person appointed to dissolve the estate, and the member's family must approach the Master of the High Court to issue a letter of authority for the member's family to get the 40% paid to the deceased member's estate or to the authorised person's bank account.

These challenges flow from the regulatory reforms introduced by the Insurance Act, which appear to create unreasonable post-sales barriers. It is recommended that the regulators consider incorporating the disclosure requirements for self-standing risk benefits in the benefit projections and member communication, to close the regulatory gap and reduce unfair outcomes that appear to be caused by the requirements to nominate a beneficiary for self-standing risk benefits. These challenges may impede the objective of the government to provide sufficient benefits to retirement fund customers, potential members, and beneficiaries, and may contribute to poverty if the members' dependants are unable to receive the benefits payable under the self-standing risk benefits.

In addition to the discrepancies flowing from the regulatory requirements on the risk benefits discussed above, the Association for Savings and Investment South Africa ("ASISA") issued a Retirement Fund Standard on Effective Annual Cost (EAC) for Individual Fund Members ("the Standard") on 28 May 2019, which was effective from 1 October 2020.[265] The Standard was issued in line with TCF outcomes 1 and 3, which stipulate that "Customers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture", and that "Customers are provided with clear information and are kept appropriately informed before, after and during the point of sale".[266] The Standard provides a "standardised retirement savings cost disclosure methodology that can be used by retirement fund members…" to assess and compare costs of the retirement products that members are covered under, to help members to make informed decisions in respect of their benefits.[267] The Standard applies to ASISA members but is not codified into the statutes or conduct standard.[268] The Standard is not part of the FSCA draft conduct standard on benefit

[265] ASISA "Retirement fund standard: effective annual cost (EAC) for individual fund members" (May 2019) at 1.
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*

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projections. This may create a regulatory gap for the ASISA members, who are also required to comply with the requirements of the draft Conduct Standard on benefit projections. I am of the view that it may be best to incorporate the requirements of the Standard into the conduct standard on benefit projections to achieve efficiency, transparency, and consistency, and for the disclosure requirements of the Standard to apply to all stakeholders.

The requirements for pension fund administrators to implement and maintain a complaints escalation and review process are similar to the requirements of the PPRs for an insurer to implement and maintain a complaints process.[269] The requirements of the complaints process under the PPRs apply to the self-standing risk benefits which are not provided by fund, if members have retirement fund benefits bundled with self-standing benefits. Complaints in respect of the fund benefits are adjudicated by the Adjudicator and are regulated by the PFA and the FSRA, whereas the long-term insurance self-standing benefits are adjudicated by the ombudsman for long-term insurance. This means that the administrator must also comply with the complaints-requirements for the fund benefits and for the self-standing benefits, which may be onerous for the administrator.

The governance requirements under the draft Conduct Standard for retirement fund administrators implement additional requirements for governance of retirement funds. Despite that these requirements create obligations for retirement fund administrators, they also create additional legislative obligations for retirement fund officers to monitor the conduct of the administrator through the legislative requirements and the administration agreement, to ensure that the administrator complies with the legislation and the terms and conditions of the administration agreement. This aligns with the requirements of the King IV Report and the Circular which require the board to appoint an administrator and to enter into an agreement with the administrator.[270] When COFI is promulgated, it will also introduce governance obligations for the retirement fund administrator to comply with.[271] These legislative requirements will

[269] *Idem* at paragraph 22.
[270] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 1 and FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007) at 3-4.
[271] Clauses 12 to 16 of COFI.

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need to be properly consolidated and harmonized to achieve efficiency and fair customer outcomes. Even though the regulatory reforms are aimed at enhancing the fair treatment and protection of customers, there are various statutes and sub-legislation which need to be complied with. This can be burdensome for the retirement fund officers, the retirement fund administrators, and other stakeholders, such as participating employers and financial advisors, and may be too technical for members to be able to understand enough to hold the fund officers or administrators accountable for their conduct. In addition, even though these new and reformed laws equip the regulators with powers through the prescribed laws, the successes of the regulation of retirement fund administrators and the retirement fund officers, through these various laws, are yet to be achieved. The powers of the regulators are yet to be exercised and measured through the outcomes of these laws.

3.4. Payment of contributions

3.4.1. The position prior to the introduction of twin peaks

Section 13A of the PFA regulates the payment of contributions (in occupational pension funds) and other benefits under pension funds.[272] It regulates the conduct of the employer, the fund or the administrator in the payment of contributions.[273] According to section 13A(1) of the PFA, the employer is the "responsible person" and is responsible for the payment of any contributions which, in terms of the rules of the fund, is to be deducted from the member's remuneration,[274] as well as any contributions for which the employer is liable in terms of those rules.[275] The contributions should be paid into the fund's bank account within 7 days after the end of the month for which the contributions are payable.[276] The principal officer and an authorised person appointed by the board are responsible for compliance with the

[272] Section 13A of the PFA and Regulation 33 of the PFA Regulations.
[273] *Ibid.*
[274] Section 3A(1) of the PFA.
[275] *Ibid.*
[276] Section 13A(3)(a)(i) of the PFA.

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payment of contributions, and for reporting failure to pay contributions by the responsible person (the employer).[277]

In terms of the provisions of section 13A(8), the following persons are personally liable for the payment of contributions:[278] each director of the relevant company or a member of the close corporation responsible for the entity's financial affairs, and, for any legal entity, each person responsible for the financial affairs of the entity.[279] Section 37 imposes a fine, not exceeding R10 million, or imprisonment, for a period not exceeding 10 years on any person who fails to comply with section 13A among other things.[280] Marumoagae notes:

> I have argued that "[t]his entails that there is a duty on the board of [management] to ensure that employers who fail to comply with the requirements of section 13A of the PFA are adequately dealt with by among others reporting them to the National Prosecuting Authority to face heavy criminal sanctions imposed by the … PFA."[281]

The Adjudicator in *LA Gafane vs The Orion Money Purchase Pension Fund and others* held that the employer is liable for the payment of contributions and losses associated with such failure.[282] However, the Adjudicator did not order the employer to pay the outstanding contributions, but instead, directed the fund to pay the complainant's benefits without the outstanding contributions.[283] The High Court set aside the Adjudicator's decision in *Orion Purchase Money Fund vs the Pension Funds Adjudicator and others* and directed the employer to pay the contributions together with the losses incurred by the members.[284] Marumoagae notes that the trustees of the

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[277] Section 13A(6) and (10) of the PFA.
[278] Section 13A(8) of the PFA.
[279] Section 13A(8)(c) of the PFA.
[280] Section 37(1)(c) of the PFA.
[281] Marumoagae "Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund" *PELJ* 2017 at 6.
[282] *L A Gafane vs The Orion Money Purchase Pension Fund (SA) and Bahwaduba Bus Service (Pty) Ltd* PFA/GA/761/99/NJ at paragraph 22.
[283] *Ibid*.
[284] *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* (1991/2001) [2002] ZAWCHC 38 (23 July 2002) at 18-19.

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fund can only invest members' contributions when they receive such contributions from the employer.[285]

The above legislative provisions on the employer's obligations are a significant market regulatory conduct instrument which ensures that the members' contributions are paid to the fund and invested accordingly.[286] This supports the fair treatment of members by ensuring that they get good value for the contributions that they pay, they get an income when they retire, and is a significant tool for financial inclusion to ensure efficiency and development in the financial industry.[287]

3.4.2. The position after the introduction of twin peaks

On 29 May 2021, the FSCA published a draft Conduct Standard on requirements related to the payment of pension fund contributions.[288] The purpose of the draft Conduct Standard is to replace Regulation 33 of the PFA, on the payment of contributions.[289] Regulation 33 incorporates the requirements of section 13A of the PFA on the payment of retirement fund contributions.[290] The FSCA recognised the need to properly regulate the reporting requirements by principal officers, authorised persons and board members under section 13A and Regulation 33, on payment of retirement contributions.[291] The FSCA also realised the need to regulate undesirable business conduct when a retirement fund appoints an attorney or a third party to claim unpaid contributions from an employer, or where a third party collects the contributions and deposits the amount into its bank account, gaining the interest earned on the monies, but does not pay over the contributions to the fund on time.[292]

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[285] Marumoagae "Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund" 2017 *PELJ* 1 at 6.
[286] Section 13A of the PFA.
[287] National Treasury *A safer financial sector to serve South Africa better* December 2013 at 41.
[288] FSCA "Draft Conduct Standard on requirements related to the payment of pension fund contributions" (29 May 2021).
[289] FSCA "Statement supporting the draft Conduct Standard prescribing requirements related to the payment of pension fund contributions" (May 2020) at paragraph 3.
[290] *Ibid.*
[291] *Ibid.*
[292] *Ibid.*

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The Authority also identified that in some cases there is a potential conflict of interest and excessive fees charged by the attorney who renders the service on behalf of the fund.[293] The FSCA therefore deemed it necessary to revise Regulation 33 to address the reporting requirements of fund officers and authorised persons, as well as address the undesirable conduct on collection of unpaid contributions by third parties.[294]

A fund is required to inform a participating employer within 30 within days of joining the fund, of the employer's responsibilities to pay contributions under section 13A of the PFA, in the format prescribed in the draft Conduct Standard.[295] In terms of section 13A(2)(a) of the PFA, the fund must provide the employer with information for payment of contributions.[296] This includes the fund name, the fund registration number, the months that contributions should be paid, the name and address of the employer and the pay points where contributions should be deducted, as well as the contact person at the employer responsible for paying contributions.[297] For each member, the fund must provide the administrator with their full name, date of joining the fund, date of birth, identity number or passport number, employer pay number, income tax number, contact number (including cellphone number), email address, postal address, remuneration, and pensionable salary (split between employer and employee contributions, and any additional, voluntary contributions).[298]

A principal officer or a monitoring person is required to report unpaid contributions to the board within seven days from the date that the contributions were due by an employer.[299] This also includes previous matters that may not have been resolved, and a reconciliation which cannot not be compiled for contributions paid by the employer.[300] The board must inform all members of non-payment of contributions within 30 days of failure to pay the contributions by the employer, and to report to the

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293 *Ibid.*
294 *Ibid.*
295 FSCA "Draft Conduct Standard on requirements related to the payment of pension fund contributions" (29 May 2021) at paragraph 2.
296 *Ibid.*
297 *Ibid.*
298 *Ibid.*
299 *Idem* at paragraph 4.
300 *Ibid.*

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Authority in the format prescribed in the draft Conduct Standard.[301] If the contravention continues for 90 days, it must be reported to the SAPS 14 days after the expiry of the 90 days, and all members must be informed of this process.[302] Interest on late payment of contributions must be calculated from the date that the contributions were due until the date that the contributions are paid, and should not exceed the prime rate plus two, or the principal debt of the outstanding contributions, including all related costs.[303]

If the board outsources the collection of contributions to an attorney, it should consider actual and potential conflict of interest for appointing the attorney, and the fund's policies on conflict of interest.[304] The fees payable to the attorney must be reasonable, commensurate with the services rendered, and may not hinder the fair outcome for customers.[305] The board is required to enter into a contract with the collecting attorney, which should stipulate, *inter alia,* that any contributions collected should be paid into the fund's bank account within seven business days from the day of receipt.[306] The fees payable should be stipulated, as should the terms and conditions on the action to be taken by the attorney, in the event of failure to pay contributions by the employer, expected time for the recovery process and the time to report to the fund on the progress made on the recovery process.[307] The final Conduct Standard was published on 19 August 2022.[308] The Conduct Standard became fully effective on 20 February 2023.[309]

3.4.3. Discussion: the successes and failures of the amendments to enhance the protection of retirement funds and their members

The Conduct Standard on the payment of contributions incorporates market conduct tools to ensure that non-payment of contributions is reported to the FSCA, and that

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[301] *Ibid.*
[302] *Ibid.*
[303] *Idem* at paragraph 5.
[304] *Idem* at paragraph 6.
[305] *Ibid.*
[306] *Ibid.*
[307] *Ibid.*
[308] FSCA Conduct Standard 1 of 2022 (RF) "Requirements related to the payment of pension fund contributions" (August 2022).
[309] *Ibid.*

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members are kept adequately informed.[310] This will help achieve fair customer outcomes, as the fund is required to inform the employer of its obligations under section 13A.[311] This requirement will assist the employers to understand their obligations under section 13A and the consequences of contravening the provisions.[312] The requirements on the information that should be provided by the employer for payment of contributions will help gather and obtain data and store member data, to enable the fund to communicate with members and keep them informed of their benefits.[313]

The requirements on the outsourcing of the collection of contributions will help mitigate unnecessary costs and exorbitant fees, protecting the members' benefits from being used to cover improper remuneration.[314] The requirements of the Conduct Standard also align with the objectives of the twin peaks under PPRs and other conduct standards, such as the draft Conduct Standard for retirement fund administrators.[315] This reflects alignment and consistency under the regulatory requirements.[316] TCF Principles are also incorporated in the draft Conduct Standard, which aligns with the objectives of the twin peaks to achieve better customer outcomes and afford better protection to retirement fund customers.[317]

Despite the successes discussed above, there are shortcomings that may impede the objectives of the Conduct Standard to ensure that retirement contributions are paid timeously. Although the requirements on the minimum information which must be submitted by an employer with the contribution schedule will help obtain data for retirement fund members and help the management of data by an administrator or the fund, the collection of data is still a challenge for retirement funds, administrators and other relevant stakeholders such as the product providers and financial advisors. There is still a lot of data missing in respect of existing members, which makes it difficult for retirement funds and administrators to communicate with members. The

[310] *Idem* at 4-6.
[311] *Ibid.*
[312] *Ibid.*
[313] *Idem* at 3-4.
[314] *Idem* at 6-7.
[315] *Idem* at 1-7.
[316] *Ibid.*
[317] *Idem* at 3-7.

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objectives of gathering the member data may be successful for new members who are being enrolled but will be difficult to achieve for existing members. This may be common among very large retirement funds with sectors like mining, textile, agriculture, and motor industries. Due to the nature of the jobs of some members, it may be difficult for an employer to gather the needed data. If the employer does not have the complete or up-to-date data for existing members, it will be difficult for the employer to provide the information with the contribution schedule.

Some employers, their representatives or trade unions who negotiate retirement benefits for their members are still not cooperating with insurers and service providers on providing the required data. This is despite the efforts by financial institutions such as insurers and retirement funds to communicate and emphasise the legislative requirements and the importance of providing clients' data. Some of these stakeholders are not fully conversant with the legislative requirements and are hesitant to provide the member data as they believe that the data will not be protected and that providing it is contrary to the legislative requirements. Other stakeholders do not respond to the data requests, and in certain instances where there is a trade union involved as an example, it is difficult for the insurer to ascertain the contact person or obtain a response. I am of the view that some of this data may never be obtained. This results in the financial institutions facing challenges to communicate with customers to provide them with the required disclosures on their benefits or provide them with benefit projections as required by legislation. This also impacts the payment of benefits and causes delays in processing claims. This also affects the ability of the financial institution to implement data management processes to manage, retrieve or retain data as required by legislation. This may impede the objectives of market conduct regulation to achieve stability, efficiency, providing benefits to customers and achieve fair customers.

There also appears to be a notion that the employer or the fund owns the data, and this may contribute to the hesitancy in providing the data. This is commonly evident in respect of service level agreements or administration agreements where the fund or employer insists on stipulating provisions in the agreement to state that the fund or the employer owns the data and the insurer, product or service provider must return the data on termination of the agreement. These provisions appear to be

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contrary to the legislative requirements and may limit the insurer's obligations to implement data management processes. In addition, the client data is regulated by strong data laws which require the insurer or financial institution to implement data management process, manage store, retain the data in accordance with the legislative requirements.

In my view, it is therefore not possible for the insurer or a financial institution to return the data to the fund or employer as the insurer is required to retain the data for 5 years after termination of a financial transaction, in terms of the legislation, and it will be in contravention of the legislation for the insurer to return the data to the fund or employer. For this reason, I am of the view that the requirements of the draft Conduct Standard in respect of pension fund administrators on the provisions that the administrator must return the data to the fund on termination of the administration agreement maybe contrary to the legislative requirements to keep the records for a period of 5 years after the termination of the agreement. I am also of the view that stakeholders who provide data to the insurer or financial need to understand the purpose of providing data and the legislative requirements for the insurer or financial institution to fulfil its obligation to provide benefits or services to the customers.

In addition to the above, in some instances, delays in processing claims are caused by customers who do not provide required claim documents such as death certificate, marriage certificate, proof of education or proof of permanent life partnership, among other things. In some instances, customers do not respond to requests or communication from the financial institutions. Some delays in processing the on boarding process, claims, or section 14 transfers are caused by a large number of clients who do not register for tax with SARS timeously or attend to their tax returns timeously. This impedes the fair outcomes of the customers and their families and causes challenges to the financial institutions in fulfilling their obligations. These limitations can be addressed through literacy programmes to the stakeholders responsible for providing the data, and literacy programmes to the customers. The customers have a major role to play in ensuring that they provide their employers or financial institutions with accurate information and to update the information where changes occur in respect of their personal information or their lives. Customers should

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also be informed of the significance of registering for tax and attending to their tax returns.

Although the reformed requirements for an employer to pay contributions will help implement market conduct regulation, many employers fail to pay contributions due to financial hardships in their business. These financial hardships result in liquidation and subsequent termination of the retirement fund or a retirement scheme. Members whose membership ends due to liquidation have an option to withdraw their full benefits, preserve or transfer their benefits to another fund. Many members in this situation elect to take their benefits in cash. This will result in the members having insufficient funds on retirement. The liquidation and termination of retirement funds also hampers the government's objectives to provide benefits to members and contributes to poverty. This may remain a challenge until such a time that the two-pot and auto-enrolment retirement system is implemented and the laws which prohibit members from withdrawing their benefits before retirement come into effect.

In some instances, the employer manages to recover from the financial hardship and request the administrator not to liquidate the fund. This may, however, be too late in cases where the FSCA has already issued a liquidation approval to appoint a liquidator to liquidate the fund and distribute the benefits to the members. In such an instance, the administrator will have to apply for a revocation of the liquidation process in terms of the FSRA.[318] Historically, the process to revoke a liquidation is lengthy and technical. During this process, the employer contributions accumulates late payment interest while the employer awaits feedback and finalisation of the process from the FSCA. The delays in the revocation process can cause anxiety among the members and the participating employer, who will be keen to have the retirement fund or scheme reinstated. These challenges can also be prejudicial to the members who resign from the employer or withdraw from the fund, as the administrator is not allowed to pay any withdrawal benefits during this process. This implies that the members withdrawing from the fund cannot access their benefits.

[318] Section 95(1) of the FSRA.

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3.5. Appointment and duties of a Principal Officer

3.5.1. The position before the introduction of twin peaks

The appointment of a principal officer is regulated by section 8 of the PFA, which requires a fund to appoint a principal officer and a deputy principal officer.[319] According to the provisions of section 8, the principal officer's duty is to report to the Registrar any matter relating to the affairs of the fund that he/she may deem prejudicial to the fund or its members.[320] The principal officer is an officer of the fund whose duties involve helping to monitor the conduct of the board members.[321] The Circular stipulates that the functions of the principal officer are essential for the "proper performance of the board".[322]

The Circular stipulates that the duties of the principal officer are, among other things, to guarantee the execution of decisions by board members,[323] oversee compliance with the law by the fund,[324] interact with service providers on behalf of the fund and the board members (except where there is a direct contract between the board and the service provider),[325] and participate at board meetings.[326] The principal officer, together with the board, is required to avoid conflict of interest in order to "promote the credibility of the governance of the fund" which will motivate the members, beneficiaries and stakeholders to trust them.[327]

3.5.2. The position after the introduction of twin peaks

On 12 December 2019, the FSCA published Communication 7 of 2019 on the Prohibition on the Acceptance of Gratification on Independence of the Principal

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[319] Section 8(1) of the PFA.
[320] Section 8(6) of the PFA.
[321] *Ibid.*
[322] FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007) at paragraph 18.
[323] *Idem* at 18.1.
[324] *Idem* at 18.2.
[325] *Idem* at 18.3.
[326] *Idem* at 18.4
[327] *Idem* at 19.1.

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Officer.[328] The purpose of this Communication is to stipulate the FSCA's process on the current conflict of interest in respect of principal officers of retirement funds who are also employees of the service providers.[329] The Communication stipulates that the principal officer's duties are, *inter alia,* to report to the Registrar any fund matters that may be prejudicial to the fund or its members, and to provide guidance to the board on the decisions that it makes.[330]

The Communication provides elaboration on the conflict of interest in respect of principal officers set out in Directive PF No. 8, and stipulates that principal officers must not receive any "gratification" which may cause a conflict of interest with their fiduciary duty towards the fund.[331] "Gratification" is defined in Directive PF No. 8 as including "any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity…"[332]

3.6. The appointment of an auditor

3.6.1. The position before the introduction of twin peaks

Section 9 of the PFA requires a fund to appoint an auditor.[333] The duty of the auditor is to report to the Registrar any matters relating to the affairs of the fund that he/she may perceive prejudicial to the fund or its members.[334] This is a market conduct regulatory mechanism, as it monitors the affairs/management of the fund.[335] Section 9A of the PFA stipulates that a registered fund which is required to have its financial status investigated, should appoint a valuator.[336] Principle 6 of the Circular states that board

[328] FSCA Communication 7 of 2019 (PFA) "Directive PF No. 8 of 2018: Prohibition on the Acceptance of Gratification The role and independence of the Principal Officer the role and independence of the Principal Officer".
[329] *Idem* at 1.
[330] FSCA Communication 7 of 2019 (PFA) "The role and independence of the Principal Officer" at paragraph 2.4.
[331] *Idem* at 2.9.
[332] *Ibid.*
[333] Section 9(1) of the PFA.
[334] Section 4(c) of the PFA.
[335] *Ibid.*
[336] Section 9A(1) of the PFA.

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members can hire expert skills such as professional accounting, actuarial, investment and legal experts.[337] This is to ensure the proper operation of the fund.[338]

3.6.2. The position after the introduction of twin peaks

FSCA draft Conduct Standard on conditions prescribed for pension fund administrators introduces new requirements on the financial matters of a fund, which includes the appointment of an auditor.[339] A benefit administrator is required to document its financial processes, to enable it and the retirement funds that it administers to report its financial affairs as prescribed by the relevant accounting standards.[340] The administrator should ensure that its bank accounts, those of the fund, and trust account comply with operational requirements prescribed in the PFA.[341] The administrator should implement administration processes, accounting records, and risk management processes to achieve absolute, appropriate and suitable processing of data, and in order to comply with reporting standards and the protection of personal information.[342]

The draft Conduct Standard requires an administrator to appoint a qualified and registered auditor on an annual basis to audit its conduct and evaluate its accounting transactions and annual financial statements.[343] It is the auditor's duty to establish if the administrator's financial statements and cash flow comply with the Financial Reporting Standard as prescribed by the Companies Act, and to certify that the administrator is conducting its business in terms of the PFA.[344] The administrator should notify the FSCA of the appointment of an auditor within 31 days from the date of appointment and provide the Authority with the appointment letter.[345]

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[337] FSB Circular PF No. 13 "Good Governance of Retirement Funds" (June 2007) at paragraphs 39-40.
[338] *Ibid.*
[339] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at part XI.
[340] *Idem* at paragraph 29.
[341] *Ibid.*
[342] *Ibid.*
[343] *Ibid.*
[344] *Idem* at paragraph 30.
[345] *Ibid.*

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Should the auditor's appointment be terminated, the administrator must notify the FSCA of the termination within 30 days from the date of termination, and provide the reasons for terminating the auditor's appointment.[346] The administrator must regularly keep complete, appropriate and updated accounting books, and must keep financial statements in the format prescribed by the accounting principles, and request the auditor to audit the accounting books and financial statements.[347] The administrator should submit the financial statements to the FSCA within six months from the date on which its financial year ends.[348] The Auditor must report to the FSCA using the form prescribed by the Conduct Standard.[349]

3.7. Discussion: the successes and failures of the amendments to enhance the protection of retirement funds and their members

The above-mentioned legislative provisions on the duties of the principal officer are an essential market conduct regulation tool, as they assist in monitoring the conduct of the principal officer as an officer of the fund and ensure that board members account for their conduct.[350] The requirements will also help enhance governance of retirement funds through the obligation of the principal officer to monitor the conduct of the board members.[351] The FSCA has not yet issued a conduct standard on the appointment of and duties of a principal officer. The appointment and duties of a principal officer are still regulated by Directive PF 8.

The requirements to appoint an auditor to audit and report on the affairs of the fund support the provisions of the PFA on the appointment of the auditor and the valuator. They also assist in executing the functions of the board and in monitoring its conduct to ensure that pension funds are properly managed.[352] The requirements to

[346] *Ibid.*
[347] *Idem* at paragraph 31.
[348] *Ibid.*
[349] *Ibid.*
[350] Section 8 of the PFA, at paragraph 18, FSCA Communication 7 of 2019 (PFA) "Directive PF No. 8 of 2018: Prohibition on the Acceptance of Gratification The role and independence of the Principal Officer the role and independence of the Principal Officer".
[351] *Ibid.*
[352] FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007) at paragraphs 39-40.

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appoint an auditor and the auditor's duties are included in the draft Conduct Standard for pension fund administrators and have been extended to specify the duties of the auditor.[353] This differs from the previous position where an auditor was appointed in terms of section 9A.[354] The requirements of the draft Conduct Standard incorporate forms for reporting by the auditor.[355] The auditor is required to audit an administrator and certify that the administrator is conducting its business in terms of the PFA and that its financial records and financial statements are in accordance with the requirements of the Companies Act.[356] These extended and clearer provisions align with the objectives of the twin peaks to promote efficiency in the financial industry and close the regulatory gaps by requiring the accounting records and financial statements to be in line with the Companies Act.[357] This is an important market conduct regulatory instrument which will help to properly monitor the financial affairs of retirement funds.[358]

Despite the above-mentioned successes, the provisions of market conduct regulation for auditors are also segmented. The requirements for a fund to appoint an auditor are stipulated in the PFA, the King IV Report, the Circular, the draft Conduct Standard conditions prescribed in respect of pension fund benefit administrators and will also be regulated by COFI.[359] The market conduct regulation requirements which will be introduced by COFI will also require the provisions of the PFA on the appointment of an auditor to be amended.[360]

These provisions on the appointment of an auditor by a retirement fund will need to be properly aligned and consolidated. It may be easier if the Regulators consider issuing a conduct standard or sub-legislation for the auditors to ensure efficiency and transparency, and to prevent regulatory overlaps and gaps which may arise from various pieces of legislation. This is in addition to the many statutes and sub-legislation that retirement funds, administrators, product providers, financial

[353] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*
[358] *Ibid.*
[359] Section 9 of the PFA, FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at part XI, Clause 45 of COFI.
[360] Schedule 2 of COFI on the amendments to section 9 of the PFA.

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advisors, participating employers, and all relevant stakeholders must comply with. It increases the complexities and the number of laws that should be complied with. This may be difficult for the members of the fund to understand well enough for them to be able to hold the auditors or the fund officers accountable for their conduct. Consolidation and harmonization of these laws will also make it easier for the FSCA, as the market conduct regulator, to exercise its powers to regulate retirement funds and auditors of retirement funds.

3.8. Complaints and adjudication of complaints

3.8.1. The position prior to the introduction of twin peaks

Chapter VA of the PFA regulates complaints and adjudication of complaints lodged by retirement fund members/customers.[361] It is a market conduct regulatory channel for retirement funds, as it provides a platform for the fund members/customers to lodge complaints and for the Adjudicator to assess the conduct of the fund/trustees or financial service providers of the fund in terms of the provisions of the PFA.[362] The Adjudicator is appointed in terms of the provisions of the PFA and her office is responsible for the adjudication of complaints.[363] The main object of the PFA is to adjudicate complaints lodged by fund members/customers in terms of section 30A(3) the PFA "…in a procedurally fair, economical and expeditious manner."[364] Section 30E of the PFA stipulates *inter alia* that, the Adjudicator should investigate any complaint, may make any order which a court of law may make, and, where necessary, require the complainant to first approach the financial institution to resolve the dispute.[365] Section 30O of the PFA stipulates that the Adjudicator's determination is equivalent to a civil judgement issued by a court of law.[366]

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[361] Chapter VA of the PFA.
[362] *Ibid*.
[363] Section 30B and C of the PFA.
[364] Section 30D of the PFA.
[365] Section 30E of the PFA.
[366] Section 30O(1) of the PFA.

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3.8.2. The position after the introduction of twin peaks in respect of the Adjudication of complaints by the Adjudicator

Section 30AA of the PFA was inserted by section 290 of the FSRA, read together with Schedule 4 of the FSRA.[367] This section stipulates that "the ombud scheme in relation to complaints regulated in terms of this Chapter is declared to be a statutory ombud scheme for the purposes of the Financial Sector Regulation Act."[368] Section 30D of the PFA was substituted by section 211 of the FSRA to stipulate that the principal objective of the Adjudicator is to resolve complaints in accordance with section 30A(3) of the PFA, which the Adjudicator is empowered to consider in terms of section 211 of the FSRA.[369] Section 30D was also amended to stipulate that the Adjudicator must apply "principles of equity", consider the contractual and/or legal relationship between the complainant and the financial institution, the requirements of the PFA, and is required to "act in a procedurally fair, economical and expeditious manner".[370]

Section 30Q of the PFA was also amended by section 290 of the FSRA, read together with schedule 4 to stipulate among other things, that in exercising her powers, the Adjudicator can enter into an agreement with any person for the provision of specific services, obtain insurance cover to insure her office "against any loss, damage, risk or liability which it may suffer or incur", hire personnel to assist in executing her functions, obtain expert advice for the execution of her duties, and delegate any of her functions, save those stipulated in section 30E in respect of her functions to resolve complaints.[371]

Section 219 of the FSRA established the Financial Services Tribunal ("FST").[372] This section stipulates that "[t]he Financial Services Tribunal is hereby established to reconsider, in terms of this Chapter, decisions as defined in section 218 and to perform the other functions conferred on it by this Act and specific financial sector laws".[373] The

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[367] Section 30AA of the PFA.
[368] *Ibid.*
[369] Section 30D(1) of the PFA.
[370] Section 30D(2) of the PFA.
[371] Section 30Q of the PFA.
[372] Section 219 of the FSRA.
[373] Section 219(1) of the FSRA.

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FST is an "independent" statutory body which "must be impartial and exercise its powers without fear, favour or prejudice", and is required to exercise its duties in terms of the FSRA and "specific financial laws".[374] The term "decision" is defined so to include a decision by a statutory ombud, which includes the Adjudicator.[375] "Decision maker" is also defined to include a statutory ombud, which includes the Adjudicator.[376]

The rulings of the Adjudicator on the complaints lodged by retirement fund customers are therefore subject to review by the FST.[377] A decision maker who has issued a decision is required to notify the person in respect of which the decision is made, of their right to have the decision reviewed by the FST.[378] Clients who lodge complaints with the Adjudicator in terms of the PFA have the right to have the determinations on their complaints reviewed by the FST, and they can refer the determinations to the FST for review if they are dissatisfied with the rulings of the Adjudicator.[379] Complainants can apply to have their decisions reviewed in terms of section 230 of the FSRA; however, they are required to apply for a review within 60 days after they are notified of the decision, and must make the application in terms of the Rules of the FST.[380]

Reconsideration of a decision or ruling on a complaint by the Adjudicator amounts to a remedy in terms of the PAJA. [381] The FST can set aside a decision by a decision maker, including rulings by the Adjudicator, and PAJA can refer the matter back to the decision maker for further consideration or dismiss the application.[382] In particular circumstances, the FST can grant an order to direct a party to the proceedings to pay part of the costs, or all of the costs, where it is of the view that the costs have been "reasonably and properly incurred by the other party in connection with the proceedings".[383] The FST can dismiss an application to reconsider a decision

[374] Section 219(2) of the FSRA.
[375] Section 218(d) of the FSRA.
[376] Section 218(e).
[377] *Ibid.*
[378] Section 228(b) of the FSRA.
[379] *Ibid.*
[380] Section 230(2) and (3) of the FSRA.
[381] Section 230(1)(b) of the FSRA.
[382] Section 234(1)(a) of the FSRA.
[383] Section 234(2) of the FSRA.

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on the grounds that the application is "frivolous, vexatious or trivial".[384] A party who is dissatisfied with the order of the FST can apply for judicial review of the order in terms of PAJA or any relevant laws.[385] A party to proceedings whose FST order has not been made an order of the court can file a certified copy of the order with a South African competent court to have the order declared an order of the court.[386]

3.8.3. The position after the introduction of the twin peaks: a consolidated Ombuds system

It is argued that market conduct regulation is more effective if customers are given a platform to exercise recourse against financial institutions and hold them accountable for their conduct.[387] Customer recourse is a significant element of market conduct regulation, as it enables the Regulator to know the grievances of the customers, identify areas of concern, and enforce their powers to address any misconduct by financial institutions.[388] Customer recourse platforms are also essential to financial institutions as they provide financial institutions with an opportunity to identify root causes of complaints and grievances and address them by reviewing and streamlining their processes.[389]

The South African ombudsman system is an additional mechanism for the protection of consumers of financial services, which addresses affordable resolutions to clients' complaints.[390] The twin peaks aimed to introduce a consolidated ombuds system in order to promote transparency and accountability, and to enhance consumer protection.[391] In September 2017, the National Treasury published a policy paper named "A Known and Trusted Ombud System for All".[392] The policy paper highlights that a strong market conduct policy is necessary for a financial industry that contributes

[384] Section 234(4) of the FSRA.
[385] Section 235 of the FSRA.
[386] Section 236 of the FSRA
[387] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 57.
[388] *Ibid*.
[389] *Ibid*.
[390] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 46.
[391] *Idem* at 57.
[392] National Treasury "A Known and Trusted Ombud System for All" (September 2011).

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significantly to economic growth and provides employment opportunities to many people.[393] The paper notes that the objectives of market conduct regulation are to circumvent and monitor, where it does not succeed at circumventing the unfair treatment of customers by financial institutions.[394] The paper highlights that protection of customers in the financial industry supports significant financial inclusion and transformation in South Africa.[395] It is suggested that financial inclusion is a significant part of South Africa transformation in the financial industry.[396]

It is argued that, due to the tougher competition it provides, transformation in the financial industry strengthens institutions and improves the treatment of customers.[397] The policy paper outlines the structure of the ombuds system under the FSRA, which supports the objectives of the twin peaks of enhancing TCF Principles and of treating customers fairly, and which bolsters the protection of customers.[398] It is an economic dispute resolution process that provides the customers with a channel to get their disputes to court.[399] An ombudsman is a significant part of costumer protection in any sector.[400] Institutions should therefore conduct themselves in accordance with their licensing and accreditation requirements, which includes satisfying the clients' requests and prospects.[401] The ombuds is an independent platform on which customers can address their grievances or dissatisfaction with the institution.[402]

In 2007, the FinMark Trust provided recommendations to the former FSB, and for this reason, the National Treasury proposed changes to South Africa's Alternative Dispute Resolution ("ADR"), to improve conditions in the financial sector for low-earning customers.[403] The FinMark report motivated the former FSB and the National Treasury to consider introducing reforms in the ombud system for the financial

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393 *Idem* at iii.
394 *Ibid.*
395 *Idem* at iv.
396 *Ibid.*
397 *Ibid.*
398 *Idem* at 2.
399 *Ibid.*
400 *Idem* at 3.
401 *Ibid.*
402 *Ibid.*
403 *Idem* at 5.

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industry.[404] These suggested reforms were incorporated into the FSRA.[405] Currently, the South African ombud system comprises of a voluntary and statutory ombud systems.[406] Examples of voluntary ombud systems are the ombuds for long-term insurance, ombuds for short-term insurance, Banking, Credit and Johannesburg Stock Exchanges (JSE).[407] The statutory ombuds are the FAIS ombud, which resolves complaints on advice and intermediary services, and the Adjudicator, which were regulated by the now-repealed Financial Services Ombud Schemes Act of 2004 ("FSOS").[408] The voluntary ombuds were acknowledged by the FSOS.[409]

The reforms on the ombuds system introduced by the twin peaks apply to all financial services and products, support easy access to financial customers, increase awareness of the ombuds system, and introduce harmonised regulatory requirements which incorporate governance, resolution of complaints, jurisdiction and reporting.[410] The FSRA incorporates the regulatory reforms and implements a consolidated ombuds system.[411] The FSRA extended the provisions of the FSOS and repealed it.[412] The FSOS Council was replaced by an Ombud Council that supervises all the ombud schemes and acts as a regulator of the ombuds.[413] The Ombud Council is defined as a financial sector body.[414] The definition of "ombud" includes the Adjudicator, the FAIS Ombud, a statutory ombud and industry ombud scheme.[415] The definitions of "ombud" and "ombud scheme" in the FSRA combine the concepts of voluntary and statutory ombuds.[416]

The Ombud Council is established in terms of section 175 of the FSRA.[417] The objective of the Ombud Council is to assist financial customers to obtain access to a

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[404] *Ibid.*
[405] *Ibid.*
[406] *Idem* at 6.
[407] *Ibid.*
[408] *Ibid.*
[409] *Ibid.*
[410] *Idem* at 17.
[411] *Idem* at 18.
[412] *Ibid.*
[413] *Ibid.*
[414] Section 1 of the FSRA.
[415] *Ibid.*
[416] *Ibid.*
[417] Section 175 of the FSRA.

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dispute resolution that is cost-effective, efficient, independent, and with a fair ADR relating to their complaints against financial institutions on the products and services rendered.[418] The functions of the Ombud Council are *inter alia*, to acknowledge industry ombud schemes, support collaboration between the functions of the ombuds, safeguard the impartiality and independence of the ombuds, and support public awareness of the ombuds and the services they render.[419] The Ombud Council is responsible for assisting customers to have access to the ombuds, publishing ombuds schemes and the complaints they address, and monitoring the conduct of the ombuds.[420] The Ombud Council is obliged to "establish and implement appropriate and effective governance systems and processes".[421]

The consolidated ombuds system implemented by the FSRA is a market conduct regulatory system which promotes the fair treatment and protection of customers.[422] Creating awareness and access to customers of retirement funds will assist them to know their recourse against the financial institutions and make them account for their conduct.[423] A consolidated ombuds system will help ensure consistency on the regulatory requirements and will harmonise the conduct of the ombuds, and enhance the fair treatment and protection of customers.[424] The easy access to the ombuds system will mitigate barriers to dispute resolution and will support efficiency in the financial industry.[425]

3.8.4. Discussion: the successes and failures of the amendments to enhance complaints and the adjudication of complaints

The adjudication of complaints is a market conduct regulatory instrument which monitors the conduct of retirement funds and financial institutions and helps make

[418] Section 176 of the FSRA.
[419] Section 177 of the FSRA.
[420] *Ibid.*
[421] Section 178 of the FSRA.
[422] Section 175 of the FSRA.
[423] Section 177 of the FSRA.
[424] *Ibid.*
[425] *Ibid.*

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them account for their conduct.[426] It isa cost effective service which provides retirement fund members/customers with an opportunity to have their grievances heard.[427] It implements market conduct regulation and the fair treatment of customers.[428]

In many instances, complaints relating to delays on payment of benefits, section 14 transfers, or failures to add a member to the fund usually get resolved upon receipt of the complaint by the fund or administrator. Where the Adjudicator issues a determination to order an employer to add the member to the fund, this order usually directs an employer to put the member in the same position that the member would have been, had the employer added the member to the fund on the correct date. These types of determinations will also make it easier for the regulator to regulate the employer's conduct when COFI is promulgated. Complaints relating to non-payment of contributions will also be inter-linked with market conduct regulation requirements on payment of contributions. This implies that the adjudication of complaints will contribute to market conduct regulation through the complaints received and the determinations granted. The referral of decisions to the FST provides members with the opportunity for a second chance to present their grievances. Where the review of a decision is in favour of the member, it provides a member with better protection in that the FST will have overturned the decision of the Adjudicator, who may have erred in reaching her decision.

The consolidated ombuds system implemented by the FSRA is a market conduct regulatory method which promotes the fair treatment and protection of customers.[429] Creating awareness and access to customers of retirement funds will help them to know their recourse against the financial institutions and know how to make institutions account for their conduct.[430] A consolidated ombuds system will help ensure consistency on the regulatory requirements, will harmonise the conduct of the ombuds and will enhance the fair treatment and protection of customers.[431] The easy

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[426] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.
[427] *Ibid*.
[428] *Ibid*.
[429] Section 175 of the FSRA.
[430] Section 177 of the FSRA.
[431] *Ibid*.

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access to the ombuds system will mitigate barriers to dispute resolution and will support efficiency in the financial industry.[432]

Despite the successes discussed above there are shortcomings in respect of the proposed consolidated ombud system and the adjudication of complaints. It is still a long way before the consolidated ombud system will be implemented to achieve the objectives of efficiency, easy access by members and the creation of awareness of their rights to lodge complaints and get their grievances heard. There are many members who are still unaware of the Adjudicator and their rights to lodge complaints, even though they are provided with disclosures. Financial literacy programmes should therefore also include education campaigns on the ombuds system and the adjudication of complaints. There is a high number of complaints lodged by retirement fund members, potential members, and their beneficiaries. Some of these complaints get resolved upon receipt of the complaint by the fund or the administrator, which implies that there are gaps in the service delivery by the administrators or service providers.

Service providers should not wait to receive a complaint for them to address queries from members or to pay a benefit that a member has long waited for. Some of these issues cause an unnecessarily high number of complaints, which floods the Adjudicator's office, while the complaints would never have arisen had the service provider assisted the member on time. The high number of complaints in the Adjudicator's office will remain a challenge as long as the service providers do not provide the necessary assistance to their members and fail to pay their benefits timeously. Some of the complaints relate to claims on benefits awarded in a divorce order where a fund is ordered to pay a portion of the member's benefit to his ex-spouse, or a maintenance order where the fund is ordered to pay an amount for maintenance of his children or spouse.

Some of the delays are caused by an incorrect decree of divorce or a maintenance order which a client should get amended by the court, to comply with the legislative requirements to get the benefit paid (discussed above). These complaints will increase when the two-pot retirement system (discussed above) is introduced, as

[432] *Ibid.*

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aggrieved members will approach the Adjudicator's office to get their benefits paid. The FSCA should therefore try and address market conduct issues relating to some of these complaints to achieve efficiency and promote the fair treatment of customers, and to mitigate the high number of complaints. There should also be proper coordination between the FSCA and the Adjudicator or the Ombuds Council to enable the FSCA to address the market conduct gaps which arise from the adjudication of complaints.

3.9. Conclusion

The chapter has revealed that, before the promulgation of the twin peaks, retirement funds were regulated by the PFA and ITA, and the LTIA and FAIS regulated market conduct in the retirement fund industry.[433] The former FSB and the SARS were the regulators of retirement funds.[434] Under the former FSB, the Registrar of pension funds was authorised to monitor and oversee retirement funds in terms of the provisions of the PFA.[435] After the implementation of the twin peaks, the FSRA established the Prudential Authority and the FSCA, which is the market conduct regulator.[436] The PA and the FSCA are both regulators of retirement funds.[437] The Registrar of retirement funds was replaced by the Authority under the PFA and the FSRA.[438] The position is different from the former position, before the twin peaks, as there were only two regulators of retirement funds, being the former FSB and SARS.[439] Retirement funds are still registered and regulated by the PFA, and regulated for tax by the ITA, but the FSRA is the financial sector law.[440] The Insurance Act regulates the prudential supervision of retirement funds, including retirement funds, to ensure that they remain financially sound.[441]

[433] The PFA, FAIS General Code of Conduct, the LTIA.
[434] *Ibid.*
[435] Section 2, and section 7A of the PFA.
[436]Section 32 and 56 of the FSRA.
[437] Section 1 of the FSRA.
[438] Section 1 of the PFA.
[439] The PFA and the ITA.
[440] Section 1 of the PFA.
[441] Section 1 of the Insurance Act.

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CHAPTER 4: SPECIFIC CHANGES TO THE EXISTING LEGISLATIVE AND PRINCIPLED FRAMEWORKS AS A RESULT OF THE INTRODUCTION OF TWIN PEAKS

4.1. Introduction

4.1.1. Market conduct regulation of retirement funds under FAIS

In this chapter I analyse the regulation of retirement funds under FAIS before and after the twin peaks. This chapter builds further on the first two research questions. Under this section, I explain how FAIS regulates the conduct of retirement funds in respect of the sale and distribution of retirement funds benefits and the rendering of advice. I also discuss the FAIS skills, competence, and proficiency requirements for financial advisors on the retirement and risk benefits that they sell and distribute. In this section, I also illustrate the regulatory gaps under FAIS before the twin peaks, and how it resulted in the lack of adequate advice to retirement fund members, unsuitable products, and the lack of proper remuneration for the services rendered to retirement funds and their members.

I also discuss the RDR and its objectives under the twin peaks regulatory reforms, which are to regulate the sale and distribution of financial products (including retirement products and risk insurance benefits provided to members), the rendering of advice and remuneration of the services provided by financial service providers. I analyse how the objectives of the RDR led to various amendments of existing and sub-legislation such as the FAIS General Code of Conduct and the FAIS Fit and Proper requirements. I also outline the objectives of the reformed laws under the FAIS General Code of Conduct, which are to ensure that members of retirement funds are provided with adequate and accurate advice, appropriate products and services, and to ensure that remuneration of financial services and products provide members with fair outcomes.

I also discuss the reformed FAIS Fit and Proper Requirements for financial advisers on the competence, skills and proficiency requirements in the sale and distribution of financial products. These competence, skills and proficiency requirements include honesty, integrity, good standing and training on the financial

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products that the financial advisors sell and distribute. The discussion also includes reformed fit and proper requirements for financial service providers such as governance requirements on identifying and managing risk, sufficient and appropriate technological systems to store and process clients' data, and adequate and appropriate human resources to provide financial services. I also evaluate the successes and failures of the regulatory reforms under FAIS.

4.1.2. Market conduct regulation of retirement funds under the LTIA

In this section, I discuss the market conduct regulation of retirement funds under the LTIA before and after the twin peaks. I outline how the LTIA regulates the conduct of insurers on disclosures provided to members on their benefits, intermediary services such as collection of premiums, payment of premiums, commission and fees payable for financial services and products provided.

I outline the LTIA requirements on the termination of long-term insurance policies and the provision of binder and outsourcing services. I deal with the regulatory gaps prior to the twin peak peaks and how they resulted in inadequate disclosures to members, to improper remuneration such as excessive and unjustified commission and fees charged on financial products and services, and lack of proper governance on binder and outsourcing services, and poor data management. I further evaluate the successes and failures of the regulatory reforms on the market conduct regulation of retirement funds under the LTIA.

4.1.3. TCF and retirement funds

In this section, I discuss TCF Principles for retirement funds before and after the twin peaks. This analysis relates to TCF Principles on complaints management for retirement funds and administrators, and the guidelines which incorporate the six TCF Principles and how retirement funds and administrators should apply them to complaints management. In this section, I also discuss the regulatory reforms introduced by Regulation 28 of the PFA. I analyse the objectives of Regulation 28 aimed at regulating the investment of the members' benefits in a manner that achieves TCF outcomes. I outline the of objectives of Regulation 28 which require the board members to provide members with an option to preserve their benefits in the fund when they retire and to design investment portfolios for this purpose, with appropriate

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fees. I also highlight that Regulation 28 was also amended to require board members to design annuity strategies for retirement fund members to purchase annuities in the fund, and to provide members with benefit counselling at least 3 months before they reach retirement.

In this section, I also discuss the requirements of POPIA for retirement funds, and its objectives to protect the clients' personal information, and how the various requirements of POPIA have been incorporated into the regulatory reforms to require retirement funds, administrators, and relevant stakeholders to comply with POPIA. I also evaluate the successes and failures of the regulatory reforms in respect of TCF and retirement funds.

4.2. Market conduct regulation of retirement funds under FAIS

4.2.1. The position prior to the introduction of twin peaks

FAIS regulates the market conduct of financial service providers, retirement fund administrators and financial advisers, for providing retirement fund services and products, and for rendering advice and intermediary services. FAIS stipulates skills, competency, and proficiency requirements and regulates conflict of interest for the rendering of advice and intermediary services for financial products, including retirement products.[1] FAIS sets out regulatory requirements for financial advisors, such as fiduciary duties towards their clients, an obligation to act in the best interest of their clients and an obligation, in rendering their services, to consider the interests of their clients above their own, and disclosure requirements on remuneration of financial products.[2] FAIS regulates the sale and distribution of retirement fund benefits, including long-term insurance benefits provided by the fund to its members.[3]

Financial service providers sell retirement fund products, and render advice and intermediary services to the fund and its members, in accordance with the

[1] FAIS Act, FAIS Fit and Proper Standards, FAIS General Code of Conduct for Authorised Financial Service Providers and Representatives, 2003.
[2] *Ibid*.
[3] FAIS and the FAIS General Code of Conduct for Authorised Financial Service Providers and Representatives, 2003.

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requirements of FAIS and the FAIS General Code of Conduct.[4] FAIS also regulates remuneration of financial service providers and disclosures to retirement funds and their customers.[5] This is a market conduct regulatory tool as it regulates the conduct of financial service providers in rendering their services to the fund and its members.[6]

Prior to the twin peaks regulatory reforms, there were concerns that regulatory gaps resulted in inadequate regulation of product suppliers and financial service providers in providing their products and services to wholesale entities such as retirement funds.[7] Due to the nature of retirement funds, advice was rendered directly to retirement funds in the form of wholesale advice, and not directly to the retirement fund members, as the fund is the entity that purchased the financial products.[8] This distribution model required the advisor to only consider the interests of the fund as the immediate client and only consider the suitability of the advice to the fund.[9] The advisor did not therefore, identify the needs of the fund members or consider whether the advice given was appropriate for them.[10] This may have resulted in the unfair treatment of customers, abuses such as inadequate or inappropriate advice, and unsuitable products offered to retirement fund customers.[11]

According to the FAIS Fit and Proper Requirements, "Fit and Proper" refers to both the experience and knowledge of the adviser, as well as personal character qualities such as honesty and integrity, relevant to the rendering of financial services.[12] Furthermore, the adviser or financial services provider needs to have the competence and operational ability to fulfil the responsibilities imposed by FAIS, including obligations in respect of providing retirement products.[13] Financial advisers are required to have the necessary skills, experience, knowledge, and personal character qualities (honesty and integrity) to render advice and intermediary services on

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[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] FSB "Retail Distribution Review" (November 2014) at 13.
[8] *Idem* at 14.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] FAIS Fit and Proper Standards.
[13] *Ibid.*

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retirement fund products.[14] A financial service provider, such as a product supplier of retirement benefits, a retirement fund administrator or a brokerage, is required to have the operational ability to render services or products to retirement funds.[15] The requirements for the operational ability to provide retirement products includes financial soundness, technological resources, governance structures and filing and storage systems.[16]

The FAIS Fit and Proper Standards are a market conduct regulatory mechanism for retirement funds, as they regulate the conduct of financial service providers and financial advisers, to ensure that they have the necessary skills, competencies, and operational ability to render services to retirement funds and their members.[17]

4.2.2. The position after the introduction of twin peaks

FAIS introduced professional standards for the conduct of intermediaries and requirements for the sale and distribution of financial products.[18] Despite this, poor customer outcomes continued through poor advice and the sale of unsuitable products to financial customers.[19] Consequently, and in addition to the existing rules, the former FSB introduced the RDR to enhance the sale and distribution of financial products and the remuneration of intermediaries, to achieve better customer outcomes.[20] The RDR was published for public comments by the former FSB on 7 November 2014.[21] The RDR forms part of TCF Principles and it stipulates the regulatory framework for the distribution of financial products, including retirement fund products.[22] The main objective of the RDR is to ensure that financial products, (including retirement benefits), are distributed in ways that support the achievement of TCF outcomes.[23] In

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[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Idem* at 54.
[19] *Ibid.*
[20] *Ibid.*
[21] FSB "Retail Distribution Review" (November 2014) at 1.
[22] *Ibid.*
[23] *Ibid.*

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particular, the RDR promotes appropriate, affordable and fair advice and distribution of financial products in the retail market through sustainable business models.[24]

The RDR aims to ensure that financial customers are provided with appropriate products and advice, and with information that they are able to understand and use to compare products and services.[25] The RDR outlines 55 specific proposals, which cover the types of services provided by intermediaries, relationships between product suppliers and intermediaries, and intermediary remuneration.[26] The RDR implements market conduct regulation in the retirement fund industry through its objectives and regulatory reforms.[27]

The RDR outlines distribution models in the financial industry and recommends activity-based methodologies on the types of services provided by intermediaries to customers and product suppliers.[28] These requirements extend to the responsibilities of product suppliers for advice and intermediary/outsourced services provided, and to remuneration models for products and services rendered.[29] These requirements apply to retirement funds, and products and services rendered to retirement funds and their customers, to enhance the fair treatment of customers.[30]

The RDR regulatory reforms were implemented in three broad phases through amendments of various laws and sub-legislation, namely:[31] the FAIS General Code of Conduct; the FAIS Fit and Proper Standards; the LTIA Regulations; and the PPRs.[32] The aforementioned amendments are discussed below.

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[24] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 54; FSB "Retail Distribution Review" (November 2014) at 1.
[25] *Ibid.*
[26] FSB "Retail Distribution Review" (November 2014) at 2.
[27] *Ibid.*
[28] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 54; FSB "Retail Distribution Review" (November 2014) at 2-3.
[29] *Ibid.*
[30] *Ibid.*
[31] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 1.
[32] *Idem* at 3.

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3.2.3. FAIS General Code of Conduct amendments on the RDR proposals amendments (sections 3A, 7 and 8 of the FAIS General Code of Conduct)

The proposed amendments to the FAIS General Code of Conduct were issued for public comment on 1 November 2017.[33] The amendments were promulgated on 26 June 2020 and became effective on 26 December 2020.[34] A summary of the amendments which relate to retirement funds is set out below.

(i) Enhanced requirements regarding intermediary remuneration

RDR Proposals HH and KK require enhanced disclosure requirements regarding intermediary remuneration, to ensure that clients fully understand and agree to the fees payable and the services they can expect in exchange of the fees payable.[35] According to the amended provision, a provider is required to disclose to the fund and its members all fees and charges, the frequency and methods of payment, as well as the details of the services to be provided by the provider or its representatives.[36] This objective aligns with the regulatory objectives for retirement funds discussed earlier, under the harmonised disclosure framework, to help retirement fund members to make informed decisions.[37] The requirement that certain financial interests must be reasonably commensurate with the services being rendered was extended to clarify what "reasonably commensurate"[38] should entail and to align it with both RDR

[33] FSB "Invitation to comment on proposed amendments to the General Code of Conduct for Authorised FSPs and Representatives and the Specific Code of Conduct for Authorised FSPs and Representatives Conducting Short-term Deposits Business" (31 October 2017) at 1.
[34] FSCA "Amendments to the General Code of Conduct for Authorised FSPs and Representatives and the Specific Code of Conduct for Authorised FSPs and Representatives Conducting Short-term Deposits Business" (26 June 2020).
[35] FSB "Retail Distribution Review" (November 2014) at 48.
[36] Section 7(1)(c)(v) of the FAIS General Code of Conduct.
[37] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 50.
[38] The court noted in *S Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) that reasonably commensurate means proportionate to the services rendered, considering fairness; not excessive – thus reasonable. The court also noted that reasonableness is determined with reference to trade standards or market norms. It was further noted that the remuneration will be that usually paid in the particular business or trade and that others in the same line of business should be able to state at what price they themselves would be prepared to undertake a particular obligation.

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intermediary remuneration principles and proposed amendments to the LTIA Regulations on intermediary remuneration.[39]

In terms of the amendments under the FAIS General Code of Conduct, an adviser may only be remunerated if the financial interest is reasonably commensurate with the actual cost of performing the services, considering the nature of the services, resources, skills and competencies required to render the services.[40] The payment of the financial interest should not result in the adviser being remunerated more than once.[41] Such payment should mitigate the conflict of interest between the adviser and the client.[42] In addition, the payment of financial interest to an adviser must not impede the delivery of fair outcomes to clients.[43]

(ii) Financial interest offered by a provider to its representatives

The FAIS General Code of Conduct stipulates that a provider may not remunerate its representatives for business secured for the provider "to the exclusion of" the quality of service rendered to clients.[44] In relation to retirement products and services, this would apply to product suppliers and service providers of retirement benefits and services.[45] Regulatory monitoring has revealed that providers do not have procedures in place to achieve and monitor compliance with this requirement.[46] The amendments will provide clarity on measurable indicators on the quality of client treatment and compliance with FAIS, which also includes retirement funds and their members.[47] This provision endorses RDR Proposal RR, whose objective is to ensure that incentives for tied and non-tied advice in the insurance sector are well balanced, by strengthening the principle of "Equivalence of Reward".[48]

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[39] FSB "Proposed Amendments to the General Code of Conduct (31 October 2017) at 3.
[40] *Idem* at 12, section 3A(d) of the FAIS General Code of Conduct.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] Section 3A(b) of the FAIS General Code of Conduct.
[45] *Ibid.*
[46] *Ibid.*
[47] FSB "Proposed Amendments to the FAIS General Code of Conduct" (31 October 2017) at 12.
[48] FSB "Retail Distribution Review Proposal RR" (November 2014) at 57.

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"Equivalence of reward" refers to the balance between the commission paid to an independent adviser in terms of the LTIA Regulations, and the remuneration paid to an adviser who is tied to an insurer and remunerated in terms of his/her employment contract with the insurer.[49] The regulator is of the view that an adviser remunerated in terms of his/her contract of employment may receive a much higher remuneration than an independent adviser who receives commission.[50] The principles of the equivalence of reward aim to ensure that an adviser tied to an insurer is not remunerated more than an independent adviser.[51] This requirement applies to retirement products and services, as they are also classified as financial products and services, and will help mitigate abuses on improper remuneration and enhancing the protection and fair treatment of customers.[52]

(iii) Suitability of advice to clients

This amendment was motivated by RDR Proposal C, with the objective of requiring providers to identify the clients' needs when rendering advice to pension funds, medical schemes, friendly societies, employers or other entities providing benefits to a group of members or employees.[53] This provision requires the advisor to conduct a collective needs analysis of members.[54] This is referred to as "wholesale financial advice" and will mark a significant change in the retirement fund industry and the long-term insurance industry, as many members of group schemes receive very limited or no advice because providers usually render the advice to the fund or the employer as the policyholder.[55]

This will further enhance member education and access to financial products in the insurance industry, as many members of group schemes or retirement funds are

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[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 6.
[53] FSB "Proposed Amendments to the General Code of Conduct" (31 October 2017) at 3, FSB "Retail Distribution Review Proposal C" (November 2014) at 30.
[54] Section 8(1)(a) of the FAIS General Code of Conduct.
[55] FSB "Retail Distribution Review Proposal C" (November 2014) at 14.

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not even aware that they have insurance benefits.[56] This requirement aligns with the regulatory objectives under retirement funds discussed earlier, which require members to be provided with sufficient information to assist them to make informed decisions on their benefits.[57]

(iv) Suitability of advice in case of legal or contractual limitations

Section 8(1)(c) of the FIAS General Code of Conduct required providers to identify an appropriate financial product, or products, "subject to the limitations imposed on the provider under the Act or any contractual arrangement".[58] Regulatory experience has demonstrated that a provider who has limited products is likely to recommend products that may not be appropriate for a client in order to "make a sale".[59] The provisions of section 8(1)(c) were amended to enhance the existing provisions of the FAIS General Code of Conduct, to clarify that where a provider is not able to identify an appropriate product to a client, the provider must not recommend the product and must advise the client accordingly.[60] This provision will help ensure that retirement funds and their members are provided with appropriate products and will help eliminate the abuses around making clients buy unsuitable financial products under retirement funds.[61]

(v) Clarification that suitability analysis may be tailored to specific circumstances of the client interaction

The purpose of the amendment is to provide further clarity on the in-depth information that should be considered for a suitability analysis before providing advice.[62] This amendment implements Proposal B of the RDR, which initially proposed that a framework should be developed for "low advice" distribution models, where advice is

56 *Ibid*.
57 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.
58 FSB "Proposed Amendments to the General Code of Conduct" (31October 2017) at 3 to 4.
59 *Idem* at 4.
60 *Ibid*.
61 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 6.
62 FSB "Proposed Amendments to the General Code of Conduct (31 October 2017). at 4; FSB "Retail Distribution Review" Proposal B (November 2014) at 30.

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provided, but a full suitability analysis is not required.[63] I am of the view that this provision will apply to retirement fund members when their benefits are amended, for instance, when their retirement contributions are increased or when changes are made to the insurance benefits offered by their fund.[64]

4.2.3. Fit and Proper Standards and RDR-related amendments

The amended FAIS Fit and Proper Requirements do not make specific reference to the RDR, but their regulatory requirements implement the RDR objectives discussed below on low advice distribution models.[65]

(i) Proposal B: Standards for "low advice" distribution models

The amended FAIS Fit and Proper Standards are aligned with Proposal B of the RDR in that they categorise "automated advice"[66] to require specific competency requirements.[67] The amended requirements require an FSP who provides automated advice to have the competency requirements to understand the technology and the product specifications.[68] The adviser is also required to understand the choices, risks and rules for providing automated advice.[69] These enhanced and additional requirements on "low advice" models will improve the protection and fair treatment of customers, when the adviser needs to use this model to implement changes to the members' benefits.[70]

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[63] *Ibid*.
[64] *Ibid*.
[65] FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 4.
[66] According to the FAIS Fit and Proper Requirements, ""automated advice" means the furnishing of advice through an electronic medium that uses algorithms and technology without the direct involvement of a natural person."
[67] FAIS Fit and Proper Requirements at 5, FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 4.
[68] Section 38(a) of the FAIS Fit and Proper Requirements.
[69] *Ibid*.
[70] FSB "Retail Distribution Review Proposal B" (November 2014) at 30.

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(ii) Proposal D: Standards for sales execution, particularly in non-advice distribution models

In line with RDR Proposal D, the FAIS Fit and Proper Standards were amended to prescribe both the definition of "execution of sales"[71] and competency standards for intermediaries performing this activity, where they perform this activity in terms of a prepared script.[72] In order to qualify for lessor competence requirements, the adviser needs to satisfy thorough governance, oversight and monitoring requirements, such as sales practices which may misled clients or result in unfair outcomes for clients.[73] These standards apply to retirement fund benefits and will promote fair outcomes for fund members as many retirement funds appoint advisers to act on behalf of the fund and its members.[74]

(iii) Proposals BB, CC, DD and EE: various proposals relating to product supplier responsibility for advice and distribution

TCF Principles require product suppliers to monitor advice and distribution outcomes and implement measures to promote fair treatment of customers and alleviate risks of selling unsuitable or misleading products.[75] The RDR Proposals BB, CC and DD require product suppliers to ensure that advisers who render advice on their products satisfy the product-specific training requirements.[76] Further, Proposal EE stipulates that product suppliers must ensure that persons who render factual information on their products through non-advice sales execution models meet the required fit and proper standards.[77] The amended FAIS Fit and Proper Standards support the above-mentioned RDR Proposals by stipulating specific competence standards in relation to

[71] According to the FAIS Fit and Proper Requirements, ""execution of sales" means an intermediary service performed by a person on instruction of a client to buy, sell, deal, invest or disinvest in, replace or vary one or more financial products."
[72] FAIS Fit and Proper Requirements at 5, FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 5, FSB "Retail Distribution Review, Proposal D (November 2014) at 31.
[73] Section 13(2) and 22 of FAIS Fit and Proper Requirements, FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 5.
[74] FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 5.
[75] *Ibid.*
[76] FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 5, FSB "Retail Distribution Review" (November 2014) at 44-46.
[77] *Ibid.*

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a "class of business training" and "product specific training".[78] They also oblige an FSP, if requested by the product supplier, to confirm to another product supplier that the supplier or its representatives satisfy product-specific training.[79] The amended requirements will enhance the protection of financial customers, (including retirement fund members), and will help achieve better fair outcomes for financial customers in that the advisers will have the required product knowledge to sell the products and render accurate advice.[80]

4.3. Discussion

4.3.1. The successes and failures of the FAIS General Code of Conduct to enhance the protection of retirement funds and their members

Under the previous FAIS regulatory regime discussed above, regulatory gaps existed around the lack of requirements to conduct needs analysis for retirement fund members. The rendering of advice to retirement funds as the clients, and not the fund members, may have led to unfair treatment of customers. The regulatory requirements implemented by the RDR and the ensuing amendments of the FAIS General Code of Conduct demonstrate the regulatory changes.[81] I am of the view that the regulatory reforms are a new regulatory framework which focus on the needs of the retirement fund members by shifting the focus from the fund as the client to the end user, who is the customer/member of the fund.[82] It allows a financial adviser to provide advice to the members directly, to cater for the interests of the members, to ensure that the members get good value for their money on retirement.[83] I am of the view that this is a market conduct regulatory tool which offers protection to retirement fund customers and will contribute to improved efficiency in the retirement fund industry.[84]

However, although the amended FAIS General Code of Conduct aims to cater for the needs of retirement fund members by ensuring that financial advisers conduct

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[78] FSB "Treating Customers Fairly Status Update: Retail Distribution Review" (December 2016) at 5, Section 28 and 29 of the FAIS Fit and Proper Requirements.
[79] *Ibid.*
[80] *Ibid.*
[81] FAIS General Code of Conduct and FSB "Retail Distribution Review" (November 2014).
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*

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a needs analysis of the members, the difficulty is that financial products are complex in nature, and it may be difficult for the members to understand the advice that they are given as a group. The focus on rendering advice should also be directed at helping the individual members achieve a better understanding of the advice and to able them to make informed decisions. Some retirement funds are very large, and it may be difficult for financial advisers to provide proper advice to a large group of members, let alone to the individual members within the group.

Members with their own individual advisers may get better and proper advice as the financial adviser's focus is not on a group but on the individual member, even though the member is covered under a retirement fund in a group of other members. I am of the view that members should be encouraged to appoint their own financial advisers because the "group" financial adviser may have too many members to attend to and may not be able to have regular engagements with the individual members under a group scheme or retirement fund.

4.3.2. The successes and failures of the Fit and Proper Standards amendments to enhance the protection of retirement funds and their members

The FAIS Fit and Proper Requirements on "low advice" create additional obligations for the product supplier and the adviser to ensure that members are provided with appropriate advice. Proposal D on "low advice" stipulates that "[t]he aim of these standards will be based on the understanding that the more basic the advice provided, the more responsibility there will be on product suppliers and intermediaries to ensure that the distribution model and level of advice provided is appropriate to the riskiness/complexity of the product".[85] These additional obligations are aimed at promoting fair outcomes for members.

However, where the members' benefits are amended to increase their risk benefits provided by the fund and the bundled self-standing risk benefits, as an example, the financial advisers should make an extra effort to ensure that they hold sessions to inform members of these changes and provide members with sufficient disclosures to assist members to understand the changes on their benefits. The

[85] FSB "Retail Distribution Review Proposal B" (November 2014) at 44-46.

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changes to risk benefits usually cause a high number of complaints under the self-standing risk benefits where the employer is the policyholder, as members may continue to be under the impression that their risk benefits are at a certain level, only to realize when an insured event arises, like an income disability claim, that their benefit level is not the same or lower that before.

Insufficient information to members lacks clear disclosures and clarity on the changes to the members' benefits and may result in unfair outcomes for members under their risk benefits, when they are faced with circumstances where they only find out about the changes when an insured event occurs. This may also be caused by changes to the members' emails or cellphone numbers, resulting in the members' not receiving the notifications of changes to their benefits. This calls for a need to convey the changes to members through various channels, including the employer's intranet and notice boards. Members in industries like mining and manufacturing, where the members do not access emails regularly and where some of them may not even have emails, should be provided with handouts of such changes and with sessions to discuss the changes, to help them to understand the changes to their benefits and keep them well informed.

This also means that employers should ensure that they provide updated data to the administrator, product provider or intermediary with the monthly premium reconciliation, to enable communication of the changes to the members. Lack of updated, or insufficient data can impede the provision of vital information to members on the changes to their benefits. Advisers should also ensure that they explain the impact of the members' instructions on execution and non-advice sales. In respect of an execution sale, as an example, if the transaction reduces a member's investments, the adviser must inform the client of the investment results.

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4.4. Market conduct regulation of retirement funds under the LTIA

4.4.1. The position prior to the introduction of twin peaks

The LTIA regulates the conduct of the business of long-term insurers and the control of certain activities of long-term insurers and intermediaries.[86] This includes the fees and commission payable on retirement products, and the disclosure of information on retirement products and services to the fund and its members.[87] Due to the nature of retirement funds and the benefits being offered on a group basis, the disclosure requirements provided to fund members may not have been adequate, as the fund is the policyholder who was entitled to the information under the policy.[88] Before the reformed amendments, the LTIA required a policyholder to be provided with a summary of policy benefits under a policy.[89] The summary to be provided to the policyholder included a summary of the policy benefits and insurance events in terms of which benefits will be paid.[90] The LTIA also regulates the termination of long-term insurance policies, including retirement fund policies.[91] As the fund is the policyholder under a long-term insurance group policy, the insurer was required to inform the fund of the termination of the policy.[92] Fund members may not have been notified of the termination or provided with sufficient information regarding the termination, which may have resulted in the unfair treatment of the members.[93]

The LTIA Regulations are a market conduct sub-legislation which regulates the collection of premiums and the remuneration of financial service providers, such as commission and fees, including binder and outsourcing fees on long-term insurance products offered to retirement funds and their members.[94] The Regulations also stipulate provisions on binder and outsourcing requirements, including governance

[86] The objectives of the LTIA, the PPRs, and the LTIA Regulations.
[87] *Ibid*.
[88] Section 48 of the former LTIA.
[89] *Ibid*.
[90] *Ibid*.
[91] The PPRs.
[92] *Ibid*.
[93] *Ibid*.
[94] The LTIA Regulations.

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and oversight.[95] Prior to the twin peaks amendments, the LTIA Regulations were believed to be inadequate in that distribution models and remuneration structures were not structured in a manner that supported the fair treatment of customers.[96] This was due to the regulatory gaps which may have caused financial advisors or FSPs to be remunerated for products which were not appropriate for retirement funds and their members.[97] Some of the fees were perceived to be excessive or unjustified.[98] Binder and outsourcing agreements were not properly governed and managed by insurers, due to a lack of proper governance and oversight arrangements by insurers.[99] The binder fees and outsourcing fees were not properly structured, as there were no proper checks and balances on the remuneration requirements.[100] This resulted in various abuses such as inadequate data management on binder and outsourcing agreements, excessive fees, inappropriate products and inadequate disclosures to retirement funds and their members.[101]

4.4.2. The position after the introduction of twin peaks

The amended LTIA Regulations were effective from 1 January 2018.[102] The amendments will give effect to the RDR Proposals outlined below, which also apply to retirement funds, product and service providers.[103]

(i) Proposal V: Insurer-tied advisers may no longer provide advice or services on another insurer's products

The definition of "representative" in Part 3A of the LTIA Regulations was amended to implement Proposal V of the RDR.[104] The previous definition of "representative" which allowed an insurer's representative to render services as an intermediary for another

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95 *Ibid.*
96 *Ibid.*
97 *Ibid.*
98 *Ibid.*
99 *Ibid.*
100 *Ibid.*
101 *Ibid.*
102 LTIA Regulations.
103 *Ibid.*
104 FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 7; FSB "Retail Distribution Review Proposal V" (November 2014") at 41.

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insurer's policies, was removed.[105] The definition was replaced with a requirement to allow the representative to render advice or related services only in respect of that insurer's products.[106] The purpose of this amendment is to mitigate conflict of interest and enhance the protection of financial customers, by preventing the representative from representing multiple product providers in addition to representing the client.[107] This requirement applies to group policies under retirement funds and will contribute to fair customer outcomes for members, by prohibiting an adviser from representing multiple product providers and mitigate conflict of interest for members.[108]

(ii) Proposals J, Z, AA and ZZ: Various proposals relating to strengthened standards and remuneration caps for binder and outsourcing arrangements

Outsourcing/binder arrangements apply to retirement funds on the provision of products or services where an insurer underwrites retirement fund products or provides services to retirement funds.[109] In December 2015, the former FSB issued Binder Regulations Thematic Review Key Findings on binder agreements.[110] One of the findings was on the binder fees, on which the Registrar noted that binder fees paid to binder holders ranged from 0% to 100% of the gross written premium.[111] The findings revealed that the insurer costs, instead of the material costs incurred by binder holders were used to calculate the binder fees.[112] In some instances these costs were not properly estimated.[113] The provisions of the Binder Thematic Review were incorporated into the LTIA Regulations, and include caps on binder fees, access to clients' data, governance and oversight.[114] These provisions apply to retirement fund products and binder/outsourcing services.[115]

[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] LTIA Regulations.
[110] FSB "Binder Regulations Thematic Review: Key Findings Report" (December 2015) at 1.
[111] *Idem* at 2.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Idem* at 16 to 17.

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The amended LTIA Regulations stipulate various measures to give effect to the above mentioned RDR proposals.[116] Regulation 3.20(1) stipulates the general principles for determining binder fees.[117] The Regulation stipulates *inter alia* that, binder fees must be reasonable and commensurate with the actual costs incurred in rendering such functions, a binder holder must not be remunerated more than once, and that payment of binder fees must not impede the fair treatment of policyholders.[118] The LTIA Regulations introduced caps for binder fees, namely 3.5% to enter into, vary or renew policies and 5% to determine policy wording, premiums and value of benefits.[119] According to the LTIA Regulations, the Authority has powers to allow an insurer to pay higher binder fees than the above prescribed maximums, if the Authority is satisfied that the fees comply with the principles of Regulation 3.20(1).[120]

(iii) Proposal OO: Product supplier commission prohibited on replacement life risk policies

Regulation 3.9A of the LTIA Regulations stipulates that an insurer may not pay commission for a replacement of a risk policy unless it is satisfied that the adviser has complied with the relevant FAIS disclosure, or if commission is paid, it must be recovered from the adviser if it is established that these disclosure standards have not been met.[121] This provision implements proposal OO of the RDR, which prohibits the payment of commission for replacement of risk policies and also prohibits an intermediary from receiving any remuneration except advice fee.[122] This LTIA Regulation should therefore be read together with Rule 19 of the PPRs and the new definition of "replacement"[123] in the amended FAIS General Code of Conduct.[124] This

[116] LTIA Regulations.
[117] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 8; LTIA Regulation 3.20(1) and 6.2A(1).
[118] *Ibid.*
[119] LTIA Regulation 3.21.
[120] *Ibid.*
[121] LTIA Regulation 3.9A.
[122] FSB "Retail Distribution Review Proposal OO" (November 2014) at 54.
[123] According to the FAIS General Code of Conduct ""replace or replacement" means the action or process of (a) substituting a financial product, wholly or in part, with another financial product; or (b) the termination or variation of a financial product and the purchase, entering into, investment in or variation of another financial product."
[124] Rule 19 of the PPRs and the FAIS General Code of Conduct.

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provision will mitigate abuses such as high fees and inappropriate remuneration of advisers, where the fund replaces a fund group policy.[125]

(iv) Proposal PP: Commission regulation anomalies on "legacy" insurance policies

With regard to legacy policies, the amended LTIA Regulations implement RDR Proposal PP on the provisions under "progressive reduction over time of the maximum causal event charges" which can be applied to legacy contractual savings policies, including retirement fund policies.[126] According to the LTIA Regulations, variable premium increases on or after 1 January 2018 for investment policies should be deemed as a separate policy to determine causal event charges and commission.[127] This will result in these increases being subject to the same commission and causal event charge basis as new policies.[128] This implies that there will be no additional charges for these policies, (including fund policies), which will promote fair customer outcomes by helping to address high fees for retirement fund members.[129]

The LTIA Regulations also stipulate that where a causal event occurs for a fund policy or a policy which is not a fund policy on or after the effective date, but before 1 January 2018, the insurer is not allowed to deduct causal event charges which exceed the prescribed maximum fees stipulated in the LTIA Regulations.[130] Maximum fees are also prescribed for causal events occurring after 1 January 2018.[131] These reformed provisions will promote the protection of retirement fund members by mitigating excess fees and additional charges on investment policies.[132]

[125] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 9 to 10; FSB "Retail Distribution Review Proposal OO" (November 2014) at 54.
[126] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 10, Part 5A and C of the LTIA Regulations.
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid.*

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(v) Policyholder Protection Rules (PPRs) in relation to retirement funds

This section will analyse the relevant provisions of the PPRs which relate to retirement funds and retirement fund members/customers.

The amended PPRs were effective 1 January 2018.[133] The amended PPRs form part of the RDR regulatory reforms and implement RDR Proposals to enhance the protection of financial customers, including retirement fund members.[134] The PPRs apply to retirement funds, retirement fund members and/or customers and to fund policies, and they were reformed to monitor the conduct of financial service providers.[135] According to the PPRs, the definition of "policyholder" includes retirement fund and retirement fund members.[136] The definition of "member" includes a member of a retirement fund.[137] The objective is to provide retirement fund members with the rights of a policyholder under a fund policy, to enable them to exercise their rights under the group policies.[138] This is a significant change which will align with the objectives of the government to promote the protection of retirement fund members.[139]

The PPRs were amended to require insurers to, *inter alia*, treat their customers fairly, provide members with adequate and appropriate advice, appropriate products, and adequate information on their benefits, and to enable customers to exercise their rights under a group policy.[140] This will also enable members to make changes to their benefits under a group/fund policy, and to submit claims or lodge complaints without unreasonable barriers.[141] The PPRs incorporate TCF Principles and require an insurer to treat its customers fairly when communicating with or providing services to customers.[142] The PPRs incorporate the six TCF outcomes, which include, among others, to ensure that products are designed to meet the needs of customers, clients

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[133] The PPRs.
[134] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016).
[135] Rule 1 and 2 of the PPRs.
[136] *Ibid.*
[137] Chapter 1 of the PPRs.
[138] The PPRs.
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*
[142] Rule 1.3 of the PPRs.

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should be provided with clear information, and customers must be adequately informed of their benefits, before, during and after the time of entering into a policy.[143]

The TCF outcomes embedded into the PPRs also require an insurer to ensure that customers are provided with adequate and appropriate advice.[144] The objective is to protect group scheme and fund members, to ensure that they get proper advice and benefits, and to mitigate abuses and prejudices against members.[145] According to the PPRs, an insurer should have procedures in place to assist the policyholder (in the case of fund policy, the fund), to provide information to the members where it is not achievable for the insurer to do so.[146] An insurer is also required to ensure that group scheme members are provided with accurate advice and with products that the insurer has led them to expect.[147] The PPRs also require an insurer to constantly monitor the extent that it achieves TCF outcomes in respect of group scheme and fund members.[148]These provisions implement the objectives of the RDR which require financial customers (including retirement fund members) to be treated fairly and to be provided with appropriate advice to help them to make informed decisions in respect of their benefits.[149] The requirements provide members with information on their benefits and help to ensure that members get accurate advice and benefits, and introduce further requirements which protect the interests of retirement fund members in respect of their risk benefits provided by the fund.[150]

Rule 11 of the PPRs requires an insurer to provide members with disclosures on their policy benefits.[151] Such information is required to be in simple, clear language which should not be misleading, and should be provided on time, to allow the member to make an informed decision.[152] The insurer is required to provide the information to the members before, during and after entering into the policy, and on an ongoing basis

[143] Rule 1.4 of the PPRs.
[144] *Ibid.*
[145] *Ibid.*
[146] Rule 1.6 of the PPRs.
[147] Rule 1.6 and 1.9 of the PPRs.
[148] Rule 1.6 of the PPRs.
[149] FSB “Retail Distribution Review” (November 2014) and the PPRs.
[150] Rule 1.6 of the PPRs.
[151] Rule 11 of the PPRs.
[152] *Ibid.*

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during the term of the policy.[153] The insurer must inform the members of any changes under the policy which affect their rights, such as variation of benefits, and any changes in premiums.[154] In terms of Rule 11, the insurer should communicate directly with members and provide them with all the necessary disclosures, where the insurer is able to do so.[155] Where the insurer is not able to communicate directly with the members to provide the necessary disclosures, the insurer should assist the employer/fund to provide the disclosures to the members.[156]

Before entering into the policy with the policyholders, the insurer is required to provide members with the premiums payable, the fees, the charges, the commission, the premiums and the frequency at which they should be paid, the guarantee period in respect of the premiums, and the cooling off rights under the policy.[157] After entering into the policy, the insurer is required to, within 31 days, provide the members with proof of cover, the process for claims and payment of benefits, exclusions in relation to their benefits, and the fees, charges, commission and premiums payable under the policy.[158] On an ongoing basis, the insurer is required to provide members with notice of changes to their policy terms and conditions, benefits, or premiums, 31 days before implementing the changes.[159] These requirements are market conduct regulations which will implement significant changes for retirement fund members, by ensuring that they are provided with sufficient information and disclosures on their benefits.[160] This differs fundamentally from the previous regulatory requirements, where the fund as the policyholder, had full rights and was entitled to the information under the group policy, and retirement fund members had limited or no access to the information.[161]

Rule 12.2 of the amended PPRs explicitly requires an insurer to enter into an intermediary agreement with an intermediary, only if the intermediary complies with

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153 *Ibid.*
154 *Ibid.*
155 *Ibid.*
156 *Ibid.*
157 *Ibid.*
158 *Ibid.*
159 *Ibid.*
160 *Ibid.*
161 *Ibid.*

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the FAIS competency requirements.[162] These requirements include the new FAIS Fit and Proper Requirements on product training.[163] Section 29 of the FAIS Fit and Proper Requirements stipulates that an advisor must conduct business and product-specific training before providing any financial services under a financial product.[164] This will apply to Rule 12.2 of the PPRs and group policies under a retirement fund, and will help ensure that intermediaries render appropriate advice to members, being familiar with the product specifications.[165]

Proposal FF stipulates provisions on customer information which product suppliers should provide to intermediaries, and customer information that advisers should provide to product suppliers.[166] Rule 12.3 of the PPRs implements Proposal FF of the RDR by requiring an insurer, at the request of an intermediary authorised by a policyholder, to provide the intermediary or the policyholder with the information indicated in the authorisation.[167] This applies whether or not the intermediary has an intermediary agreement with that insurer.[168] Where the insurer chooses to provide the information to the policyholder rather than the intermediary, the insurer must also provide the policyholder with a clear explanation as to why the information was not provided to the intermediary.[169] This applies to retirement fund members in respect of their benefits under a fund group policy and will assist in the provision of information to retirement fund members. It also extends the requirements of Rule 11 in respect of disclosures where the member requires information on their policy.[170]

[162] Rule 12.2 of the PPRs.
[163] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 12 to 13; FSB "Retail Distribution Review Proposals BB to EE" (November 2014) at 44 to 46; PPRs Rule 12.2.
[164] Section 29 of the FAIS Fit and Proper requirements.
[165] Rule 12.2 of the PPRs.
[166] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 12 to 13; FSB "Retail Distribution Review Proposals BB and FF" (November 2014) at 47.
[167] Rule 12.3 of the PPRs.
[168] *Ibid.*
[169] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 12 to 13; FSB "Retail Distribution Review Proposal FF" (November 2014) at 47; Rule 12.3 of the PPRs.
[170] *Ibid.*

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4.5. Discussion: the successes and failures of the amendments to enhance the protection of retirement fund members under the LTIA

The purpose of the amendments on the binder and outsourcing arrangements is to monitor the remuneration of outsourcing and binder services, in order to address abuses and inconsistencies identified by the regulator and enhance the protection of financial customers.[171] This is a market conduct regulatory mechanism which forms part of the government objectives on remuneration of financial service providers.[172] Regulation 6.2A(1) stipulates governance and oversight requirements on binder agreements which include, *inter alia*, the ability of an insurer to exercise effective oversight over the binder holder on an on-going basis, and the complete accuracy, validity and security of information provided by the binder holder.[173] The binder holder is also required to satisfy the fit and proper requirements, to provide the insurer with access to up-to-date, accurate data, for the insurer to have access to the data held by the binder holder.[174]

These reformed requirements will enable the insurer to monitor the activities of the binder holder, to ensure that the binder holder is operating the activities in line with the legislative requirements, and will enable the regulator to monitor the conduct of the insurer and the binder holder.[175] This will enhance the protection of retirement fund members on outsourced and binder activities in respect of services provided to the retirement funds.[176] The data requirements will also contribute to efficiency in providing disclosures to fund members on their benefits, and providing the necessary disclosures in terms of the requirements of the PPRs.[177]

Rule 20.2 of the amended PPRs stipulates provisions on the termination of group policies, including fund group policies which provide benefits to retirement fund

[171] FSB "Treating Customers Fairly Status Update: Retail Distribution Review (December 2016) at 8; LTIA Regulation 3.20(1) and 6.2A(1).
[172] *Ibid.*
[173] LTIA Regulation 6.2A.
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*

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members.[178] If the insurer terminates a policy for reasons other than the non-payment of premiums, or due to reasons which contractually entitles it to terminate the policy, the insurer can terminate the policy.[179] The insurer will remain liable for 31 days, for the risk under the policy, upon receipt of confirmation that the policyholder has been notified of the termination of the group policy and confirmation that the policyholder has entered into another group policy with similar benefits.[180] The insurer is required to notify the policyholder/members and the FSCA of the termination of the group policy.[181] The insurer is also required to provide proof to the FSCA that it notified the members of the termination of the group policy, or that it provided the policyholder with the necessary support to notify the members of the termination, where it is not possible for the insurer to communicate directly with the members.[182] The insurer is required to notify the FSCA, the policyholder and the members of the termination of the group policy, within 31 days of the date of termination.[183]

The requirements of Rule 20.2 introduce new market conduct regulations which monitor the conduct of insurers on termination of group policies, to ensure that retirement fund members are aware of the changes under their policies and are kept well informed.[184] The requirement to notify the FSCA implements checks and balances by ensuring that the FSCA can exercise its powers to protect the members of the fund under the group policy and to ensure that members are not left without cover, due to the termination of the group policy.[185] The changes introduced by the reformed sub-legislation are meant to ensure that members of group schemes, (including fund members), are provided with appropriate advice, appropriate products and adequate information on their benefits.[186]

Notwithstanding the successes discussed above, retirement fund benefits and risk benefits provided by the fund, and the bundled self-standing benefits are costly to invest and administer. In addition to the commission charged, there is also usually

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[178] Rule 20.2. of the PPRs.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*

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advice fees, administration fees, asset management fees, and consulting fees charged on the retirement and risk benefits provided to members. This results in lower retirement savings for members. Regulations should also include provisions on the sale, distribution and remuneration for products bundled with retirement fund benefits, to mitigate inconsistent and unfair treatment of customers. To achieve fair customer outcomes, bundled fees and commission should be regulated such that they are not only favourable to large schemes, but are also well balanced for members of small schemes, so that they too can enjoy any discounts on the bundled fees, and should apply to all type of schemes.

Data will remain a challenge in respect of providing disclosures to members or communicating with members. Some group policies terminate due to non-payment of premiums, resulting in members not having risk cover. As discussed above, there is also a challenge of failure to complete nomination forms by members, specifically for the self-standing funeral benefits and lumpsum death benefits which are usually bundled with retirement benefits. Despite disclosures provided to members in terms of the PPRs, some members simply ignore the communication. Some members may not fully understand the need to complete nomination forms. Apart from providing disclosures to members, sessions should also be held to explain the importance of completing nomination forms. Claim requirements and data management provisions under the PPRs, and those under the PFA, need to be properly aligned to prevent overlaps and regulatory gaps.

4.6. TCF Principles and retirement funds

4.6.1. The position prior to the introduction of twin peaks

TCF Principles were published by the former FSB in 2010 (and are still endorsed by the FSCA), with the objective to strengthen market conduct regulation.[187] TCF is an outcome-based methodology, which requires financial institutions to adhere to the fair treatment of customers, from product design to the marketing, advice, sale and post-

[187] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.

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sale stages of the products.[188] TCF principles inspire financial institutions to centralise the conduct of their business in a manner that supports the fair treatment of customers.[189] According to the FSB discussion paper:

> The TCF programme is a regulatory initiative by which firms are required to consider their treatment of customers at all the stages of the product life-cycle, including the design, marketing, advice, point-of-sale and after-sale stages. By encouraging firms to re-evaluate their company culture and to inculcate the attitude of treating customers fairly, the outcome is likely to result in a more optimal one from the perspective of the regulators, consumers and ultimately, firms.[190]

TCF Principles have the following desired outcomes:

- Customers can be confident they are dealing with firms where TCF is central to the corporate culture;[191]
- Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly;[192]
- Customers are provided with clear information and are kept appropriately informed before, during and after point of sale;[193]
- Where advice is given, it is suitable and takes account of customer circumstances;[194]
- Products perform as firms have led customers to expect, and service is of an acceptable standard and as customers have been led to expect;[195] and

[188] *Ibid.*
[189] *Ibid.*
[190] FSB "Treating customers fairly a discussion paper prepared for the Financial Services Board" (April 2010) at 1.
[191] *Idem* at 4.
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid*
[195] *Ibid.*

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- Customers do not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint. [196]

In 2017, the former FSB (now the FSCA) published the following TCF guidance documents for retirement funds, aimed at guiding the boards of retirement funds on the implementation of the TCF outcomes.[197] The guidance paper highlights *inter alia* how the six TCF outcomes apply to retirement funds.

Outcome 1 – Customers are confident that they are dealing with firms where the fair treatment of customers is central to the firm's culture

This principle entails that customers are confident that the retirement fund is managed and administered in a way that the fair treatment of members and beneficiaries is central to the retirement fund's culture.[198] "Member satisfaction should not be misconstrued for fairness: even if a member or beneficiary is satisfied with the service, it does not necessarily mean that the fund has treated the member fairly."[199]

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

The guidance notice stipulates that retirement products and services should be developed and administered to meet the needs and expectations of retirement fund members, beneficiaries, nominees or dependants of members, participating employers and members' spouses, to achieve the end result of providing members with suitable retirement benefits.[200] According to the guidance notice, the board should not be persuaded to buy products and services which are not suitable for members, to ensure that members are provided with appropriate benefits which cater for their needs, and that members and beneficiaries are kept adequately informed about their

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[196] *Ibid.*
[197] FSB "Guidance to boards of retirement funds for the implementation of the TCF outcomes" (October 2017).
[198] *Idem* at 1.
[199] *Ibid.*
[200] *Ibid.*

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benefits to enable them to make informed decisions.[201] The application of TCF Outcomes to retirement funds assists in the implementation of the government's objectives on the regulation of market conduct and enhances fair treatment of customers.[202]

(i) Guidance to benefit administrators for the implementation of the TCF outcomes

The guidance notice incorporates the 6 TCF Outcomes, *inter alia*. Outcome 1 states that "[c]ustomers are confident that they are dealing with administrators where fair treatment of customers is central to the administrator's culture".[203] This outcome is based on the principle that administrators should provide their services in a way that fair treatment of customers is central to the retirement fund and its members.[204] This principle highlights that the fair treatment of customers should not be confused with an excellent service provided to a client by the administrators.[205] The guidance notice also incorporates Outcome 2 of TCF Principles and stipulates that "[p]roducts and services are designed to meet the needs of the administrator's customers."[206] According to this principle, the services provided by administrators must, among other things, be designed to meet the needs of retirement funds and their members, be appropriate for its customers, and be clear and easily accessible by the customers.[207]

TCF Outcome 3 is also stipulate in the guidance notice and it stipulates that "[c]ustomers are given clear information and are kept appropriately informed before, during and after the time of contracting".[208] In terms of this principle, administrators are required to regularly provide clear and proper information to their customers and should provide the information timeously, including disclosures on fees, charges, costs

[201] *Idem* at 2.
[202] National Treasury *A safer financial sector to serve South Africa better* 2011 at 39.
[203] FSB "Guidance to benefit administrators for the implementation of the TCF outcomes" (October 2017).
[204] *Idem* at 1.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*
[208] *Idem* at 2.

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and risks associated with the products.[209] The guidance notice also stipulates TCF Outcome 4 which states that "[w]here customers receive advice, the advice is suitable and takes account of their circumstances".[210] According to this principle, customers should be provided with clear and appropriate advice.[211]

The guidance notice stipulates Outcome 5 which states that "[c]ustomers are provided with products that perform as product providers have led them to expect, and the associated service is both of an acceptable standard and what they have been led to expect."[212] Administrators are required to provide customers with suitable products that meet their needs and expectations.[213] TCF Outcome 6 of the guidance notice states that "[c]ustomers do not face unreasonable post-sale barriers to change product, switch provider, submit a claim or make a complaint".[214] According to this principle, administrators are required to ensure that customers do not face unreasonable barriers when they want to change a product, switch providers, submit a claim or make a complaint.[215] This principle requires that the administrators' complaints process must be accessible, understandable, and must not frustrate customers.[216]

The application of TCF Principles to administrators helps monitor their conduct, account for their conduct, ensure that they conduct their business on a culture centred on TCF and enhance the fair treatment of customers.[217] It also assists in the implementation of market conduct regulation in line with the government's market conduct regulation objectives.[218]

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209 *Ibid.*
210 *Ibid.*
211 *Ibid.*
212 *Ibid.*
213 *Ibid.*
214 *Ibid.*
215 *Ibid.*
216 *Idem* at 3.
217 National Treasury *A safer financial sector to serve South Africa better* 2011 at 39.
218 *Ibid.*

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(ii) Treating Customers Fairly complaints management requirements for retirement funds

The guidance notice stipulates that complaints management is a supervisory method that enables the board to assess whether it is fulfilling its obligations in terms of 7C(2)(a) of the PFA, and to properly safeguard the interests of the members in accordance with the fund rules and the PFA.[219] It also enables the board to assess the "suitability of the products and services provided by service providers."[220] The guidance notice is a significant tool of market conduct regulation as it helps the trustees to assess whether they are achieving their objectives and ensure that their conduct protects the interests of the fund members.[221] The complaints management process also helps the trustees identify gaps in the benefits provided to members and the quality of services provided by the service providers.[222] This will help in achieving the objectives of the government and TCF Outcomes by ensuring that members are provided with suitable benefits and provided with an income on retirement.[223]

(iii) Treating Customers Fairly complaints management requirements for administrators approved in terms of section 13B

The guidance notice stipulates that an efficient complaints management is a significant feature of TCF which promotes the fair treatment of customers.[224] It enables administrators to assess whether they are fulfilling their obligations in terms of the PFA, and whether they are complying with the legislation.[225] The guidance notice helps to monitor the market conduct regulation of retirement fund administrators and to account for their conduct.[226] The above mentioned guidelines incorporate TCF Principles in relation to the provision of retirement benefits, administration of retirement

[219] FSB "Treating Customers Fairly complaints management requirements for retirement funds" (October 2017) at 1.
[220] *Ibid.*
[221] *Ibid.*
[222] National Treasury "Twin Peaks in South Africa: Response and explanatory document accompanying the second draft of the Financial Sector Regulation Bill" December 2014 at 4.
[223] *Ibid.*
[224] FSB "Treating Customers Fairly complaints management requirements for administrators approved in terms of section 13B" (October 2017).
[225] *Ibid.*
[226] National Treasury *A safer financial sector to serve South Africa better* 2011 at 39.

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funds, and the handling of internal complaints.[227] The guidelines will assist in implementing TCF Principles and market conduct regulation in retirement funds.[228]

4.6.2. The position after the introduction of twin peaks

The FSCA issued a few Conduct Standards in terms of section 98(1) the FSRA, to align certain provisions under the PFA with the twin peaks, to achieve consistency and close regulatory gaps.[229] Examples of these Conduct Standards were discussed in the previous chapters, namely, the guidance notice on Directive 8, to provide guidance and interpretation on Directive 8.[230] Directive 8 requires all persons regulated by it to report any contravention with Directive 8.[231] Another example is the FSCA guidance notice on section 7B(1)(b), to remove the expiry of exemptions issued under section 7B(1)(b) of the PFA.[232] Guidance Notice 2 of 2020 was issued by the FSCA in terms of section 141 of the FSRA, to provide guidance on requirements in terms of the PFA, and the and FI Act with regard to the board's fiduciary duties in terms of section 7(c)(f), in respect of payment of a portion of unpaid surplus.[233]

The FSCA published a draft Conduct Standard on communication of benefit projections to members of pension funds.[234] The FSCA also issued a draft Conduct Standard on conditions for pension fund benefit administrators, to align the conduct of pension fund administrators with TCF Principles, and the objectives of the twin peaks.[235] The FSCA further published a draft Conduct Standard on requirements for payment of pension fund contributions, to replace Regulation 33 of the PFA and align the requirements of section 13A of the PFA with the objectives of the twin peaks.[236]

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[227] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 51.
[228] *Ibid.*
[229] Section 98(1) of the FSRA.
[230] Clause 2 of the FSCA Guidance Notice 2 of 2018.
[231] *Idem* at Clause 3.1.
[232] Clause 2,2 to 2.4 of the FSCA Guidance Notice 4 of 2018.
[233] Clause 1 of the FSCA Guidance Notice 2 of 2020.
[234] FSCA "Statement supporting the conduct standard – communication of benefit projections to members of pension funds" (June 2020) at paragraph 2.1.
[235] FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[236] FSCA "Draft conduct standard on requirements related to the payment of pension fund contributions" (29 May 2021).

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The FSRA incorporates the regulatory reforms and implements a consolidated ombuds system.[237] The FSRA incorporated and extended the provisions of the FSOS and repealed it.[238] The Ombud Council will supervise and monitor all the ombud schemes to promote the fair treatment of customers, and will be a regulator of the ombudsman, and will align with the TCF Principles for retirement funds discussed above.[239] The purpose of the guidance notices and Conduct Standards is to achieve better customer outcomes by requiring benefit administrators, retirement funds and their fund officers to conduct themselves in a manner that achieves fair customer outcomes.[240] The sub-legislation discussed above incorporates the TCF Principles for retirement funds discussed above. This will ensure consistency, efficiency and the protection of retirement fund customers.[241]

(i) Regulation 28

Regulation 28 of the PFA was implemented to protect members of retirement funds and to promote economic growth by ensuring that the members' benefits are properly invested.[242] Regulations 37, 38 and 39 issued in terms of section 36(1)(c) of the PFA were implemented to ensure that pension funds are properly regulated and are operated fairly and successfully.[243] The purpose of the default regulations is to enhance fair outcomes for members of retirement funds to ensure that they get good value from their retirement savings.[244] The trustees are required to provide default in-fund preservation to members who exit the fund before retirement, as well as a default investment portfolio to contributing members, and provide instructions in respect of their retirement benefits.[245]

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[237] Section 175 of the FSRA.
[238] *Ibid.*
[239] *Ibid.*
[240] The FSRA.
[241] *Ibid.*
[242] National Treasury "Explanatory Memorandum Revised Draft Regulations 37, 38 and 39 issued in terms of section 36(1)(c) of the Pension Funds Act, 24 of 1956" (December 2016) at 1.
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*

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The board of a retirement fund with a defined contribution category to which members belong should incorporate default investment portfolio(s) in its policies.[246] The purpose, fees, asset allocation, and risks associated with the investment portfolio(s) should be suitable for the class of members whose benefits will be "automatically" invested into.[247] The board should communicate the structure of the assets and the performance of the investment portfolio(s) to the members.[248] The fees and charges payable on the default investment portfolio(s) must be realistic and economical, given the size and asset distribution of the fund.[249] The board should monitor the default investment portfolio(s) regularly to ensure that it complies with the Regulations.[250] Loyalty bonuses in respect of the members' contributions or benefits are not allowed.[251]

If a member's investment option is stipulated in the fund rules, the member is allowed to instruct the fund every 12 months to transfer their benefits from the default investment portfolio to another investment portfolio provided in the investment policy.[252] The FSCA can exempt a fund from the requirements of the Regulations.[253] The fund rules of an occupational pension or provident funds must stipulate that members whose employment is terminated before they reach retirement should become paid-up members.[254] Upon termination of a member's employment before retirement, such members must become paid-up, until the members instruct the fund to pay the benefits to them or transfer the benefits to another fund.[255] The fund must issue paid-up certificates to the paid-up members according to the fund rules, within two calendar months of the member leaving employment.[256] Fees and charges should be the same for both active members and paid-up members, and the administration fees for the paid-up members should be reasonable and commensurate with those of

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246 National Treasury "Final Default Regulations", Regulation 37" (25 August 2017).
247 *Ibid.*
248 *Ibid.*
249 *Ibid.*
250 *Ibid.*
251 *Ibid.*
252 *Ibid.*
253 *Ibid.*
254 *Idem* at Regulation 38.
255 *Ibid.*
256 *Ibid.*

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the active members.[257] An initial one-off fee cannot be charged for paid-up members.[258] The fund rules of an occupational pension or provident fund should stipulate provisions for receiving benefits transferred from another fund, on condition that the transferred benefits must include a defined contribution portion.[259]

The fund should request a list of all paid-up membership certificates within 4 months of the member joining the fund.[260] If a paid-up member opts to transfer their benefits, the fund should arrange the transfer of the member's benefits without imposing any fees or charges.[261] The fund rules should stipulate that no new contributions or risk premiums/fees are payable for the paid-up members, and that a defined benefit should be changed to a defined contribution amount when a member becomes a paid-up member.[262] The paid-up members qualify for benefits in terms of the fund rules and must be provided with retirement benefit counselling before the benefits are paid to them or transferred to another fund.[263]

Board members are required to implement an annuity strategy.[264] If the fund rules allow a member to choose an annuity, the fund should implement an annuity strategy.[265] The board should prove to the FSCA that it assessed, to a great extent, the value of the earnings that the retirees will acquire, the assets, market fluctuations and the risk associated with the investments, as well as the benefits payable to the beneficiaries on the death of the member.[266] With regard to living annuities, the board should notify members frequently, on the type of investments, investment returns and changes on their benefits, in a simple and clear language.[267] The fees and costs should

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[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*
[260] *Ibid.*
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] *Idem* at Regulation 39.
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*

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be cost-effective and in relation to the benefits provided, and should be disclosed to members regularly, in a simple and clear language.[268]

Members should be provided with retirement benefits counselling at least three months before they reach the normal retirement age, according to the provisions of the fund rules.[269] The board is required to evaluate the annuity strategy once a year, to check if it complies with the Regulations and whether it is appropriate for the members.[270] Living annuities can be paid directly from the fund or via a fund policy, or be obtained from an external product provider as a component of the annuity strategy, on condition that it is restricted to the 4 investment portfolios prescribed in Regulations 28 and 37.[271] If a living annuity is paid from the fund, the fund should oversee the maintenance of the income obtained by the retirees and notify members if their drawdown rates are no longer achievable.[272] An annuity provided by a long-term insurer can be provided as part of the fund's annuity strategy.[273]

The default regulations are a significant market conduct regulation for retirement funds, providing protection to members and aiming to achieve fair customer outcomes by requiring retirement funds to implement annuity strategies aligned with the prescribed default investment portfolios.[274] The prescribed investment portfolios ensure that retirement funds do not deviate from the requirements, and must invest the members' benefits in the default investment portfolios.[275] Members are entitled to retirement benefit counselling to provide them with guidance on purchasing annuities when they retire.[276] The requirements for the board to communicate with members and disclose fees and costs payable in respect of their benefits offer protection for members.[277] The requirement to communicate the performance of investment portfolios to members, and for the board members to frequently assess the

[268] *Ibid.*
[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*
[273] *Ibid.*
[274] National Treasury "Final Default Regulations" (25 August 2017).
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid*

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performance of investment portfolios, is an additional protection tool for members, to prevent losses due to investments in portfolios that are not suitable for members.[278] Paid-up members are also awarded better protection by the requirements to stipulate provisions for paid-up members in the fund rules, and to provide the members with an option to transfer their benefits to other funds.[279] Paid-up members are also eligible for retirement benefit counselling, which provides guidance to members when they retire.[280]

(ii) POPIA and retirement funds

The objective of POPIA is to regulate the processing of personal information by public and private bodies in a way that allows for the individual's right to privacy.[281] POPIA applies to retirement funds, participating employers, and retirement fund administrators. Relevant stakeholders, as they collect and hold customers' information, are "responsible parties" and should therefore also comply with POPIA.[282] The term "responsible party" is defined as "a public or private body or any other person who, alone or with the assistance of others, determines the purposes and ways of processing personal information".[283] "Personal information" is broadly defined and includes, *inter alia,* information about "a person's race, gender, marital status, ethnic or social origin, age language, religion, education, medical history, financial history, criminal history, employment history, contact details etc".[284] The members, retirement fund customers, members' dependants or beneficiaries/nominees are data subjects.[285] A data subject "is an individual whose information is processed by a responsible party".[286] "Processing" covers "collecting, receipt, recording, collating, storage,

278 *Ibid.*
279 *Ibid.*
280 *Ibid.*
281 POPIA at 1.
282 Section 1 of POPIA.
283 *Ibid.*
284 *Ibid.*
285 *Ibid.*
286 *Ibid.*

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modifying, dissemination, distribution, merging linking, erasure, degradation and destruction of personal information".[287]

Retirement fund members or customers have the right to have their personal information processed according to the conditions of the lawful processing of personal information prescribed by POPIA.[288] This includes the right to, *inter alia,* be notified that one's personal information is being collected or accessed by an unauthorised person.[289] The fund, employer and administrator, as responsible parties, can only process personal information if the processing is adequate, relevant and not excessive, and can only collect the members'/customers' information for a specific purpose, and should notify the data subjects.[290] As responsible parties, the fund, employer and administrator are required to have processes in place to protect the members' and customers' personal information from damage, loss, unauthorised processing and access, and from destruction.[291]

4.6.3. Discussion: the successes and failures of the amendments to enhance the protection of retirement funds members under TCF

The reformed legislation, such as the guidance notices, draft Conduct Standards and Conduct Standards, incorporates TCF Principles for retirement funds. TCF Principles are no longer guiding principles only but have been embedded into various pieces of the new and reformed legislation, discussed above. These range from the government objectives for retirement funds namely, to provide adequate disclosures to members, proper and adequate advice, to encouraging members to preserve more for retirement, financial literacy programmes and financial inclusion. The regulatory reforms on benefit projections to members, communication to members, collection of contributions, and requirements for administrators, among others, incorporate governance and fit and proper requirements for retirement fund administrators, and also incorporate TCF Principles, with the objective of achieving better customer outcomes.

[287] Section 5 of POPIA.
[288] *Ibid.*
[289] *Ibid.*
[290] Sections 9 to 13 of POPIA.
[291] Section 19 of POPIA.

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The regulatory reforms under the RDR, PPRS, LTIA Regulations, the FAIS General Code of Conduct and the FAIS Fit and Proper Requirements, implement the government objectives to address abuses in the financial industry, and proper remuneration requirements for retirement and risk benefits provided to members. This also implements the objectives of achieving better customer outcomes. The PPRs incorporate all six TCF Outcomes discussed above, as well as the claims and complaints processes discussed above, to ensure better outcomes for members.

The default regulations discussed above also aim to protect the members' benefits to ensure that members' benefits are properly invested, members are provided with guidance and benefit counselling before they purchase annuities, and members are kept appropriately informed in respect of the investment of their benefits. The objectives are also in place to ensure better protection of members and to achieve better customers. This also aligns with the government objective to ensure that members get good value for their benefits. POPIA will apply to retirement funds to ensure the protection of personal information for retirement funds, members and their dependants. This also aligns with the government objectives and the TCF Principles for retirement funds discussed above.

However, apart from the successes indicated above, the TCF guidelines for retirement fund administrators should be considered together with the new and reformed regulatory requirements on the conduct of administrators, retirement funds and stakeholders discussed above. This adds to the burden of the existing segmented legislation on market conduct legislation as indicated in the previous chapters. The reformed legislation and the TCF guidelines for retirement funds and administrators have many similarities and may be burdensome to comply with. They may also result in regulatory overlaps and gaps. Examples of such overlaps are in the draft Conduct Standard on requirements for pension fund administrators, which incorporates TCF requirements on communication with members, and claim and complaints requirements. These requirements are also in the TCF guidelines and in the PPRs. This implies that an administrator is required to implement measures to comply with all the pieces of legislation.

When COFI is promulgated, it will also implement requirements on product design, sale and distribution of products, complaints and claims requirements, and

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other areas. There is therefore a need to properly align the various pieces of legislation and consolidate them to ensure efficiency and to achieve better customer outcomes. This will also be vital to achieve the objectives of market conduct regulation to monitor the conduct of administrators, and for members to be able to hold them accountable. The administrators and relevant stakeholders also need to have clear laws, which are properly consolidated, for them to understand their obligations and be able to conduct themselves accordingly, by aligning their business strategies, processes, products, and compliance and governance processes with the legislation, to ensure encompassing market conduct strategies and achieve the fair treatment of customers.

Despite the achievements of the PFA regulations discussed above, there should be an emphasis on ongoing counselling and financial literacy programmes, while members are still actively employed, to educate members on their options upon reaching retirement. There should also be ongoing sessions on the emphasis and the importance of members saving for retirement from an early age, given that our laws have not implemented compulsory preservation of retirement benefits when members exit their retirement funds while they are still employed.

4.7. Conclusion

This chapter has highlighted some of the legislative changes to regulation of retirement funds, namely, the FSRA which is the twin peaks, the Insurance Act, FAIS, PFA, ITA, LTIA and COFI, which will implement market conduct laws for financial institutions.[292] The FSCA will be the market regulator of COFI and will also regulate retirement funds.[293] POPIA was enacted on 1 July 2021, and regulates the protection of personal information for retirement funds and their clients.[294] The information regulator is the regulator of personal information under POPIA and will also regulate the processing of personal information under retirement funds.[295] The government is implementing various regulatory reforms in the retirement industry as part of its strategy to provide

[292] The FSRA, the PFA, ITA, LTIA, FAIS and the Insurance Act.
[293] Section 1 of the COFI Bill.
[294] Section 1 of POPIA.
[295] Section 9 to 12 of POPIA.

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retirement, life and disability benefits.[296] The objectives of the regulatory reforms in the retirement industry are to mitigate risks, abuses discussed above, regulate remuneration of retirement products and service, enhance savings, protect consumers, alleviate poverty and aim to achieve financial inclusion.[297]

TCF Principles aligns with the government's objectives to implement a strong market conduct regulation.[298] TCF Principles are being incorporated into reformed regulation to supervise the conduct of the financial institutions.[299] TCF guidance notices for retirement funds and administrators are incorporated into the new and reformed legislation.[300] These new laws are aligned with the objectives of the twin peaks and reflect that the regulators are implementing the government's objectives of enhancing the fair treatment of customers under retirement funds.[301]

Retirement funds in South Africa are now governed by laws which incorporate TCF Principles and aim to protect financial customers by ensuring that they are kept appropriately informed of their benefits and rights when they submit claims lodge complaints and when the employer does not pay contributions.[302] These new laws will help to address the regulatory gaps, as they are aligned with the objectives of the twin peaks, and will help to alleviate regulatory inconsistencies by introducing provisions which enhance the fair treatment of customers and require retirement funds, board members and fund administrators to adhere to the fair treatment of customers.[303]

Although the twin peaks introduced various regulatory reforms for retirement funds, there are various shortfalls highlighted in the previous chapters. One of the biggest challenges is the lack of sufficient retirement savings by many members. This is mostly caused by the current laws, which allow members to withdraw their benefits when they exit the retirement funds while they are still employed. Even though the government is in the process of introducing the two-pot retirement system, this may

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[296] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 40.
[297] *Ibid.*
[298] National Treasury *A safer financial sector to serve South Africa better* 2011 at 43.
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid.*
[302] *Ibid.*
[303] *Ibid.*

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not be of help to many members who already accessed their benefits over the past years. As discussed above, there are many people who do not belong to retirement funds, specifically those in the informal sectors. Some of the members who belong to retirement funds withdraw from their benefits involuntarily due to the liquidation of retirement funds caused by financial difficulties experienced by their employers. These regulatory reforms may therefore, to a very large extent, be beneficial in the future but this will be in the long run, as the members who accessed some of their benefits when they withdrew from the fund and those who do not belong to retirement funds may still encounter financial difficulties after retirement.

The delays in implementing the auto-enrolment system, the NSSF and other objectives, such as the mitigation of high costs on the administration of retirement and risk benefits, may continue to hamper the provision of sufficient retirement benefits to the citizens. Poverty may therefore continue to be a factor to many people in South Africa. The government should therefore make efforts to implement these objectives, some of which are overdue, sooner, to achieve the objectives that it identified, to promote the fair treatment of customers. Failure by members, to nominate beneficiaries for self-standing funeral and lumpsum benefits may result in post-sale barriers, and insurers not being able to pay these risk benefits to the members' families, which may also contribute to poverty and a high number of unclaimed risk benefits.

The difficulties experienced by retirement fund administrators, retirement funds, product providers, and other relevant stakeholders in obtaining data for existing members will cause challenges to communicate with members and to provide them with the required disclosures on their benefits. This may obstruct the achievement of the government objectives discussed above. I am of the view that it is not sufficient for retirement funds, administrators, intermediaries and other stakeholders to request the participating employers, trade unions or relevant parties to provide member data. The FSCA as the market conduct regulator should hold data campaigns to reach out to members and employers to emphasise the importance of providing the necessary data. Insurers, administrators, intermediary firms and other stakeholders have implemented the data management processes in their various businesses, in accordance with the new and reformed laws. However, since the implementation of

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these requirements, it has proven to be difficult to obtain data for existing members. As an example, before the regulatory reforms, and for many years, some group schemes were administered on a census-based administration system, where a labour union or a group of employers in the same industry would only provide the number of members or insured lives covered under a group policy, and a reconciliation of premiums to the insurer or administrator, without providing the members' details. Some insurers or administrators have still not obtained the data from these stakeholders, despite several requests and communications. It appears some of the stakeholders are unable to obtain the data. It will therefore be difficult for the insurers or administrators to provide disclosures to these members, to comply with data management laws and achieve the fair treatment of customers, in respect of these members.

In the next chapter, the paper will discuss market conduct regulation of retirement funds under COFI.

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CHAPTER 5: COFI AND MARKET CONDUCT REGULATION OF RETIREMENT FUNDS

5.1. Introduction

In the previous chapters, I analysed market conduct regulation for retirement funds before and after the twin peaks and the various regulatory reforms for retirement funds by introduced the twin peaks in South Africa. In this chapter, I will discuss how COFI will regulate market conduct in the retirement fund industry. This discussion analyses the objectives of COFI which are to advance market conduct regulation of the financial industry and enhance the protection of consumers, through market conduct regulations. This also includes an analysis of how COFI will replace existing conduct legislation through principles-based, outcomes-based, activity-based, and risk-based and proportionate approaches and how it COFI will codify TCF Principles.

In this chapter, I also analyse how COFI will apply to retirement funds and how it will implement market conduct laws. These market conduct laws will stipulate requirements on governance and culture for retirement funds, licensing requirements, market conduct provisions on product design, sale and distribution of retirement products. The chapter also discusses the COFI provisions for trustees and principal officers, which require them to fulfil their obligations and act in the best interest of customers, to ensure their fair treatment. The chapter will also highlight the successes and failures of COFI in respect of retirement funds. The chapter thus builds on research questions one and two.

5.2. Overview

The government's regulatory reforms highlight that the identified gaps in the current regulatory framework require a stronger market conduct regulatory framework, aligned with international standards.[1] As a result of this finding, as per the market conduct policy framework preceding current reforms, the new, enhanced framework will be

[1] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 9.

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incorporated into COFI.[2] COFI will implement outcome-based activities and will address the abuses in the financial sector.[3] After the implementation of the twin peaks through the FSRA, COFI is the next stage of regulatory reforms, whose objectives are to enhance regulation of fair treatment of customers in the financial industry, as discussed above.

The current financial sector laws which regulate the financial industry will be consolidated under the "conduct of business" regulatory framework.[4] COFI is intended to replace most of the current conduct legislation, which will include replacing existing statutes; for example, FAIS, the LTIA and the sub-legislation and incorporate it into COFI, and amending or incorporating new provisions into the PFA.[5] The FSRA is deemed to be "regulator-facing", while COFI will be "entity-facing" as it will regulate the conduct of financial institutions and the outcomes that they must deliver.[6]

The objectives of COFI will implement the government's market conduct regulation policy.[7] COFI will enhance consumer protection by implementing an absolute market conduct law, to ensure consistent consumer protection principles.[8] COFI will replace existing conduct legislation through the following approaches:

- **Principles-based** – a principles-based approach prescribes rules that stipulate the intention of regulation, rather than rules that specify requirements of a financial institution.[9]
- **Outcomes-focused** – an outcome-based approach supports the delivery of desired outcomes by financial institutions and allows the regulator to monitor the

[2] *Ibid.*
[3] *Ibid.*
[4] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 33.
[5] National "Treasury Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 20.
[6] National Treasury "Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 21.
[7] *Idem* at 14.
[8] *Ibid.*
[9] *Idem* at 11.

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level at which financial institutions can achieve the desired outcomes, to implement measures to prevent and limit the risk of poor customer outcomes.[10]

- **Activity-based** – an activity-based approach defines the activities that should be conducted by financial institutions and removes the various regulatory silos.[11]

- **Risk-based and proportionate** – a risk-based and proportionate approach allows the regulator to identify areas that present the highest market conduct risks and use proportionate regulatory functions to attend to these risks. [12]

Chapter 3 of COFI will apply to retirement funds.[13] It stipulates governance and cultural principles which require financial institutions to conduct their businesses on a culture that gives regard to the fair treatment of customers.[14] COFI stipulates requirements for designing and providing products to financial customers.[15] This is applicable to long-term insurance products, which includes products offered to retirement fund members/retirement funds.[16] COFI requirements on financial products incorporate the provisions of the PPRs.[17] Clauses 20 to 23 of COFI relate to long-term insurance products and retirement products, as they stipulate principles for the design and provision of financial products.[18] These provisions are currently incorporated in the amended PPRs.[19] Clause 9 will regulate the distribution of financial products, as it stipulates requirements on the appointment of representatives.[20] Clause 13 will regulate the distribution and advice models for long-term and retirement products.[21] The provisions of Clause 13 requires a financial service provider to take reasonable steps to monitor the quality of advice provided to financial customers.[22]

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[10] *Ibid*.
[11] *Idem* at 10.
[12] National Treasury "Media statement Invitation for public comments on the draft Conduct of Financial Institutions Bill" (2018) at 2.
[13] *Idem* at 44; chapter 3 of COFI.
[14] *Ibid*.
[15] Clauses 20 to 23 of COFI.
[16] *Ibid*.
[17] Rules 4, 1.5, 1.6, 1.7, 1.8, 1.9, 2, 6, 10, 11 of the PPRs.
[18] Clauses 20 to 23of COFI.
[19] Rules 1.4 and 2.2 of the PPRs.
[20] Clause 9 of COFI.
[21] Clause13 of COFI.
[22] *Ibid*.

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The above-mentioned provisions support the objectives of RDR distribution models, as they require distribution models to enable customers to understand and compare costs of long-term and retirement products.[23] They also endorse the RDR objectives in that they require distribution models which support the delivery of fair outcomes.[24] COFI introduces an activity-based licensing for financial products and services.[25] Long-term insurers will be required to be licensed for each activity that they conduct.[26] In some instances, the activity may not relate to a corresponding product.[27] This will apply to the retirement fund industry on long-term insurance products offered to retirement funds.

5.3. The COFI Bill and retirement funds

Pension funds are currently regulated by the PFA, the ITA, the FSRA, FAIS, the LTIA and the Insurance Act.[28] The PFA stipulates prudential and market conduct requirements for retirement funds.[29] It also stipulates provisions on the duties and responsibilities of participating employers, administrators, trustees, auditors, valuators, monitoring persons and principal officers.[30] Retirement funds will be licensed by the regulators under the PFA and COFI, to ensure consistency of fair treatment of members of retirement funds.[31] Retirement fund administrators and other service providers currently governed by the PFA will be licensed under COFI only.[32] Registration of retirement funds will continue to be regulated by the PFA, in respect of the establishment of a fund as a separate juristic person.[33]

Trustees and principal officers are key persons of pension funds and will continue to be obliged to fulfil their fiduciary duties, to be responsible and accountable

[23] Financial Services Board "Retail Distribution Review" (November 2014) at 1.
[24] *Ibid.*
[25] National Treasury "Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 36.
[26] *Ibid.*
[27] *Ibid.*
[28] *Idem* at 25.
[29] *Ibid.*
[30] *Ibid.*
[31] *Idem* at 25 and schedule 6 of COFI.
[32] *Ibid.*
[33] National Treasury "Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 25.

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for the fund's compliance requirements. As officers of the fund, they will be required satisfy the fit and proper requirements and will be regulated as key persons under the FSRA.[34] Clause 12 of COFI requires a financial institution to "act in good faith and in the interests of its financial customers fairly and treat them fairly."[35] A financial institution is also required to, *inter alia,* conduct its business honestly, fairly and with due skill, care and diligence.[36] A financial institution should ensure that financial products and services are provided in a manner that is clear and unambiguous.[37] These requirements will apply to retirement funds and retirement fund administrators.[38]

COFI legalises TCF Principles and requires a financial institution to, *inter alia,* prioritise the fair treatment of customers, and for customers to be provided with appropriate products and services.[39] Customers must be provided with clear information, should be kept adequately informed about their benefits and must be provided with accurate advice.[40] Retirement funds and administrators will be required to treat retirement fund members/customers fairly and ensure that they are provided with suitable products and advice.[41] COFI prescribes provisions on governance and culture.[42] It stipulates that the governing body of a financial institution is responsible for compliance with COFI, for implementing governance arrangements and monitoring and supervising the governance of the financial institution.[43] The trustees of retirement funds, as the governing body, are responsible for governance of the fund, and the governing body of an administrator is responsible for governance of the administrator.[44] A principal officer is a key person and is required to comply with the fit and proper requirements.[45]

[34] *Ibid.*
[35] Clause 12 of COFI.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] Clause 13 of COFI.
[40] *Ibid.*
[41] *Ibid.*
[42] Clauses 14 to 16 of COFI.
[43] Clauses 15 to 16 of COFI.
[44] *Ibid.*
[45] Clauses 18 to 19 of COFI.

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COFI stipulates provisions to issue conduct standards for trustees on eligibility criteria, fit and proper requirements and governance.[46] Furthermore, different conduct standards can be issued for different types of funds.[47] Employers will be classified as "supervised entities" under COFI and FSRA, in respect of their obligations under section 13A of the PFA.[48] The definition of "supervised entity" under the FSRA will be amended to include employers.[49] According to the proposed amendments under the FSRA, "supervised entity" in respect of employers is defined as "(d) an employer as defined in section 1(1) of the Retirement Funds Act in respect of the employer's obligations in terms of that Act, for the powers to be exercised in terms of Chapters 7, 9, 10 and 13 of this Act."[50]

COFI requires a "self-administered" retirement fund to be licensed for retirement fund administration, in addition to the activity of providing financial products.[51] This is in order to close the current regulatory gap on of "self-administered" funds.[52] The regulators will issue conduct standards for licensing requirements for retirement funds, in respect of each type of retirement fund.[53] Section 13B retirement fund administrators will licensed under COFI, and will be referred to as "third-party retirement fund administrators".[54] The regulation of retirement fund administration under section 13B of the PFA will be removed from the PFA, and will be incorporated COFI.[55] State-owned funds such as Transnet Retirement Fund and GEPF will be regulated by COFI and the PFA.[56]

5.4. The successes and failures of COFI to enhance the protection of retirement funds and their members

COFI will implement the objectives of the twin peaks regulatory framework by introducing a market conduct regulation, with the objective of enhancing the fair

[46] Clauses 4 and 5 of COFI.
[47] *Ibid.*
[48] Clause 1 of COFI.
[49] *Ibid.*
[50] Part 17(2) of Schedule 2 of COFI.
[51] Item 5b of Schedule 6 of COFI.
[52] Item 5c of Schedule of COFI.
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] Clause 1 of COFI.

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treatment of customers. The consolidated market conduct laws will assist to ensure efficiency and the fair treatment of retirement fund customers. The governance requirements for administrators and retirement funds, board members and principal officers will also help enhance the fair treatment of retirement fund customers and the protection of their benefits. The requirements on product design, advice, distribution of products, and complaints and claims management will also help ensure that retirement fund members are provided with accurate and adequate advice, and appropriate products which perform as members have been led to expect. The requirements for employers to regulated as "supervised entities" will help address unfair outcomes for members, by ensuring that employers are regulated to fulfill their obligations in respect of enrolling members to the fund, paying contributions and submitting claims on behalf of the members.

The licensing requirements for retirement funds, self-administered funds, administrators, product providers and intermediaries will help clarify the financial activities of these entities and to issue conduct standards to regulate these financial institutions. This will also ensure efficiency in the retirement fund industry.

Notwithstanding the successes discussed above, COFI stipulates a regulatory framework for market conduct regulation. This implies that there will be various pieces of sub-legislation which will stipulate market conduct regulation. This will be in addition to the many financial laws and sub-legislation that have been issued to date, and will mean additional compliance requirements for retirement funds, administrators, brokers, insurers, employers and other relevant stakeholders. This also means that retirement funds, administrators, intermediaries, product providers and relevant stakeholders must implement compliance measures to comply with COFI and align their processes and business strategies with COFI. It is costly to implement these measures, and these costs will be additional costs for the administration of retirement funds and the provision of retirement products and services, some of which will be borne by the members. This may impede the objectives of enhanced retirement savings for members and may have negative customer outcomes for the members and their dependents.

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Retirement funds will require dual licensing under section 4 of the PFA and under COFI.[57] The definition of "financial institution" under the FSRA includes retirement funds.[58] Providing a financial product is an activity that is required to be licensed under COFI.[59] The FSRA defines "financial product" so as to include the activity of providing retirement fund benefits by a retirement fund to its members.[60] The licensing of retirement funds (including self-administered retirement funds) under COFI for providing retirement benefits to members will be an activity-based licensing.[61] This amounts to dual licensing for retirement funds and will require dual compliance requirements for licensing or retirement funds under the PFA and COFI.

Despite that the objective of the market conduct regulatory requirements to promote efficiency and the fair treatment of customers, it may be onerous for retirement funds to comply with. The officers of retirement funds (trustees and principal officers) will need to review and streamline their compliance and governance processes to ensure compliance with the licensing requirements. At this point it is not clear which Authority (the FSCA/the PA) will be responsible for the licensing of retirement funds under COFI. The regulators will need to collaborate and agree on this function. The regulatory functions and powers in respect of the licensing requirements are still yet to be tested, to assess the efficiencies and regulatory risks that they may impose.

There are various market conduct laws for retirement funds which have similar or the same requirements, namely, governance of retirement funds under the King IV Report, the Circular, guidance notices issued by the FSCA in respect of board members, draft Conduct Standard in respect of requirements for retirement fund administrators, draft Conduct Standard on the benefit projections and communication to members, and the Conduct Standard on the payment of contributions, among others. In addition to this, there are claims and complaints requirements under the PPRs, which are also incorporated in the draft Conduct Standard for pension fund administrators. The disclosure requirements in the draft Conduct Standard for

[57] Section 4 of the PFA and Schedule 6 of COFI.
[58] Section 1 of the FSRA.
[59] Schedule 6 of COFI.
[60] Section 1 of the FSRA.
[61] Schedule 6 of COFI.

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retirement fund administrators are also in the PPRs. The fit and proper requirements for board members are also in the King IV Report, in the Circular and in some of the draft Conduct Standards, in the FAIS Fit and Proper Requirements, and some of them will be incorporated into COFI. There are various market conduct laws which need to be consolidated and aligned with COFI and the PFA, to prevent regulatory gaps and overlaps, to support the fair treatment of customers, and to promote efficiency in the market conduct regulation of retirement funds

5.5. Theoretical argument regarding the application of rules-based principles for retirement funds

Against this background, I discuss some brief concluding thoughts on the regulatory approach to retirement funds. COFI will implement consolidated market conduct laws through principles-based, outcome-based, activity-based, risk-based and proportionate approaches, which will be achieved through the FSCA's regulatory strategies discussed in the previous chapters of this thesis.[62] However, I am of the view that, while the above mentioned regulatory approaches are aimed at providing the regulator with powers to monitor and supervise the conduct and activities of financial institutions, (including retirement funds) and to remove the various regulatory silos, these regulatory approaches alone are not suitable for retirement funds. These regulatory approaches will be applied to the market conduct regulation of retirement funds, but the PFA as the principal statute of retirement funds and the ITA will continue to regulate the taxing of retirement funds. The PFA prescribes provisions which require application of rules for retirement funds and the rules-based regulatory methods.

Pan notes that "rulemaking is the setting of rules or standards to govern the acts of private persons where such a rule is a general norm mandating or guiding conduct or action in a given type of situation".[63] The author also notes that rule making is complex as it requires the regulator to prescribe specific rules which must be applied to fulfil specific obligations.[64] As an example, section 4 of the PFA prescribes

[62] National Treasury "Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill" at 11.
[63] Pan "Understanding Financial Regulation" 2012 *Utah Law Review* 1897 at 1909.
[64] *Ibid*.

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requirements for the establishment retirement funds through registration of the fund rules.[65] Section 4 requires a fund to draft rules which stipulates provisions for the operation of the fund, which must include the appointment and duties of the fund officers (trustees and principal officers), the provision of retirement and risk benefits by the fund, the payment of benefits under the fund, eligibility requirements for members, participating employers' obligations, payment of contributions, among other things.[66] Retirement funds can only be established through the registration of rules, and the fund must provide benefits and operate the fund in terms of the fund rules, the PFA, the ITA, the FSRA, the Insurance Act, and other relevant statutes.[67] COFI will require retirement funds to be licensed to monitor the activities of providing benefits to the members.[68] However, the requirements to register retirement funds in terms of section 4 will remain in place and are rules-based requirements.[69]

The definitions of the various types of retirement funds in the ITA and the PFA are also rules-based, as they prescribe rules to be applied for the operation of these funds which must be incorporated in the fund rules.[70] The definition of the various retirement funds in the ITA also prescribe tax rules for retirement funds.[71] COFI will therefore prescribe market conduct regulations for retirement funds while, the provisions of the PFA and the ITA which are rules-based will continue to provide rules-based requirements. I am of view that the regulation of retirement funds should therefore comprise principles-based, outcome-based, activity-based, risk-based and proportionate regulatory methods, as well as the rules-based regulatory methods. Although the market conduct regulatory methods introduced by COFI aim to implement the principles-based, outcome-based, activity-based, risk-based and proportionate regulatory methods to remove the regulatory silos, retirement funds are complex and have many rules which already regulate them. In addition, the twin peaks financial regulation has introduced various laws, which creates further segmentation of laws through market conduct laws and prudential standards. I am of the view that a sub-silo should be created for retirement funds to streamline the various segmented

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[65] Section 4 of the PFA.
[66] *Ibid*.
[67] *Ibid*.
[68] Schedule 2 of COFI.
[69] Section 4 of the PFA.
[70] Section 1(1) of the ITA, and section 1(1) of the PFA.
[71] Section 1(1) of the ITA.

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laws created by the twin peaks, to achieve efficiency and enhance the fair treatment of customers and better outcomes for customers. I recommend that the FSCA should consider amending its regulatory strategies to establish a sub-silo for retirement funds and align its strategies to incorporate rules-based regulatory strategies.

In order to illustrate the above – albeit not with a pure market conduct example, but one that may affect the integrity of retirement funds and, consequently, those who benefit from proper governance – I outline a brief reference to Environmental, Social, Governance ("ESG") and retirement funds below. ESG considerations in the context of companies have been sources of contention in South Africa.[72]

5.6. Example: ESG and retirement funds

5.6.1. Overview

In relation to funds, ESG refers to investment channels which originated in the beginning of the twentieth century, and which invest in entities that support environmental, social and governance objectives.[73] "ESG funds" became popular in the 1970s, and gained greater recognition in the 1990s, and have to date attracted several investors due to the significance of "climate change, diversity and inclusion, companies' compliance with regulations, and boards of directors' composition".[74] There is however considerable deliberation on whether ESG funds are suitable investment alternatives for retirement funds, due to their focus on environmental, social and governance objectives, in contrast to the objectives of retirement benefits which are for economic and financial gain for the individuals who invest in them.[75]

It is argued that various officers of retirement funds who hold fiduciary duties (trustees and principal officers), and auditors and valuators of retirement funds are reluctant to invest in ESG funds due to beliefs that ESG funds do not yield favourable

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[72] See e.g. Webber Wentzel *ESG: Reporting & Disclosure in a New Era for Companies JSE's Sustainability and Climate Disclosure Guidances* 2022.
[73] DeSipio "ERISA Fiduciary Duties and ESG Funds: Creating a Worthy Retirement Future" 2023 *Drexel Law Review* 121 at 121.
[74] *Ibid*.
[75] *Ibid*.

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returns in the investment markets, and it will not be in the best interest of the members to invest in such investment portfolios.[76] In contrast, the supporters of ESG funds contend that the objectives of ESG funds have developed over the years to apply ESG components on "investment risks and returns and strengthen the traditional investment analysis".[77] There are many investors who are keen to invest in ESG funds, and investment companies have realised the need to provide "socially responsible investment products" to address the needs of the customers.[78]

DeSipio recommends that the United States of America ("USA") law makers should consider reforming the USA retirement fund laws to implement ESG investments for retirement funds.[79] The author argues that one of the ESG funds was found in 1928, with the objective to prohibit investments which advance alcohol, tobacco and gambling.[80] The author notes that over the years, ESG funds have developed from the objectives of prohibiting the investment of companies that supported the Vietnam war, and prohibiting companies that supported apartheid in South Africa, to the objectives of "human rights, climate change, and anti-corruption in the recent years".[81] The author also discusses that it has been established that ESG investments have recently gained extensive recognition by wealthy investors, and are increasingly expanding, with high contributions from retirement funds.[82]

The author recommends that, due to different views on ESG investments for retirement funds by the USA administration, the USA law makers should consider amending their laws to incorporate provisions to allow ESG investments for retirement funds.[83] The writer suggests that the USA policy law makers should amend the "Financial Factors in Selecting Retirement Plan Investments Act" to consider ESG

[76] *Ibid.*
[77] *Ibid.*
[78] Musciano "Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing" 2022 *Georgia Law Review* 427 at 429.
[79] DeSipio "ERISA Fiduciary Duties and ESG Funds: Creating a Worthy Retirement Future" 2023 *Drexel Law Review* 121 at 122.
[80] *Idem* at 123.
[81] *Ibid.*
[82] *Idem* at 123-124.
[83] *Idem* at 125-126.

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components, to evaluate investment growth and negative returns for retirement funds locally and internationally.[84] She also suggests that the proposed changes by the USA Department of Labour should be included in the amended laws to detract contradictory views that ESG funds are not favourable for retirement fund.[85]

The writer also recommends that the amendment laws should include provisions for retirement fund fiduciary holders to "consider environmental, social, governance, or similar factors, that the fiduciary prudently determines are material to evaluating an investment's" estimated risk-returns, and consider collateral environmental, social, governance, or similar factors .." for retirement fund investments strategies and investment portfolios.[86] The writer further recommends that the amended laws should stipulate that ESG elements are considered for the benefit of the members, prudential analysis is conducted to ensure that retirement funds comply with the industry's solvency and liquidity requirements, and that investment returns are achieved for the members.[87]

The author emphasises that given the robust investment returns by ESG investments in recent years to date, and the concerns on the climate changes worldwide, retirement funds should be provided access to invest in ESG funds.[88] She also emphasises that ESG components have become significant indicators for investors worldwide, and are also significant for retirement funds, due to vast climate changes which have enormous environmental and social negative impact worldwide.[89] The author argues that this will also achieve "financially successful retirement plans while also ensuring "a world worth retiring in."[90]

Due to the rapid climate changes and the damages that it causes economically and socially worldwide, researchers have recommended that regulators should design compulsory ESG disclosures to stipulate accurate and consistent data, to mitigate the

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[84] *Idem* at 175-176.
[85] *Ibid*.
[86] *Idem* at 177.
[87] *Idem* at 178.
[88] *Idem* at 180-181.
[89] *Ibid*.
[90] *Ibid*.

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mismanagement of investments in ESG funds.[91] ESG regulations are being developed in various countries worldwide to stipulate requirements for designing product features for ESG investments.[92] This is to provide the necessary information for investment managers and investors, for the proper evaluation of ESG products, and to prevent greenwashing.[93] Greenwashing is defined as "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."[94] This is usually done to mislead clients with greenwashing claims to discourage them from claiming.[95]

The USA government is in the process of developing compulsory ESG disclosures to be incorporated into their laws.[96] International bodies such as the International Reporting Standards Foundation recently established the International Sustainability Standards Board ("the ISSB") which is responsible for designing international ESG disclosures.[97] The CFA Institute designed Global ESG Disclosure Standards for Investment Products to abolish standards which were not compliant with international ESG reporting and to provide requirements for various types of investments.[98] The Sustainability Accounting Standards Board ("SASB") and the Global Reporting Initiative ("GRI") stipulate ESG reporting requirements.[99]

There are several countries which have developed and implemented ESG regulations and standards, namely China, the European Union ("EU"), Japan, Malaysia, and Mongolia.[100] Countries in the process of drafting and designing the ESG disclosures and regulations are Russia, South Africa, and South Korea.[101] The countries with regulations and standards being developed are Bangladesh, Canada,

[91] Musciano "Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing" 2022 *Georgia Law Review* at 427.
[92] *Ibid.*
[93] *Ibid.*
[94] *Idem* at 439.
[95] *Ibid.*
[96] *Idem* at 454-456.
[97] *Idem* at 457-458.
[98] *Idem* at 458-459.
[99] *Ibid.*
[100] *Ibid.*
[101] *Idem* at 459-460.

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Chile, Colombia, the Dominican Republic, India, Indonesia, Kazakhstan, New Zealand, the Philippines, Singapore, Thailand, the United Kingdom ("UK"), and Vietnam.[102] Mexico and Sri Lanka are in the process of discussing the development and implementation of ESG disclosure requirements.[103]

The EU is a significant leader in implementing ESG regulations, which it implemented in 2020 "to facilitate sustainable investment," and in 2021, it also implemented its Sustainable Finance Package in 2021.[104] The Ministry of Ecology and Environment in China implemented its own proposed ESG disclosures for companies.[105] Despite all the efforts by international bodies and various countries to design ESG regulations, it is perceived that various officers of retirement funds who hold fiduciary duties (trustees, principal officers), and auditors and valuators of retirement funds, are reluctant to invest in ESG funds due to beliefs that ESG funds do not yield favourable returns in the investment markets, and it will not be in the best interest of the members to invest in such investment portfolios.[106]

5.6.2. Discussion of the successes and failures of ESG funds

ESG funds are vital for enhancing requirements to address climate changes as their investments support environmental, social and governance objectives.[107] ESG funds are also important as they assist company directors to comply with regulations on climate changes.[108] ESG funds are essential for advancing environmental, social and governance standards, and awareness of climate changes, to address the challenges and damages caused to economies on people's health, financial drawbacks, death and loss of income. ESG funds have advanced in recent years, as evidenced by the use of ESG components to identify investment risks and investment growth in ESG

[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] *Idem* at 462.
[106] *Ibid.*
[107] DeSipio "ERISA Fiduciary Duties and ESG Funds: Creating a Worthy Retirement Future" 2023 *Drexel Law Review* 121 at 121.
[108] *Ibid.*

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investments.[109] ESG funds have become favourable for many investors who wish to invest in products on climate changes.[110]

One of the ESG funds was established in 1928, to prohibit investments which supported the advancement of alcohol, tobacco and gambling.[111] In the subsequent years, ESG funds were established to prohibit investments in companies which supported the Vietnam war and apartheid in South Africa, to progress the objectives of "human rights, climate changes, and anti-corruption in the recent years".[112] Many retirement funds and wealthy investors have contributed to the growth of ESG investments in recent years, and will help to contribute to a healthy retirement environment.[113]

Various countries are designing ESG regulations to provide requirements on ESG products, to equip investment managers and investors with adequate disclosures on ESG products, and to protect customers from being misled by entities on environmental practices.[114] International bodies such as the ISSB, have been established to design international ESG regulations and reporting standards for ESG investments.[115] China, the EU, Japan, Malaysia, and Mongolia have designed and implemented ESG laws and standards.[116] USA, Russia, South Africa, South Korea, Canada, Chile Columbia, India and UK among others are in the process of designing ESG regulations.[117]

Notwithstanding the successes discussed above, there are many doubts whether ESG funds can achieve positive investments for retirement benefits, since their objectives are to advance environmental, social and governance objectives,

[109] *Ibid.*
[110] Musciano "Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing" 2022 *Georgia Law Review* 427 at 429.
[111] DeSipio "ERISA Fiduciary Duties and ESG Funds: Creating a Worthy Retirement Future" 2023 *Drexel Law Review* 121 at 123.
[112] *Ibid.*
[113] *Idem* at 123-124 and 439.
[114] *Ibid.*
[115] *Idem* at 457-458.
[116] *Idem* at 457-458.
[117] *Idem* at 459- 460.

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versus the objectives of retirement funds to provide an income to the members.[118] Retirement fund officers and investment managers are reluctant to recommend ESG investments for retirement funds, due to concerns that they may fail to protect the interests of the retirement funds and their members, and will be deemed to have failed to exercise their fiduciary duties diligently, if there are negative investment returns.[119] Even though international bodies and some countries like China and the UK have developed and implemented ESG regulations, various countries are still in the process of developing and designing ESG laws, while others are still only discussing them.[120] It is still a long way before ESG investments are regulated worldwide and before they can become compulsory for retirement funds.

Musciano notes that South Africa is one of the countries in the process of developing and designing ESG regulations.[121] The investment of retirement funds in South Africa are prescribed by the PFA and Regulation 28.[122] Regulation 28 regulates the investment of retirement funds in default investment portfolios, the fees payable, asset allocation, risks associated with the investment portfolio(s), among other things.[123] Section 19 of the PFA also regulates the investment of retirement funds.[124] The Investments of retirement funds benefits are also regulated by the governance requirements of the Circular which stipulates provisions for trustees to properly administer, invest the fund assets, and to account to the fund members.[125] However, as South Africa is still in the process of developing ESG regulations, the laws which regulate the investment of retirement fund benefits do not incorporate requirements for ESG investments for retirement funds.

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[118] DeSipio A "ERISA Fiduciary Duties and ESG Funds: Creating a Worthy Retirement Future" 2023 *Drexel Law Review* 121 at 121.
[119] Musciano "Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing" 2022 *Georgia Law Review* 427 at 456 to 457.
[120] *Idem* at 457-458.
[121] Idem at 459 to 460.
[122] National Treasury "Explanatory Memorandum Revised Draft Regulations 37, 38 and 39 issued in terms of section 36(1)(c) of the Pension Funds Act, 24 of 1956" (December 2016) at 1.
[123] *Ibid*.
[124] Section 19 of the PFA.
[125] FSB Circular PF No. 130 "Good Governance of Retirement Funds" (June 2007) at paragraph 13.

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Retirement funds in South Africa are managed like a company, with trustees and principal officers who are assigned fiduciary duties that they owe to the retirement funds and its members.[126] The members of retirement funds are deemed to have similar rights to shareholders of a company.[127] The PFA and the Circular stipulate governance requirements for retirement funds[128]. The Kind IV Report stipulates governance principles for retirement funds similar to those for companies.[129] The governance provisions for retirement funds compare shareholders of a company to the members of retirement funds.[130] A retirement fund is deemed to be a company and the trustees are compared to directors and the governing body, while a principal officer is deemed to be a CEO of a retirement fund akin to the CEO of a company.[131]

As retirement funds are compared to a company, the trustees to a governing body of a company, the principal officer to a CEO of a company and members to shareholders of a company, I recommend that the objectives of retirement funds in South Africa should also include objectives to invest in ESG funds, to advance the economic, social and governance objectives. I also recommend that regulations should be developed for retirement funds to invest in ESG funds, to achieve retirement environment that is healthy and worth retiring in, while also achieving the objectives of providing an income to the members and their families. Regulations should also be designed to prescribe disclosures for ESG investments and reporting, and for South Africa to align with the international ESG disclosures and reporting standards. Retirement fund officers, valuators, auditors and investment managers should be educated on ESG investments to inform them of their significance, to eliminate the doubts created on the efficiencies of ESG investments. The FSCA should also include ESG investments in its financial literacy programmes for customers.

I also recommended that the National Treasury should develop a policy specifically for retirement funds on ESG investments, and stipulate objectives, proposed standards, regulations and reporting requirements for ESG investments,

[126] *Idem* at paragraphs 3 and 4.
[127] *Ibid.*
[128] *Ibid.*
[129] Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 95.
[130] *Ibid.*
[131] *Ibid.*

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which are aligned with international standards. South Africa has experienced the damages caused by floods in recent years due to climate changes, which also caused damages to the economy, caused the death of citizens and financial losses and loss of homes for many people. Some of the damages caused by the floods in Kwa-Zulu Natal are still yet to addressed, and some families are still homeless after losing their homes and loved ones to floods. In May 2023, floods caused damages in the Western Cape in South Africa. During the September 2023, some parts of South Africa in Cape Town and other areas have experienced harsh sea waves, which have caused damages to people's homes and assets. There were floods in some parts of Cape Town in September 2023, which have caused damages to people's homes, assets, infrastructure, among other things. This shows the reality of climate changes, and the how it is also affecting South Africa, and causing damages in many ways. ESG investments for retirement funds will assist to achieve the objectives of ESG funds, to contribute to investments to repair the damages caused by climate changes to the South African economy and other countries.

5.7. Conclusion

In order to achieve market conduct regulation of retirement funds, the PFA will be amended to align with COFI.[132] Some of the provisions of the PFA will be repealed and some will be amended, as discussed above.[133] One of the pertinent amendments to the PFA which relate to market conduct regulations under COFI are that the PFA will be named the Retirement Funds Act.[134] The term "pension fund" will be replaced with the term "retirement fund" as the term "pension fund" only refers to one type of retirement, fund and may be confusing.[135] The PFA will introduce a centralised "unclaimed benefit fund" to enhance the protection of fund members.[136] The terms for the different types of retirement funds, namely, "pension fund", "pension preservation fund", "provident fund", "provident preservation fund", "retirement annuity fund" and "unclaimed benefit fund" will be defined so as to describe what these retirement funds

[132] Schedule 2 of COFI.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*

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do, instead of referring to the ITA.[137] This is to enable the Authorities to issue conduct standards for each type of retirement fund.[138] The definition of "beneficiary fund" will be amended to include benefits paid to a dependant or nominee in terms of section 37C of the PFA.[139]

The requirement to have retirement funds licensed under the PFA may contribute to further segmentation of market conduct legislation for retirement funds.[140] COFI introduces a shift in the licensing of retirement fund administrators and other service providers, by requiring them to be licensed only under COFI in the future.[141] This will support efficiency where it is accompanied by a code of conduct for retirement fund administrators, given the segmented market conduct regulation in the retirement fund industry.[142] The requirements for employers and trade unions and sponsors of retirement funds to comply with COFI licensing provisions will introduce a new market conduct regulatory framework which will promote outcome-based activities, and will help monitor the conduct of these stakeholders, to promote the fair treatment of customers.[143] COFI requires board members to fulfil their fiduciary duties, to *inter alia* ensure that the fund complies with legislative requirements.[144] However, the governance principles and TCF principles for board members are segmented, as discussed above.[145] Consolidation of the governance principles will assist in achieving efficiency and stability in the retirement fund industry.[146] Other PFA provisions such as amalgamation and transfer of pension funds, which despite being retirement fund legislation may have, in many ways, an impact on the fair treatment of retirement fund members.[147]

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[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] Schedule 6 of COFI.
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
[144] Clauses 14 to 16 of COFI.
[145] *Ibid.*
[146] *Ibid.*
[147] Section 14 of the PFA.

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CHAPTER 6: INTERNATIONAL BEST PRACTICES

6.1. Introduction

In this chapter, international best practices relating to the market conduct regulation of retirement funds are considered. The purpose is to determine the extent to which the South African framework aligns with these principles. The analysis is undertaken against the background of the discussion of the South African position and constitutes a high-level evaluation of the framework. This chapter deals with research questions three and four.

Benchmarking the South African system against international principles is important because the South African financial industry makes a significant contribution to the South African economy and to the global economy.[1] Market conduct regulation, as one of the peaks of the twin peaks model adopted by the South African government, was introduced by many of South Africa's international counterparts, with the objective to ensure sufficiency and effectiveness in the financial sector.[2] South Africa and international role players continue to strive to achieve economic stability internationally and locally as part of the G20.[3] As market conduct regulation supports financial stability,[4] the framework for the market conduct regulation of the retirement fund industry becomes relevant.

International financial regulation continuously strives towards achieving global and economic stability – which requires dedication from the respective international

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[1] National Treasury *A safer financial sector to serve South Africa better* 2011 at foreword.

[2] *Ibid*. The government introduced the twin peaks through the FSRA and adopted principles from international role players such as the UK and Australia (*idem* at 28). The former FSB introduced TCF principles in 2010, which was adopted by financial institutions in their conduct of business (*idem* at 39). The former FSB adopted TCF Principles from the UK, which was implemented by the Financial Services Authority, the former regulator of the UK financial sector (see the discussion in Millard "Through the Looking Glass: Fairness in Insurance Contracts – A Caucus Race" 2014 *THRHR* 547 at 548). TCF is embedded in the regulatory reforms and forms part of the objectives of the new and reformed statutes such as the FSRA, the Insurance Act, the RDR, the PPRs, the FAIS General Code of Conduct (National Treasury *A safer financial sector to serve South Africa better* 2011 at foreword). The TCF Principles incorporated into the South African financial legislation therefore align the laws with principles adopted from UK (*ibid).*

[3] National Treasury *A safer financial sector to serve South Africa better* 2011 at foreword.

[4] See paragraph 1.2 above.

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bodies.[5] In order to achieve its objective of continuous contribution to the global and local economy, the South African government identified objectives for regulatory reforms from international standards.[6] The government based many of its objectives of regulatory reforms on international standards in order to ensure that the laws are internationally appropriate.[7] Many South African financial laws are therefore aligned with international standards and jurisdictions in order to ensure efficiency and enable the South African financial industry to participate in, and contribute to, the global economy.[8]

It is, however, important to know that alignment may occur with international best practices as well as practices of specific jurisdictions such as the UK and Australia.[9] An analysis of selected international best practices is undertaken in this chapter – the OECD *Recommendation on Core Principles of Occupational Pension Regulation*, the G20 *High-Level Principles on Financial Consumer Protection*, and the World Bank's *Good Practices for Financial Consumer Protection*. Chapter seven deals with the Australian framework in order to consider the lessons that can be learned from a developed foreign jurisdiction.

The *OECD Recommendation on Core Principles of Occupational Pension Regulation* ("the OECD Core Principles") were approved by the OECD Council on 5 June 2009.[10] OECD members should consider these principles when they establish,

[5] National Treasury *A safer financial sector to serve South Africa better* 2011 at foreword.
[6] *Ibid*.
[7] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 26.
[8] *Ibid*.
[9] See the discussion in footnote 2 above. Note further that the government adopted some of the G20 High-Level Principles on consumer protection in financial services as objectives for regulatory reforms (National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 86). Examples include the realisation that protection of financial customers is fundamental to the regulatory framework, and that there must be supervision by regulatory bodies (*ibid*). In addition, the fair treatment of customers should be implemented in all steps of the financial services process when dealing with customers, financial customers should be provided with adequate disclosures in respect of their benefits, and financial customers should be imparted with financial knowledge (*ibid*). These principles have been incorporated into South African financial regulation to achieve the fair treatment of customers and financial inclusion (*ibid*).
[10] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 1.

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implement, assess or amend pension laws in their own countries and communicate the principles to the financial institutions in their respective countries.[11]

The G20 *High-Level Principles on Financial Consumer Protection* ("the G20 High-Level Principles") were developed in October 2011 upon request of the G20 members to develop uniform rules on the protection of consumers in the financial industry.[12] The G2- High-Level Principles were developed by the "Task Force on Financial Consumer Protection of the OECD Committee on Financial Markets (CMF), the Financial Stability Board, other international organisations and standard setter bodies and consumer and industry associations".[13] The purpose of the G20 High-Level Principles is to help the G20 countries and related countries advance the protection of financial customers.[14] The development of these non-binding principles were aimed at harmonising the current international principles and guidelines, and not to replace existing principles.[15]

These principles are founded on the notion that integrity and service excellence supports solidarity, development, efficacy and invention in the financial industry.[16] This is achieved through customary regulatory and monitoring structures implemented by regulatory bodies to ensure consumer protection and has been acknowledged as a principal strategy to advance consistency in the financial industry.[17]

Despite existing financial laws, it is necessary to continuously reform and strengthen these laws to promote the protection of financial customers.[18] This is motivated by the risks and complications associated with financial services and products, the evolution of technology, the limitation to access financial products, and financial illiteracy of consumers.[19] Reform is further motivated by the risks of "fraud, abuse and misconduct" that financial customers are exposed to due to regulatory gaps

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[11] *Idem* at 2.
[12] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 1.
[13] *Idem* at 3.
[14] *Ibid.*
[15] *Ibid.*
[16] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 4.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

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in the supervision of financial products and services, and irregular remuneration for financial products and services.[20] This necessitates the strengthening of customer protection combined with "financial inclusion and financial education policies" to achieve efficiency and solidarity in the financial industry.[21] Reform of financial laws should prescribe requirements for the fair treatment of financial customers, adequate disclosures, advanced financial literacy, honourable business conduct by service providers and financial service providers, suitable financial advice, data protection requirements, sound governance measures by financial institutions, and processes to manage complaints by consumers.[22]

All G20 members (including South Africa) and related countries were invited to adopt the principles to improve the protection of financial customers, and to align their financial laws with these principles.[23] As a member of the G20, South Africa adopted the G20 High-Level Principles when designing its objectives to reform and introduce new laws for the financial industry.[24] The government's objective to separate prudential and market conduct regulation through the twin peaks model of financial regulation, with the objectives of making the financial sector safer, are linked to the G20 High-Level Principles.[25]

The World Bank's *Good Practices for Financial Consumer Protection* ("the Good Practices") were designed to support global principles on the protection of financial customers.[26] The first edition which was published in 2012 was mainly developed to identify and analyse concerns regarding the protection of consumers and to serve as a diagnostic tool.[27] It covered the main issues that arise in consumer protection, with a focus on the banking, securities, and insurance sectors.[28] The 2017 edition builds on international principles such as the G20 *High-Level Principles on Financial Consumer Protection*, the International Association of Insurance

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[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] National Treasury *A safer financial sector to serve South Africa better* 2011 at 1.
[25] *Ibid.*
[26] World Bank *Good Practices for Financial Consumer Protection* 2017 at 1.
[27] *Ibid.*
[28] *Ibid.*

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Supervisors' (IAIS), *Insurance Core Principles and Application Paper on Approaches to Conduct of Business Supervision*, and the work of the G20/OECD Task Force on Financial Consumer Protection.[29]

The parts of the Good Practices that are relevant to retirement funds include those pertaining to private pensions and insurance law. Insurance law is relevant to the study as insurance business practices apply to retirement funds in relation to insurance benefits provided to retirement funds and their customers. The relevance of the practices relating to private pensions is self-explanatory. The recommendations of the Good Practices on retirement funds are mostly founded on defined contribution funds and aligned with, and influenced by, the G20 High-Level Principles on Financial Consumer Protection (G20 FCP Principles) of the OECD.[30]

The 2008 global catastrophe emphasized the significance of the protection of financial customers to achieve solidarity in the global financial market.[31] The World Bank highlighted that "…financial stability, financial integrity, financial inclusion, and financial consumer protection objectives…" have been adopted by many countries who have developed regulatory structures to deal with the protection of financial customers.[32] The protection of financial customers has been a significant consideration for many years and increases access to financial products and services.[33] The protection of financial customers has an effect on the ability of customers to make informed decisions in respect of financial services and products, which results in the efficiency and stability of, and competition in the financial markets.[34]

[29] *Ibid.*
[30] *Idem* at 99.
[31] *Idem* at 1.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

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6.2. The legal, regulatory and supervisory framework

6.2.1. The legal framework

Core Principle 1 of the OECD Core Principles stipulates "conditions for effective regulation and supervision".[35] This Principle determines that private pensions must be regulated by suitable laws that are absolute, vigorous and adaptable to achieve the protection of members and beneficiaries, and efficiency in the market.[36] The guidelines for implementing Core Principle 1 stipulates *inter alia* that occupational pension funds must comply with the laws that regulate them.[37] Such laws must protect the members and beneficiaries, and the solvency and value of retirement funds.[38]

According to the G20 High-Level Principles, the protection of financial customers is fundamental to the regulatory structure.[39] Financial laws must be suitably balanced to regulate the nature and quality of financial products and services, the customers' rights and obligations, and should monitor new products and distribution models.[40] Rigorous regulatory and supervisory tools must safeguard customers from deception, exploitation and oversights.[41] Financial institutions should disclose information about their financial advisors, brokers, intermediaries and representatives, and should be adequately monitored by regulators.[42] The respective governments should develop policies on customer protection in collaboration with "industry and consumer organisations, professional bodies and research communities".[43]

At first glance, the provisions of Core Principle 1 are similar to the government objectives on regulatory reforms in South Africa.[44] The objectives of the regulatory reforms are to *inter alia* promote efficiency in the financial industry, including the

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[35] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 1.
[36] *Ibid*.
[37] *Ibid*.
[38] *Ibid*. The rules and regulations should further establish a complaints resolutions body occupied by legal experts who can execute the resolution of complaints and require their decisions to be binding on financial institutions (*ibid*).
[39] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.
[44] National Treasury *A safer financial sector to serve South Africa better* 2011 at 1-2.

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retirement fund industry, and to enhance the protection of financial customers, including customers or members of retirement funds.[45] The purpose is to also enhance the fair treatment of customers by introducing and reforming various laws which protect financial customers through rigorous market conduct regulation, and to monitor the conduct of retirement funds and financial institutions – such as the conduct of product providers and administrators of retirement funds.[46]

The regulatory reforms in South Africa were introduced by the twin peaks financial regulation model which was established by the FSRA.[47] These regulatory reforms were incorporated through various laws which regulate the market conduct in the retirement fund industry, centred on TCF principles, which require financial institutions to conduct themselves in terms of a culture which supports the fair treatment of customers.[48] The G20 High-Level Principles on "legal, regulatory and supervisory frameworks" are reflected in the government's objectives on the regulatory reforms which introduced the twin peaks financial regulation model and the special focus on market conduct regulation.[49] The government introduced the twin peaks regulatory model with the objectives of enhancing the protection of financial customers.[50] The regulatory reforms in the financial industry transformed various existing financial laws and introduced new laws which are centred on promoting the fair treatment of customers.[51]

The objectives of the FSRA are to *inter alia* "…improve market conduct in order to protect financial customers", which is comparable to this G20 High-Level Principle.[52] Consolidated market conduct regulation in South Africa, through COFI, will include the

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[45] *Ibid*.
[46] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 8 and 18.
[47] *Ibid*.
[48] *Ibid*.
[49] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 and National Treasury *A safer financial sector to serve South Africa better* 2011.
[50] *Ibid*.
[51] *Ibid*.
[52] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.

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regulation of retirement funds.[53] COFI will regulate the conduct of financial institutions, the provision of financial products and services, codify TCF principles and prescribe requirements for financial institutions, (including retirement funds), to conduct themselves in a manner that treats customers fairly. These objectives relate to G20 commitments for South Africa.[54]

However, as indicated above in chapter 5, it is debatable whether the new regulatory system is conducive ("suitable" to use the OECD terminology") to the regulation of the retirement fund industry due to the numerous laws, guidelines, etc. that exist and apply to retirement funds irrespective of overlaps and the generality of application (due to the need to remove a "siloed" approach to regulation). It is also not clear whether COFI will resolve this issue through the consolidation of various market conduct laws as additional conduct standards may still be issued by the regulator and special conduct rules may remain necessary to protect retirement fund beneficiaries. It would be disappointing to see a future generation of beneficiaries dependent on retirement fund income, be neglected in an attempt to consolidate as many laws as possible and without considering that certain areas, such as retirement funds, may require stricter, specialised, rules-based regulation over and above regulatory oversight. I am of the view that this sphere of the financial sector cannot be left to the supervision of the regulator without a proper legal framework.

6.2.2. The regulatory and supervisory framework

(i) The enabling framework

The G20 High-Level Principles recommends that regulatory structures be established to supervise the protection of financial customers and that regulators must be equipped with the necessary powers to execute their functions.[55] The regulators' functions and obligations should be set out clearly in the legislation, they must exercise

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[53] National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 8 and COFI.
[54] National Treasury *A safer financial sector to serve South Africa better* 2011 at 15.
[55] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5; National Treasury *A safer financial sector to serve South Africa better* 2011 at 1.

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their duties impartially, have enough resources, clear reporting requirements, and distinct regulatory structures.[56]

The regulators should hold themselves to "high professional standards", comply with the data protection laws in respect of consumer information and relevant stakeholders, and implement policies on conflict of interest.[57] They should further coordinate with other regulators on related matters and exercise joint regulation where necessary, to promote efficiency and achieve unified and stronger regulatory outcomes.[58] The regulators should also liaise with other international bodies on matters relating to the protection of financial customers.[59]

These provisions are similar to the provisions of the FSRA which prescribe the functions of the FSCA as the market conduct regulator of financial institutions, including retirement funds.[60] The objectives of the FSCA are, among others, to ensure that financial customers are protected and to enhance their fair treatment by exercising its supervisory and regulatory powers to regulate the conduct of financial institutions.[61] The FSCA is tasked with monitoring of the delivery of fair customer outcomes by financial institutions.[62] In this regard, the FSRA empowers the FSCA to regulate and supervise financial institutions, including retirement funds, and aligns with the G20 High-Level Principles on the role of supervisory bodies.[63]

The FSCA is responsible for designing and implementing financial literacy programmes to educate financial customers on financial products and services, and to create awareness and assist customers to make proper decisions in respect of financial services and products.[64] These provisions contribute to financial inclusion by assisting customers to understand financial products and services, and to buy appropriate products to insure their lives in the event of disability, death and

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56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 Chapters 3 and 4 of the FSRA.
61 Section 57 of the FSRA.
62 Section 58 of the FSRA.
63 *Ibid.*
64 *Ibid.*

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retirement, and provide financial support to their families on the happening of these events.[65]

The FSCA is further responsible for issuing Conduct Standards on financial literacy programmes.[66] These provisions incorporate the G20 High-Level Principle on financial literacy and awareness, and apply to retirement funds and their members.[67] The G20 High-Level Principles stipulate that the regulators should conduct financial literacy, educate financial customers on financial product, and inform them of how the law protects them and what their duties are in respect of their products and the services rendered.[68] The regulators should devise suitable methods to educate customers which can be easily understood by customers, including education on the risks associated with financial products.[69]

The FSCA's regulatory strategy stipulates the that its main objective is to "to promote the financial literacy and capability of consumers."[70] "The FSCA sees its role as more broadly supporting financial resilience of households and small businesses, primarily by enabling them to make more well-informed financial decisions, with a focus on savings and wealth creation. This involves making resources and information available and undertaking targeted campaigns based on identified needs, especially in relation to those households and businesses that are particularly vulnerable. In addition, the FSCA will be developing a framework to monitor consumer resilience and vulnerability."[71]

The above appears to indicate that the FSCA's main function is to promote financial education and provide the training materials to the consumers.[72] The FSCA's function does not seem to be conducting the financial literacy training itself.[73] This

[65] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5; Section 58 of the FSRA.
[66] Section 106(2)(c) and 3(d) of the FSRA.
[67] Section 57, 106 and 58 of the FSRA.
[68] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 6.
[69] *Ibid.*
[70] FSCA Regulatory Strategy 2021 – 2025 at 20.
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*

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differs from the principles of the G20 High-Level Principles on financial literacy and awareness, which stipulates that the regulators must conduct financial literacy training for financial customers.[74] This is also supported by the FSCA draft Conduct Standard [-] of 2023 (GENERAL) – Requirements for Financial Institutions Providing Financial Education Initiatives.[75] The purpose of the draft Conduct Standard is to ensure that financial institutions have suitable governance processes to establish and implement financial literacy programmes, and "appropriate oversight arrangements to monitor and review the design, suitability and effectiveness of its financial education initiatives on an ongoing basis."[76] The draft Conduct Standard also stipulates that the financial literacy programmes must be "measurable" by the financial institute to assess whether it is effective and achieving its purpose.[77] This is also outlined in the FSCA's "Discussion document on ensuring appropriate financial consumer education initiatives."[78] It is therefore evident that the FSCA will not be conducting the financial literacy training for existing financial customers that financial institutions provide products and services to.

The FSRA requires the FSCA to conduct itself with competence and professionalism, and to design and employ suitable and effective management and control processes, taking international practices into consideration.[79] The FSCA must comply with legislation, including the protection of personal information of financial customers and financial institutions.[80] These provisions are linked to the G20 recommendations.[81]

The World Bank's Good Practices relating to retirement funds are reflected in the South African laws on retirement funds. The FSRA implemented the twin peaks

[74] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.
[75] FSCA draft Conduct Standard [-] of 2023 (GENERAL) – Requirements for Financial Institutions Providing Financial Education Initiatives at 1.
[76] *Idem* at 3.
[77] *Idem* at 4.
[78] FSCA Discussion document – ensuring appropriate financial consumer education initiatives (June 2020) at 5.
[79] Part 2 of the FSRA.
[80] *Ibid*.
[81] *Ibid*.

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model and established the Prudential Authority and the FSCA.[82] The FSCA is the dedicated market conduct regulator of retirement funds.[83] The FSCA also regulates the conduct of the retirement funds through its named board of trustees and principal officers, among others.[84] The FSCA oversees the administration of retirement funds and payment of contributions by the employer on behalf of the members, to ensure that retirement benefits and contributions are properly managed and invested.[85]

The Good Practices stipulate that legislation should outline the obligations of the regulator when it comes to monitoring and regulating the conduct of financial institutions – to ensure regulation in an objective, responsible and comprehensive manner.[86] The regulator should have sufficient capital and personnel, and should have adequate legislative powers to exercise its regulatory powers without encountering unnecessary restrictions or barriers.[87] The legislation should authorise the regulator to investigate financial institutions and relevant stakeholders to gather the necessary information to exercise its regulatory functions.[88] The Good Practices also state that the legal framework should enable the regulator to take steps against institutions which conduct business that they are not licensed to conduct, and for contravening the law.[89]

The market conduct regulatory framework under the Good Practices reflect the objectives of the FSRA and the regulatory powers of the regulator.[90] These objectives include, *inter alia,* to regulate and monitor financial product and service providers, to enhance market conduct of financial institutions, and to advance the protection of financial customers.[91]

The objectives of the FSRA are similar to the Good Practices in that the legislation includes provisions on collaboration and coordination between regulators,

[82] Section 32 and 56 of the FSRA.
[83] Section 1 of the PFA.
[84] Section 7 of the PFA.
[85] Section 13A of the PFA
[86] World Bank *Good Practices for Financial Consumer Protection* 2017 at 67.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*

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and confers investigative powers on the regulators, such as on-site visits, gathering information and imposing administrative penalties.[92] It can be argued, at least on theoretical and principled bases, that the FSRA is on par with international standards and is an efficient financial statute which will enhance stability in the local and global markets.[93]

(ii) The approach to regulation

The Good Practices refer to supervisory activities which entail that the regulator should adopt a "risk-based and proactive" method to regulate market conduct risks in the insurance industry to achieve the fair treatment of customers.[94] The proposals further entail that the regulator must, on a regular basis, gather and monitor information on insurance business, such as products, services, complaints lodged by customers, premiums and claims paid.[95] The regulator must have an annual strategy in place which outlines its regulatory functions, focus areas and responsibilities, and its regulatory processes.[96] The regulator's approach should include various methods to implement a strong market conduct regulation framework, which includes industry research, strategy assessment, off-site monitoring, on-site monitoring, "thematic review[s]", investigations, and resolution of complaints.[97] The principles of the Good Practices on supervisory activities also stipulate that the regulator should review its processes, methods, and systems regularly; should employ staff with the necessary skills, expertise and knowledge of the insurance industry; and must report on its functions and performance to the public.[98]

The Good Practices note that, previously, regulatory structures for market conduct regulation comprised mostly of an analysis of areas of violation of the law which were "rules-based".[99] International standards imply that, currently, the preferred

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[92] *Ibid.*
[93] *Ibid.*
[94] World Bank *Good Practices for Financial Consumer Protection* 2017 at 70.
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Idem* at 71.

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approach is "risk-based, proactive, and flexible".[100] The regulator should use the that it prefers according to the nature, scale, and complexity of the insurance sector.[101] In order to achieve this, the regulator should document its strategies and outline its focus areas, functions and responsibilities.[102]

The Good Practices further note that, in order to implement efficient "risk-based" market conduct regulation, thorough research of the market should be conducted, considering the economic conditions, size, structure, insurance products, selling and distribution methods, risks, and complexity of the sector.[103] Market research can assist to establish efficient regulatory mechanisms by enabling the classification of risks and articulating examples of risks – and assist with choosing the right the type of regulatory tool that should be employed.[104]

The above-mentioned supervisory principles of the Good Practices are similar to the regulatory principles of the FSCA.[105] The FSRA requires the FSCA to design and issue its regulatory strategy which should outline, *inter alia*, its monitoring and governing focus areas for the next three years.[106] The FSCA strategy should include the main objectives that it aims to achieve, its achievements already attained, tools for imposing penalties, its approach to "consultation, accountability, consistency with relevant international standards", and how it will fulfil its duties and obligations.[107] These requirements are similar to the Good Practices' recommendations on supervisory activities which require a regulator to design and document a strategy, outlining its regulatory functions and focus areas.[108]

The FSRA provides that the FSCA may employ tools that are vital to fulfill its obligations, which can include, among other things, coordinating with other regulators, and considering "…the need for a primarily pre-emptive, outcomes-focused and risk-

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[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] Chapter 4 of the FSRA.
[106] FSCA Regulatory Strategy 2018 at 4.
[107] *Ibid.*
[108] World Bank *Good Practices for Financial Consumer Protection* 2017 at 71.

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based approach…".[109] The FSCA strategy document highlights that its supervisory principles include a risk-based and proportional approach.[110] This supervisory principle requires the FSCA to determine the main risks that may hinder it from accomplishing its goals and to focus on those areas to address the risks.[111] The strategy document notes that a market conduct risk-based method requires the regulator to assess the risks that customers, and the efficacy and consistency of the financial industry will be exposed to.[112]

This implies that the FSCA will apply its "supervisory and regulatory" methods in a manner that allows it to prevent the manifest of risks to the users of the financial system and itself.[113] The FSCA uses the data provided by the financial institutions to evaluate the conduct risk.[114] The FSCA also analyses developing international standards on conduct risk regularly, to align its regulatory structure with these standards.[115] The FSCA's risk-based and proportional approach is similar to the principles of the Good Practices which require a regulator to adopt a "risk-based and proactive" process to monitor market conduct risks to achieve the fair treatment of customers.[116] The use of data to assess conduct risk is a practice which a regulator must implement to monitor insurance products, services, complaints and claims paid.[117]

The FSCA uses a transparent and consultative approach and outlines this approach in its strategy document.[118] The FSRA requires a consultative procedure when issuing conduct standards and guidance notices and requires the regulator to present the conduct standards to parliament for approval and disclose its consultation process to the public.[119] This incorporates the principles of the Good Practices which

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[109] Section 58 of the FSRA.
[110] FSCA Regulatory Strategy 2018 at 53-54.
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] World Bank *Good Practices for Financial Consumer Protection* 2017 at 70.
[117] *Ibid.*
[118] FSCA Regulatory Strategy 2018 at 53-54.
[119] *Ibid.*

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require a regulator to implement a strong market conduct regulation through industry research and information gathering.[120]

The FSCA supervises and regulates the delivery of fair customer outcomes by financial institutions using an outcome-based approach.[121] The FSRA requires the FSCA to implement this regulatory method to supervise and monitor the outcomes of the fair treatment of customers by assessing whether financial customers are provided with products and services that meet their needs and expectations.[122] TCF Principles have been incorporated into the FSRA, financial laws and the FSCA's regulatory strategy.[123] This is similar the principles of the Good Practices which stipulate that a regulator must monitor the conduct financial institutions regularly using a risk-based-proactive approach to achieve fair customer outcomes.[124]

The Good Practices do not, however, stipulate an outcome-based regulatory approach in the same manner as the FSCA, despite the links to the risk-based pre-emptive approach, but reference is made to the "Proving Incentives for Long-Term Investment by Pension Funds: The Use of Outcome-Based Benchmarks," Policy Research Working Paper 6885 (World Bank, May 2014).[125] The FSCA adopted a "comprehensive and consistent" supervisory approach to identify issues that may negatively affect the financial markets and the fair treatment of customers.[126] The FSCA's risk-based principle allows it to monitor the risks on financial products and services, which is also a principle under the Good Practices.[127]

The "credible deterrent" enforcement strategy aims to encourage compliance with the regulatory laws by financial institutions.[128] Its enforcement mechanisms places emphasis on addressing contraventions of financial laws and regulatory requirements

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[120] World Bank *Good Practices for Financial Consumer Protection* 2017 at 70.
[121] FSCA Regulatory Strategy 2018 at 53-54.
[122] *Ibid.*
[123] *Ibid.*
[124] World Bank *Good Practices for Financial Consumer Protection* 2017 at 71.
[125] *Idem* at 129.
[126] *Ibid.*
[127] FSCA Regulatory Strategy 2018 at 54 to 55.
[128] *Ibid.*

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when it comes to the conduct of business by financial institutions.[129] Where appropriate, this regulatory tool is applied to compensate financial customers and may include administrative penalties and restrictions, where necessary.[130] This principle forms part of complaints resolution under the Good Practices, to monitor the conduct of financial institutions to achieve fair customers.[131]

The FSCA's functions are to monitor and supervise financial institutions, consistently assess the efficacy of financial regulation, and implement measures to alleviate the risks identified.[132] The FSCA's duties to supervise the treatment of customers when it comes to the suitability and fairness of financial products and services are similar the supervisory principles of the Good Practices which require a regulator to supervise financial institutions regularly.[133]

(iii) Regulatory mechanisms

The FSCA's "toolkit" comprises of its legislative mandate prescribed by the FSRA and regulatory procedures which is established through knowledge and "international best practice".[134] The toolkit includes:

> "information gathering, supervisory off-site monitoring, supervisory on-site inspection, making regulatory instruments, guidance notices, interpretation ruling, investigations, directives, leniency agreements, customer redress, enforceable undertakings, debarments and removal of key persons and suspension or revocation of licenses, administrative penalties and administrative action procedure (AAP)".[135]

The FSRA enables the FSCA to gather information.[136] In terms of its "information gathering process", the FSCA's approach is to obtain information from sources beyond the financial institutions that it monitors and regulates, to obtain substantial and

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129 *Ibid.*
130 Ibid.
131 World Bank *Good Practices for Financial Consumer Protection* 2017 at 71, 166 and 168.
132 Section 58 of the FSRA.
133 *Ibid.*
134 FSCA Regulatory Strategy 2018 at 55.
135 *Idem* at 55-58.
136 Section 131 of the FSRA.

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objective views on the information gathered.[137] To achieve this, the FSCA obtains the information from, *inter alia*, complaints and queries lodged by consumers or other participants, consumer bodies and industry associations, ombudsman, other regulatory bodies, social media, "mystery shopping"[138] and whistleblowers.[139]

"Supervisory and off-site monitoring" also form part of the FSCA's information gathering processes.[140] In addition to regulatory reporting by financial institutions on the conduct of their business, the FSCA obtains information from specific financial institutions which can include a uniform request on "risk profile, distribution model, product type or customer base".[141] The FSCA uses this information to address conduct risk and to interpret a financial institution's risk profile.[142]

The FSRA allows the FSCA to conduct supervisory and on-site inspections.[143] The purpose of the on-site inspections is to substantiate the information gathered from the off-site inspections, and to monitor and assess the conduct risk of financial institutions.[144] The FSCA's on-site inspections are guided by "…an institution's individual risk profile and will include consideration of factors such as systemic importance, market share, distribution model, product complexity, size and sophistication of customer base..".[145] Interviews with board members, executives,

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137 FSCA Regulatory Strategy 2018 at 55.

138 Section 131(3) of the FSRA. According to the FSCA's Strategy document, "During a 'mystery shopping' exercise, an employee of the FSCA (usually a supervisory team member) or an external individual appointed by the FSCA may approach a financial institution or its representatives in the role of a potential customer to understand first-hand what a typical customer experience would be in a specific scenario in relation to that financial institution.
The objective of mystery shopping is to identify specific risks facing financial customers and to assess how best to pragmatically address such risks. This could be done by assessing a particular practice across a number of financial institutions or a specific practice or practices of a particular financial institution.
Generally, when consumers complain about a specific experience with a financial institution, it can be very difficult to establish after the event what was said or how the customer was treated during the actual customer interaction. By recording how a financial institution deals first-hand with a 'mystery shopper', the FSCA obtains valuable insights into the financial institution's 'real life' practices and customer culture in a way that it would not otherwise be able to through traditional supervisory mechanisms." *Ibid.*

139 *Ibid.*

140 Section 131 of the FSRA and FSCA Regulatory Strategy 2018 at 56.

141 FSCA Regulatory Strategy 2018 at 56.

142 *Ibid.*

143 Section 132 of the FSRA.

144 FSCA Regulatory Strategy 2018 at 56.

145 *Ibid.*

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senior managers and staff assist the FSCA to understand the culture of the financial institution.[146] The FSCA provides feedback on the investigation directly to the financial institution.[147]

This incorporates the principles of the Good Practices which stipulate that a regulator should use mechanisms that are suited to the nature, scale, and complexity of the insurance industry.[148] The FSCA's off-site inspections incorporate the principles of the Good Practices which state that effective risk-based market conduct regulation can be achieved by comprehensive research of the sector, in view of the economic circumstances, nature and type of insurance products, marketing and distribution processes, risks and complexity of the sector.[149] In order to achieve this, the regulator should document its strategies and outline its focus areas, functions and responsibilities.[150]

Mystery shopping is a supervisory method used by the FSCA to gather information on the problems that clients encounter when they are dealing with financial institutions.[151] The purpose of mystery shopping is to identify risks to customers and assess how to address them.[152] The Good Practices note that mystery shopping is an essential supervisory method used by countries such as Malaysia, Singapore, the United States and the UK to protect financial customers.[153] The FSCA uses mystery shopping for the same objective and therefore adopts the principles of the Good Practices.[154]

The FSCA's "toolkit" embraces the Good Practices regulatory framework in relation to its supervisory structure and strategies.[155] These principles require that a regulatory framework should include various processes to strengthen market conduct

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[146] *Ibid.*
[147] *Ibid.*
[148] World Bank *Good Practices for Financial Consumer Protection* 2017 at 71.
[149] *Ibid.*
[150] *Ibid.*
[151] FSCA Regulatory Strategy 2018 at 55.
[152] *Ibid.*
[153] World Bank *Good Practices for Financial Consumer Protection* 2017 at 71.
[154] FSCA Regulatory Strategy 2018 at 55.
[155] *Idem* at 56.

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regulation, through industry studies, policy review, off-site monitoring, on-site monitoring, "thematic reviews", investigations and resolution of complaints.[156]

In 2022, the FSCA developed the "Omni-Conduct of Business Returns (Omni-CBR)" for efficient reporting on the conduct of financial institutions.[157] The Omni-CBR applies to long-term insurers, retirement funds and their administrators.[158] It is part of the FSCA's primary regulatory off-site "toolkit" based on data provided by financial institutions.[159] The FSCA's annual report for 2021 to 2022 states that the FSCA achieved "99% offsite analysis performed on the conduct of business returns submitted by insurers earmarked for review in the 2021/22 financial year."[160]

The FSCA conducted "on-going supervision of the business conduct of entities authorised to provide retirement fund benefits" in the 2021/2022 financial year.[161] In respect of the outcome for "enhanced supervision to promote sound management of retirement funds thereby protecting and safeguarding retirement benefits and rights of beneficiaries", the FSCA achieved 91.24% of the on-site inspections that it conducted in 2021/2022.[162] In respect of off-site inspections on analysis of returns from registered retirement funds, the FSCA completed 91.3% of the returns that it received from retirement funds for the financial year 2021/222.[163] The FSCA has thus incorporated the Good Practices to strengthen market conduct regulations through off-site and on-site monitoring.[164]

(iv) Licensing

Core Principle 2 stipulates the "establishment of pension plans, pension funds, and pension fund managing companies".[165] This Principle notes that an efficient and suitable "legal, accounting, technical, financial, and managerial" system should be

[156] World Bank *Good Practices for Financial Consumer Protection* 2017 at 70.
[157] FSCA Annual Report 2021 – 2022 at 54.
[158] *Ibid.*
[159] *Ibid.*
[160] *Idem* at 115.
[161] *Idem* at 118.
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 4.

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established for the administration of retirement funds. [166] Guidelines for implementing Core Principle 2 stipulates licensing requirements for pension funds.[167] The guidelines state that regulatory requirements should be implemented to oblige pension funds to be licensed by the regulatory authorities, including the type of retirement funds that should be registered and incorporated as legal entities.[168]

In terms of the World Bank's Good Practices, in the context of insurance, licensing requirements should include requirements that shareholders, board members of companies and senior managers should have integrity, and the necessary skills and expertise.[169] Financial institutes must implement proper governance and management process and should have enough capital and supplies to conduct its business.[170]

The regulatory licensing requirements guides lawmakers on the powers and functions of the regulatory authority, the licensing requirements which will be considered by the regulatory authority in the application, and governance and compliance requirements to assess an entity's compliance with the licensing requirements.[171] The regulatory authority must have the ability to reject a license application if the requirements are not met.[172] The authority must also have powers to amend license requirements and withdraw the license if the fund no longer complies with the license requirements.[173]

The requirements of Core Principle 2 that an efficient and suitable "legal, accounting, technical, financial, and managerial" system should be established for the administration of retirement funds is similar to the provisions of section 13B of the PFA and the FSCA draft Conduct Standard on conditions prescribed in respect of pension

[166] *Ibid.* The retirement fund should also be separated from the sponsor (*ibid*).
[167] *Ibid.*
[168] *Ibid.*
[169] World Bank *Good Practices for Financial Consumer Protection* 2017 at 9.
[170] *Ibid.*
[171] *Idem* at 6.
[172] *Idem* at 7.
[173] *Ibid.*

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fund benefit administrators (July 2021).[174] Section 13B(1) of the PFA stipulates that "No person shall administer on behalf of a pension fund the receipt of contributions or the disposition of benefits provided for in the rules of the fund, unless such person has been approved by the registrar and continuously complies with such conditions as may be prescribed."[175] Section 13B(1A)(c) of the PFA states that an application for approval as a pension funds administrator must include information on "the competence and operational ability of the applicant to fulfil the responsibilities imposed" by the PFA and information on the "applicant's financial soundness".[176]

These requirements are stipulated in paragraph 37 of the FSCA draft Conduct Standard on conditions prescribed in respect of pension fund benefit administrators under "operational ability."[177] The requirements for operational ability require a retirement fund administrator to have "adequate and appropriate human, technical and technological resources, to – (a) effectively perform its administrative functions; and (b) ensure that accurate and complete data and records are maintained."[178] The draft Conduct Standard also stipulates that an administrator must have an administration system which is appropriate and efficient to keep accurate member records, allows the administrator to properly communicate with members, protect the member records, disaster recovery and back-up processes, system testing, loading of new data for new members, processing and payment of claims, "pensioner payroll administration", "termination of funds", "housing loan administration", and reporting (internally and to the Authorities).[179] The operational requirements for retirement fund administrators under Section 13(B) of the PFA and the draft Conduct Standard on conditions prescribed in respect of pension fund benefit administrators on "operational ability" are aligned with the requirements of the Core Principles and international standards.[180]

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[174] Section 13B(1)(c)(ii) of the PFA and FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 28 to 30.
[175] Section 13B(1) of the PFA.
[176] Section 13B(1A)(c) of the PFA.
[177] FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 28 to 30.
[178] *Idem* at 28.
[179] *Idem* at 29.
[180] Section 13B(1A), (1B) and 5 of the PFA and FSCA "Draft conduct standard on conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 28 to 30.

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The licensing guidelines under Core Principle 2 are also similar to the provisions of section 4 of the PFA.[181] Section 4 of the PFA provides for the registration and incorporation of retirement funds.[182] This section requires each pension fund to apply for registration before it may commence with its operations.[183] The application must be submitted together with payment of a prescribed fee and proof of compliance with the requirements for a successful application.[184] When the Registrar[185] approves the application, it issues the fund with a registration certificate.[186] Once registered, retirement fund becomes a juristic person which obtains the capacity to file a suit in court and can also be prosecuted by aggrieved parties.[187] COFI will implement and regulate licensing requirements for retirement funds when it is promulgated.[188] This will include self-administered retirement funds.[189] Section 13B administrators will also be licensed under COFI.[190] COFI will thus also incorporate the guidelines of Core Principle 2.[191]

6.2.3. Corporate governance

Core Principle 2 also outlines governing principles for pension funds, which require a fund to have documented governing processes including details on the type benefits offered by the fund, the governance framework, requirements for outsourcing services, and the rights of members and beneficiaries.[192] Provisions on governance of retirement funds from part of market conduct regulation as they relate to the board members in their capacities as representatives of the fund.[193] Core Principle 2 stipulates that a

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[181] Section 4 of the PFA.
[182] *Ibid.*
[183] Section 4(1)(a) of the PFA.
[184] Section 4(1)(b)1.
[185] The definition of "Registrar" means "Authority" in section 1A of the PFA. "Authority" is defined as "the Financial Sector Conduct Authority established in terms of section 56 of the Financial Sector Regulation Act." (See section 1 and 1A of the PFA). When COFI is promulgated, the PFA will be amended to replace the term "Registrar" with the term "Authority". See Schedule 2 of COFI.
[186] Section4(1)(4)
[187] Section 4B(1) of the PFA.
[188] Item 1c and 5c of Schedule 6 of COFI.
[189] Item 5b of Schedule 6 of COFI.
[190] *Ibid.*
[191] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 2-6.
[192] *Ibid.*
[193] *Ibid.*

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retirement fund must appoint a governing body[194] responsible for managing and overseeing the operation of the fund, the conduct of the funds' officers, and to protect the rights of members and beneficiaries.[195] The governing body must comply with the fit and proper requirements to manage the affairs of the fund, and represent members and protect their interests.[196]

The governance principles under Core Principle 2 are similar to the governance principles of retirement funds under the PFA.[197] Section 7A of the PFA requires each fund to elect a board which comprises "… of at least four board members, at least 50% of whom the members of the fund shall have the right to elect".[198] Similar to the requirements of Core Principle 2 discussed above, the board members are obliged to acquire skills and undergo training in line with the standards stipulated by the Registrar and to maintain these skills and keep up with training during their terms as board members.[199]

The duties of the board are "…. to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund".[200] The board is required to implement measures to protect the interests of members continuously, specifically in respect of the amalgamation or transfer of retirements funds in terms of section 14 of the PFA, or the termination of a fund, or the reduction or increase of members' contributions to the fund by the employer, or when the employer terminates its participation in the fund.[201] During this time, the board must "….act with due care, diligence and good faith", and act independently and impartially towards all members and beneficiaries of the fund.[202] These provisions relate to market conduct regulation

[194] The governing body of a retirement fund is the board or trustees of the fund (See Chapter 3 above)
[195] *Ibid.*
[196] *Ibid.*
[197] Section 7A to 7F of the PFA.
[198] Section 7A(1)(2) of the PFA.
[199] Section 7A(3) of the PFA.
[200] Section 7C(1) of the PFA.
[201] Section 7C(2) of the PFA.
[202] *Ibid.*

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of retirement funds and align with the guidelines under Core Principle 2 discussed above.[203]

Core Principle 6 stipulates requirements for the governance of pension funds.[204] It determines that the conduct duties and responsibilities of a pension fund must be clearly specified.[205] The governance framework and purpose of the fund must be set out in the rules of the fund.[206] Pension funds that are sponsored and underwritten by financial institutions should clearly stipulate the duties of the sponsor.[207] The governance framework must be "risk-based" and should stipulate the type and scope of risks that fund is exposed to.[208] Core Principle 6 states that each pension fund should establish a governing body responsible for safeguarding the interests of the members and beneficiaries.[209] The governing body must ensure the protection of the fund's assets and the benefits of the members, and remain accountable for the execution of its duties where it delegates its powers and duties under the fund, including outsourced services.[210] The governing body must be accountable to the fund, its members and beneficiaries.[211] To ensure accountability of the members of the governing body, the members and beneficiaries of the fund should elect the members of the governing body.[212] It may also be necessary for the governing body to be accountable to the sponsor of the pension fund, where appropriate.[213]

The members of the governing body must satisfy "…a high level of integrity, competence, experience and professionalism in the governance of the pension fund."[214] They must also have the required skills and knowledge to supervise the

[203] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 2-6.
[204] *Idem* at 18.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.* The underwriter of an umbrella fund is also generally referred to as a commercial sponsor. A trade union or an affinity group is usually a sponsor of an industry-specific umbrella fund. See Hanekom et al *Manual on retirement funds and other employee benefits* (2020) at 4.1.2.
[208] *Ibid.*
[209] *Idem* at 19.
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid.*
[214] *Ibid.*

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conduct and affairs of the fund.[215] The members of the governing body should be notified of the requirements that may render them unfit for their roles.[216] The governing body may delegate its duties to the employees of the fund or external service providers, but remains liable for the proper execution of such duties.[217] The governing body may obtain professional advice, where assistance is needed, when executing certain functions and must validate the qualifications and experience of any appointees before it appoints them to provide services.[218]

The governing body is required to appoint an independent auditor to audit the books and affairs of the fund, and the auditor should be accountable to the governing body, the fund and regulatory authorities.[219] The auditor must report to the authority any findings on the financial affairs of the fund which may affect the financial status of the fund.[220] The governing body should further appoint a statutory actuary to assist the fund to comply with statutory requirements.[221] The actuary must timeously report any failure or possible failure by the fund to comply with statutory requirements to the authority and the corrective measures to be taken to assist the fund.[222]

The fund must implement a “risk-based” governance process, aligned with the objectives of the fund and pension legislation, to ensure that the fund complies with the legal framework.[223] The governance process should incorporate the administration process of the fund, risk management process, information technology system, and the claims process.[224] The governing body should design a code of conduct and conflict of interest policy, exercise its powers independently and impartially, and implement processes to ensure the protection of confidential information, and implement measures to protect unauthorised access and use of the confidential information.[225]

[215] *Ibid.*
[216] *Ibid.*
[217] *Idem* at 20.
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*
[225] Ibid.

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The body is required to make all the necessary disclosures to the stakeholders of the fund, namely the fund, the members and beneficiaries, auditor, actuary, and regulatory authority.[226]

The provisions of Core Principle 6 are reflected in the provisions of section 7A of the PFA which stipulates the requirements for the appointment and duties of a governing body of a pension fund – discussed under Core Principle 2 on the requirements of appointing a governing body and the management of a pension fund.[227] The requirements of Core Principle 6 are also similar to the requirements of the Circular which stipulates requirements of good governance of retirements funds.[228] Some of the notable similarities between Core Principle 6 and the Circular are the requirements that the governing body must conduct itself with integrity, due diligence, and appropriate skilfulness, and must act with good faith towards the fund and its members.[229] Both documents require the fund to offer benefits to the members and their beneficiaries in terms of the fund rules.[230]

The Circular requires that any risks that the fund is exposed to must be risks associated with fund benefits and should be monitored, addressed and evaluated against the benefits under the fund to ensure positive fund returns.[231] The Circular further determines that the governing body is accountable to the members, beneficiaries, and the fund.[232] Similar to Core Principle 6, the Circular requires every retirement fund to appoint an auditor in terms of the rules of the fund, within 30 days of registration, and formally apply for approval of the appointment of the auditor by the FSCA.[233] The auditor's duties are to audit the financial activities of the fund, and to present the findings to the governing body of the fund and the FSCA.[234] When the

[226] *Idem* at 21.
[227] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 2 and section 7A of the PFA.
[228] FSB *Circular PF No. 130 Good Governance of Retirement Funds* June 2007, and paragraph 3.2.(i) above.
[229] *Idem* at 1.
[230] *Ibid.*
[231] *Ibid.*
[232] *Idem* at 3-4.
[233] Section 9 of the PFA.
[234] *Ibid.*

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auditor's appointment is terminated, the auditor must notify the FSCA of the termination and the reasons therefor, and must also submit the fund's audit report to the FSCA.[235] An auditor is obliged to report any matters which may adversely affect the fund to the FSCA.[236]

Every registered fund which is obliged to have its financial status investigated must appoint a valuator, similar to the provisions of Core Principle 6 which requires every pension fund to appoint a statutory actuary.[237] The fund must appoint another valuator in the event that the appointed evaluator resigns.[238] A valuator has a duty to investigate the financial position of the fund and to submit the report to the FSCA.[239] A valuator is further obliged to calculate the surplus apportionment of the employer and the fund for distribution to the employer, the fund and the members, and to certify that the surplus apportionment complies with the PFA.[240]

6.2.4. The customer

(i) Information

The Good Practices note that retirement funds are complicated due to the type of products that they are, and it is difficult for many consumers to comprehend the structure of their benefits during the life cycle of their contributions to the retirement fund and at the time of payment of the benefit.[241] This complexity necessitates a deeper comprehension of the financial products for the customer to make informed financial decisions on the selection of benefits, which includes among others, a suitable retirement fund, contribution scales, investment portfolios and a suitable product supplier of annuity benefits on retirement.[242] The customer's decisions on the type of retirement benefits and the investment portfolios have a significant impact on

[235] *Ibid.*
[236] *Ibid.*
[237] *Ibid.* (See paragraph 2.3.10 above).
[238] *Ibid.*
[239] Section 7A of the PFA.
[240] Section 15B of the PFA.
[241] World Bank *Good Practices for Financial Consumer Protection* 2017 at 99.
[242] *Ibid.*

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the retirement benefits that the customer will receive on retirement.[243] Consumer protection laws should therefore mandate the provision of essential information to help consumers to make informed decisions on their retirement benefits.[244]

The G20 High-Level Principles include provisions that customers must be provided with the necessary information which outlines their benefits, and the terms and conditions thereof, including the broker or intermediary selling the products and rendering advice.[245] The information should be clear, brief, accurate, and in plain language.[246] It should be provided timeously to the customers, should set out the type and quality of the products, and the type of services rendered.[247] The information should also include fees and charges payable on the products and services, any restrictions, and the terms on termination.[248] Information on advertising should be in plain language, easy to understand, and should not be deceitful.[249] Customers should be provided with accurate advice according to their financial needs and taking the product features into account.[250] In South Africa, the trustees and the administrators are responsible for communicating with the members to keep members appropriately informed on their benefits to assist them to make an informed decision.[251]

This G20 High-Level Principle is comparable to the provisions of the PPRs on disclosures and advertising.[252] The PPRs require an insurer to implement processes to communicate with members of group schemes and retirement funds in a manner that achieve the fair treatment of customers, and to provide members with adequate and suitable advice on their benefits.[253] An insurer is required to provide members of a group scheme and retirement fund members with suitable and adequate disclosures about their risk benefits.[254] This includes the type of benefits provided to members,

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[243] *Ibid.*
[244] *Ibid.*
[245] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.
[246] *Ibid.*
[247] *Ibid.*
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*
[251] Rule 1.6 and 11 of the PPRs.
[252] Rules 10 and 11 of the PPRs.
[253] Rules 1.7 to 1.9 of the PPRs.
[254] Rule 11 of the PPRs.

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any restrictions on the benefits, a summary of the policy terms and conditions, and the premiums, fees and charges payable.[255] An insurer is also required to provide ongoing disclosures to members of the group scheme, on the terms and conditions or changes under the benefits which affect the rights of the members, as well as any changes in premiums or fees payable by the members.[256]

The G20 High-Level Principle on advertising requirements are comparable to the PPRs advertising requirements.[257] The PPRs stipulate that an insurer must design and implement advertising processes which should provide information which is accurate, in simplified terms which can be understood by the clients, and the information should not be deceitful to clients.[258] This is applicable to risk products and services rendered to retirement funds and their members and is a G20 High-Level Principle.[259]

(ii) **Protection of information**

The G20 High-Level Principles provide that financial institutions should design and implement procedures to protect their customers' personal information.[260] Such processes should outline the purpose for which the data is collected and processed.[261] The processes should incorporate the rights and interests of customers to have their personal information protected.[262] Consumers should be notified of the processing of their personal information and sharing of the information with third parties, as well as their rights to have any of their information corrected or deleted where it is incorrect.[263]

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[255] *Ibid.*
[256] *Ibid.*
[257] Rule 10 of the PPRs. These provisions are also similar to the Good Practices which stipulate that the legislative structure should require insurance policies to stipulate provisions which include *inter alia*, disclosure requirements, the provision of data, obligations of the insurer and the policyholder, exclusions under the cover. The exclusions should distinguish the types of cover such as life, critical illness and accidental cover. This should also include requirements on simple language, material and non-material disclosures by the clients, claims process and termination provisions. (See page 65 of the Good Practices.)
[258] *Ibid.*
[259] *Ibid.*
[260] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 7.
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*

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In the context of insurance, the Good Practices outline principles on data protection and privacy for financial customers.[264] The law should prescribe requirements for insurers and intermediaries to collect data with the consent of customer.[265] The legal provisions must relate to the methods of collecting, recording and safe storing of data, the type of data, the purpose of collecting the data, and the time-period that the data must be kept secure and on records by the financial institution.[266] Financial institutions must provide their customers with access to their information free of any charges.[267] Financial institutions must be obliged to comply with the legal principles on the collection and securing of the clients' information, as well as privacy and confidentiality requirements.[268] Clients should be allowed to amend errors and to lodge complaints or queries in relation to the handling of their personal information.[269]

The Good Practices also stipulate that financial service providers must be required to design processes to protect and secure clients' personal information and information relating to products and services provided.[270] To protect and secure the information, financial service providers must provide access to the information according to the different employment levels in their businesses.[271] They should also be held accountable for any misuse of information or contravention of data protection laws.[272] The Good Practices also state that data protection laws should prescribe rules to access of clients' information by third parties, government departments, credit bureaus, and debt collection agencies.[273] Where an insurer is obliged to provide client information to third parties in terms of the law, the insurer must inform the client in writing, of the nature and type of information request, and how and when the information will be provided to the third party.[274] Except where required by law,

[264] World Bank *Good Practices for Financial Consumer Protection* 2017 at 90.
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid.*
[270] *Idem* at 91.
[271] *Ibid.*
[272] *Ibid.*
[273] *Idem* at 92.
[274] *Ibid.*

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financial service providers must obtain customer consent for sharing information with third parties and customers should be provided with the option to revoke the consent.[275]

The above data protection and privacy requirements under the Good Practices are comparable to the provisions of POPIA which regulates the processing of personal information by public and private bodies including insurers, intermediaries, and retirements funds.[276] The term "processing" under POPIA means to *inter alia* collect, receive, store and distribute personal information.[277] Insurers and intermediaries are responsible parties under POPIA, and they are required to collect, process, store, distribute and protect the clients' personal information according to the provisions of POPIA, similar to the principles of the Good Practices.[278] The provisions of POPIA also require them to notify clients that their personal information is being collected or accessed by an unauthorised person, similar to the requirements of the Good Practices.[279] In addition, insurers and intermediaries as responsible parties are only allowed to process personal information if the processing is adequate, relevant, and not excessive, and may only collect the information for a specific purpose.[280] They should notify the members/clients of their actions as these customers are data subjects.[281] POPIA further requires insurers and intermediaries to implement systems and processes to protect the clients' personal information from damage, loss, unauthorised processing and access, and from destruction.[282] These requirements are also similar to the principles of the Good Practices.[283]

The requirements of the Good Practices on data privacy and protection of information are also similar to the PPRs requirements on data management.[284] The PPRs incorporate the provisions of POPIA on the processing of personal information

[275] *Ibid.*
[276] POPIA at 1.
[277] Section 5 of POPIA.
[278] *Ibid.*
[279] *Ibid.*
[280] Sections 9 to 13 of POPIA.
[281] Sections 9 to 13 of POPIA.
[282] Section 19 of POPIA.
[283] *Ibid.*
[284] Rule 13 of the PPRs.

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in respect of products, services and personal information.[285] The PPRs require an insurer to establish "…an effective data management framework…" which includes proper policies, systems and processes to process clients' data and allows the insurer to constantly "access and retrieve the data and maintain accurate, updated, reliable, secure and complete data".[286] The data management processes should allow the insurer to identity, evaluate, and mitigate risks to achieve fair customer outcomes.[287]

The insurer must be able to comply with the legislation, to evaluate its obligations under the insurance policies, and to classify complaints lodged by clients.[288] The insurer must also be able to access the clients' data where it outsources its business to a third party and require the outsourcing party to comply with the data protection laws.[289] As such, the PPRs data management requirements incorporate the principles of the Good Practices on data privacy and protection of data.[290]

The FSCA Draft Conduct Standard on conditions prescribed on pension fund benefit administrators reflects the requirements of the G20 High-Level Principles on consumer data and privacy.[291] The Draft Conduct Standard determines data management requirements for retirement fund administrators in accordance with the provisions of POPIA.[292] An administrator is required to implement data management processes to store and process clients' data, and to retrieve and protect the data.[293] The administrator must be able to assess, monitor and mitigate the risks associated with the clients' data and to categorise the data for reporting purposes.[294] As the data requirements are aligned with the provisions of POPIA, the administrators and relevant stakeholders are required to comply with POPIA when processing the personal information of the fund and its customers.[295] These principles incorporate the

[285] Rule 13.2 of the PPRs.
[286] Rule 13.3 of the PPRs
[287] *Ibid.*
[288] *Ibid.*
[289] Rule 13.6 of the PPRs.
[290] Rule 13 of the PPRs.
[291] FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[292] *Idem* at 26.
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*

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provisions of the G20 High-Level Principles discussed above, on the customers rights and interests on the processing of their personal information.[296]

(iii) Consumer protection

Core Principle 5 of the OECD Recommendations stipulate provisions on the "[r]ights of members and beneficiaries…." and access to sufficient benefits.[297] The legal framework must contain laws which prohibit discrimination and the exclusion of eligible members from qualifying for benefits based on their salaries or employment conditions such as contract workers working on fixed term contracts or restrictions based on the number of years in service.[298] The rules of the fund must therefore not contain provisions which treat members unequally when it comes to their benefits, disclosures and access to information, or the right to lodge complaints or raise queries in respect of their benefits.[299] Members' benefits should be protected from creditors of the sponsor of the fund, and during amalgamation and transfers.[300] Members should be able to transfer their benefits after termination of their employment with the employer.[301] The transfer of benefits must not be hindered by excessive or unnecessary termination fees.[302]

Core Principle 5 further states that members, beneficiaries, and potential members of retirement funds should be able to easily obtain information about their benefits, including their retirement contributions, investment policies, projected retirement contributions and benefits, contact details of the fund, and the process to claim their benefits.[303] In line with open disclosure channels, Core Principle 5 recommends that the fund must notify members of the employer's failure to pay contributions in the appropriate manner, as prescribed by legislation.[304] The fund is also required to provide members with benefit statements which must include

[296] *Ibid.*
[297] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 15.
[298] *Ibid.*
[299] *Ibid.*
[300] *Idem* at 16.
[301] *Ibid.*
[302] *Ibid.*
[303] *Idem* at 17.
[304] *Ibid.*

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information that allows the members to view their retirement savings, related benefits, and investment returns.[305]

The provisions of Core Principle 5 on the rights of members and beneficiaries are reflected on numerous occasions in the framework for retirement funds in South Africa. Despite that there is currently no law in South Africa which obliges an employer to join a retirement fund, once the employer decides to join a retirement fund, the employer must comply with the legislative requirements on eligibility requirements for its employees.[306] The provisions that enable access to sufficient benefits are similar to the provisions of the ITA.[307] As discussed above, according to the provisions of the ITA, the Commissioner of Revenue approves the tax of the retirement fund on condition that the employer *inter alia* ensures that it is compulsory for all employees who qualify for retirement benefits to join the fund.[308] This means that a member is not allowed to withdraw from the fund while in employment, and can only withdraw from the fund on resignation, retrenchment, dismissal, liquidation of the retirement fund or upon the death of the member.[309] This condition applies to both pension and provident funds.[310] Should the employer fail to comply with these requirements, the commissioner can withdraw the tax approval of the fund.[311]

The requirements of Core Principle 5 on the protection of members' benefits from creditors are reflected in the provisions of section 37A of the PFA.[312] Section 37A does not allow the member's benefit to be pledged, ceded, or transferred in favour of a debt.[313] The provisions of Core Principle 5 on the protection of members' benefits from amalgamation or acquisition of the sponsor, and the protection of members' benefits as a result of transfer from one fund to another, are similar to the provisions of section 14 of the PFA.[314] The PFA facilitates the protection of the members' benefits

305 *Ibid.*
306 Section 1 of the ITA. (See also paragraph 2.2 above).
307 *Ibid.*
308 *Ibid.*
309 *Ibid.*
310 *Ibid.*
311 *Ibid.*
312 Section 37A of the PFA.
313 *Ibid.*
314 Section 14 of the PFA.

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by prescribing that the transfer should not result in the members being prejudiced by the transfer.[315] The PFA also prescribes that members must be adequately informed about the transfer.[316] The checks-and-balances-process should include a comparison of the benefits and fees between the transfer and transferee fund.[317]

The provisions of Core Principle 5 on providing members with disclosures and adequate information on their benefits is reflected in the King IV Report and the draft FSCA draft Conduct Standard conditions prescribed in respect of pension fund benefit administrators.[318] As discussed above, the King IV Report stipulates that the governing body's principal duties are to supervise the fund, make decisions on behalf of the fund, oversee management duties and decision-taking, and disclose information to members about their benefits.[319]

As discussed above, according to the FSCA draft Conduct Standard on requirements for pension fund administrators, an administrator must disclose information to the fund before, during and after entering into an administration agreement, and disclose all the necessary information that may guide the fund to appoint the administrator.[320] The disclosures must include, among others, the retirement benefits to be provided to the fund and its members, and associated risks, fees and costs for providing the services.[321] The above provisions incorporate the requirements of Core Principle 5 and are market conduct tools which enhance the fair treatment of customers.[322]

According to the Good Practices, effective principles on the protection of financial customers contributes towards the consistency and development of the

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315 *Ibid.*
316 *Ibid.*
317 *Ibid.*
318 Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 2 and the FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 18. (See also paragraph 3.2.1(ii) and 3.3.3(ii)).
319 *Idem* at 21.
320 FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 18. (See also paragraph 3.3.3(ii) above).
321 *Ibid.*
322 Institute of Directors of Southern Africa "King IV Report on Corporate Governance for Southern Africa" (1 November 2016) at 2 and the FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 18. (See also paragraph 3.2.1(ii) and 3.3.3(ii)).

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insurance sector.[323] Insurers need to conduct themselves with integrity and assure their clients that they can fulfill their obligations under the insurance business that they conduct with their customers.[324] Insurers must also be able to assure their customers that they will treat them fairly throughout the process of rendering products and services.[325]

Conversely, in order to provide suitable and efficient products and services to their clients, customers should be reliable.[326] Customers are responsible for providing insurers with the necessary information to enable the insurers to assess the risk posed by these customers and to provide them with suitable insurance.[327] In order to enable proper flow of info information, it is important to ensure that the requirements for data accumulation and exchange are adequately regulated, otherwise fraudulent activities such as fraudulent claims and increased risk of insolvency of the insurers may ensue.[328]

(iv) Equitable and fair treatment

The G20 High-Level Principles stipulate that financial customers "...should be treated equitably, honestly and fairly at all stages of their relationship with financial service providers."[329] The fair treatment of customers is fundamental to "…good governance and [the] corporate culture…" of financial institution, brokers, intermediaries and representatives.[330] In South Africa, the fair treatment of customers has been embedded into the reformed regulatory framework and applies to retirement funds, its members, beneficiaries and potential customers.[331] The objectives of the FSRA are *inter alia* to implement a legislative structure which supports the fair treatment and protection of

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323 World Bank *Good Practices for Financial Consumer Protection* at 63.
324 *Ibid.*
325 *Ibid.*
326 *Ibid.*
327 *Ibid.*
328 *Ibid.*
329 G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.
330 *Ibid.*
331 National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 and National Treasury *A safer financial sector to serve South Africa better* 2011.

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customers and effectiveness and stability in the financial industry and aligns with the G20 High-Level Principles.[332]

The above is reminiscent of the TCF principles discussed earlier in this thesis. TCF has been incorporated into the FSRA, the RDR, the LTIA, the LTIA Regulations, the Insurance Act, FAIS, the FAIS General Code of Conduct, and COFI. TCF principles have also been incorporated into the PPRs.[333] The PPRs require insurers, their representatives and retirement funds to treat their customers fairly.[334] The PPRs stipulate that an insurer must implement processes which support the fair treatment of its clients.[335] This includes requirements that customers can be assured that the insurer's business is established on fair treatment practices, products are designed to suit the customers' needs, and customers should not encounter unnecessary difficulties to contact the insurer, to lodge a complaint, or to lodge a claim.[336] The PPRs also require an insurer to consider TCF principles when designing, reviewing and monitoring its products.[337] An insurer must consider the fair treatment of customers when designing its data management processes, and must process claims and handle complaints in a manner which supports the fair treatment of customers.[338]

The provisions of the PPRs relate to the conduct of an insurer who underwrites and administers risk benefits for retirement funds, its members, beneficiaries and potential customers.[339] Earlier in chapter 5,[340] it was mentioned that there are claims and complaints requirements under the PPRs, which are also incorporated in the FSCA draft Conduct Standard in respect of requirements for administrators. The disclosure requirements in the draft Conduct Standard for retirement fund administrators are also in the PPRs. In chapter 2,[341] it was mentioned that insurers may underwrite retirement funds. This means that the alignment of the PPRs with

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[332] Section 7 of the FSRA.
[333] Rule 1.4, 1.6 and 1.7 of the PPRs.
[334] *Ibid.*
[335] *Ibid.*
[336] *Ibid.*
[337] Rules 2 and 14 of the PPRs.
[338] Rules 13, 17 and 18 of the PPRs.
[339] Rule 1 of the PPRs.
[340] Paragraph 5.4 above.
[341] Paragraph 2.3.6. above.

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international best practices may directly and indirectly benefit the retirement fund industry.

Rule 1 of the PPRs require insurers to treat their customers fairly, including retirement fund and their members.[342] The PPRs also require insurers to conduct themselves with precision and integrity towards their customer.[343] According to the PPRs, insurers must implement processes to effect TCF Principles in their businesses, which includes *inter alia*, the provision of products and services which meet the needs and expectations of the customers, to treat their customers at all times.[344] The PPRs require insurers to provide the necessary information to their clients, ensure that customers are provided with appropriate advice, and implement measures which enable customers to lodge claims or complaints without any obstacles.[345]

The Good Practices note that intermediaries, brokers and insurers' representatives must satisfy the minimum requirements to provide intermediary services.[346] They should have the necessary skills and experience, training and on-going training regulatory supervisions as well as honesty and integrity and should be fined if they contravene the law.[347] In addition, the Good Practices determines that financial service providers must implement remuneration structures which do not encourage unnecessary risk and in order to achieve fair customer outcomes.[348] The remuneration structures must prohibit front-end commission which encourage the distribution of unsuitable products.[349] Remuneration policies must therefore not cause a conflict of interest between the insurer and the broker.[350] Insurers must adequately mitigate conflict of interest.[351] Commission and fees payable must be disclosed to the client before the distribution of products and services to the clients.[352]

342 Rule 1 of the PPRs.
343 *Idem* at Rule 1.3.
344 *Idem* at Rule 4.
345 *Ibid.*
346 World Bank *Good Practices for Financial Consumer Protection* 2017 at 88 to 89.
347 *Ibid.*
348 *Idem* at 89.
349 *Ibid.*
350 *Ibid.*
351 *Ibid.*
352 *Ibid.*

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The principles of the Good Practices on minimum requirements, necessary skills, experience, and training in order to provide intermediary services are similar to the FAIS Fit and Proper requirements.[353] Fit and Proper Standards include the experience and knowledge of the adviser, as well as personal character qualities like honesty and integrity, necessary to provide financial services.[354] The FAIS Fit and Proper Standards embraces the principles of the Good Practices.[355] The remuneration requirements of the Good Practices for intermediaries, which stipulate *inter alia* that remuneration structures should not encourage risk taking and should promote the fair treatment of customers, are akin to the RDR principles.[356] The former FSB designed the RDR to align the sale, marketing of financial products and the remuneration of intermediaries, with the protection of financial customers.[357] The objective of the RDR is to ensure that financial customers are provided with suitable products and advice, and with information to enable them to understand and compare products and services.[358] The RDR principles require advisers to disclose all fees and commission to be disclosed to clients.[359] The RDR also requires financial service providers to mitigate conflict of interest in respect of remuneration for the products and services rendered.[360] The RDR provisions on remuneration of advisers and conflict of interest were incorporated into the FAIS General Code of Conduct.[361] The RDR principles are therefore aligned with the requirements of the Good Practices.[362]

Similar to the above, the G20 High-Level Principles state that financial institutions, brokers, intermediaries and representatives should conduct their businesses in a manner that supports and protects the fair treatment of customers.[363] FSPs should conduct a needs analysis and identify their clients' needs before they

[353] FAIS Fit and Proper Standards.
[354] *Ibid.*
[355] *Ibid.*
[356] Financial Services Board *Retail Distribution Review* November 2014 at 1.
[357] *Ibid.*
[358] *Ibid.*
[359] *Ibid.*
[360] Financial Services Board *Proposed Amendments to the General Code* 31 October 2017 at 12 and section 3A(d) of the FAIS General Code of Conduct.
[361] *Ibid.*
[362] *Ibid.*
[363] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 7.

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provide them with products, services and advice.[364] Employees who deal with clients should receive suitable and adequate training.[365] The FSPs and the representatives should avoid conflict of interest and should make the necessary disclosures to customers where there is possible conflict of interest.[366] Remuneration for FSPs, representatives, brokers and employees should be designed in a manner which support fair customer outcomes, honourable business conduct and prevent conflict of interest.[367]

The provisions of the PPRs which require an insurer and its representatives to conduct themselves in a manner that achieves the fair treatment of customers, incorporates the G20 High-Level Principle on responsible business conduct.[368] The PPRs require an insurer to conducts a needs analysis to establish the nature and class of customers when designing products.[369] The needs analysis should be conducted by skilled personnel with adequate knowledge on the features of the product.[370] This is to ensure that the sale and distribution models of the products and disclosure requirements are aligned with the insurer's business policies, and mitigation of risks and regulatory requirements.[371] The needs analysis should also consider the fair treatment of customers.[372] These provisions incorporate the G20 High-Level Principles on designing products and also apply to retirement funds and their members.[373]

The requirements on distribution models are similar to the provisions of the RDR.[374] The principal purpose of the RDR is to stipulate a regulatory structure on the distribution models for financial products, which achieve the fair treatment of customers.[375] This also includes requirements that remuneration for financial products

[364] *Ibid.*
[365] *Ibid.*
[366] *Ibid.*
[367] *Ibid.*
[368] Rule 1 of the PPRs.
[369] Rules 1 and 2 of the PPRs.
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*
[373] *Ibid.*
[374] Financial Services Board *Retail Distribution Review* November 2014 at 1.
[375] *Ibid.*

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and services, including the rendering of advice should be structures in a manner that is affordable and which achieves fair customer outcomes.[376] These requirements also include financial products and services offered to retirements funds and their customers and are aligned with the distribution requirements of the G20 High-Level Principles.[377]

Lastly, the objectives of COFI incorporate the G20 High-Level Principle on the fair treatment of customers.[378] The objectives of COFI are, *inter alia*, to regulate and supervise the protection of financial customers by financial institutions through a regulatory structure which supports the fair treatment of customers.[379] These requirements will also extend to the financial products designed by product providers, the services they render and the sale and distribution of the products.[380] This will include products and services provided to retirement funds, their members and beneficiaries.[381]

I am of the view that it may be difficult to achieve fair outcomes for members and beneficiaries, given that the real need of a member on reaching retirement is to have sufficient savings and be able to live comfortably on that income and continue to provide an income to their family. Where a member's retirement and risk benefits are low, the member's family will not have sufficient income on the death of the member. In my view, the financial products do not therefore achieve fair customer outcomes in these instances.

(v) Complaints handling processes

The Good Practices highlight that financial service providers must implement suitable complaints handling policies and processes which should be managed by a senior manager to ensure efficient resolution of complaints.[382] The complaints management process should include resolution of complaints within a set time, which must be

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[376] Ibid.
[377] Ibid.
[378] COFI at 2.
[379] *Ibid.*
[380] Clause 20 of COFI.
[381] *Ibid.*
[382] World Bank *Good Practices for Financial Consumer Protection* 2017 at 49.

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adhered to, and must also be applied to outsourced insurance business.[383] The FSPs should provide customers with suitable means to submit complaints without unnecessary difficulties.[384] Employees and representatives must be properly trained to manage and resolve complaints.[385] The complaints process must provide adequate means for the FSPs to record and document complaints, respond to complaints within the set time, and inform the complaints of the outcome of the complaint and the relief sought by the complainant.[386] The FSPs must be able to extracts reports on complaints to assess the nature of complaints and the impact on their businesses, and use this information to consistently review the conduct, services and products.[387] The FSPs should be able to provide the complaints reports to the regulators for assessment and review of their conduct.[388]

The complaints process should allow customers to submit their responses within a certain time and should be given an opportunity to appeal the decisions granted by an authorised independent body.[389] The decisions of the authorised body must be binding in the same manner as a court judgment or a court order.[390] The independent body must be able to exercise its functions objectively, with proper checks and balances, and should have sufficient finances to carry out its duties.[391] The duties should be executed by an individual with the required expertise.[392] The services must be rendered to customers at no cost.[393]

The Good Practices' complaints management principles are similar to Rule 18 of the PPRs.[394] Rule 18 of the PPRs requires an insurer to implement and sustain a suitable and efficient complaints management structure, which is relative to the type,

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[383] *Ibid.*
[384] *Ibid.*
[385] *Ibid.*
[386] *Idem* at 49 to 50.
[387] *Idem* at 50.
[388] *Ibid.*
[389] *Idem* at 51.
[390] *Ibid.*
[391] *Ibid.*
[392] *Ibid.*
[393] *Ibid.*
[394] Rule 18 of the PPRs.

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size and category of the insurer's business.[395] The complaints management structure should facilitate a process for the insurer "…to gather and investigate all relevant and appropriate information and circumstances, with due regard to the fair treatment of customers…".[396] The complaints process should not place any unnecessary difficulties on customers to lodge complaints.[397] Rule 18 requires an insurer to consistently assess its complaints process and to record any amendments made to the process.[398] The PPRs require an insurer's complaints process to stipulate suitable targets, principal guidelines and appropriate duties for handling of complaints, remuneration structures, processes to record and classify complaints, and the process for reviewing, monitoring and outcomes of complaints.[399] The complaint management process should allow the insurer to regularly report the risks identified to senior management and the board of directors – explaining the impact on the complaints process, the risks determined and proposal to mitigate the risks.[400] The complaints process must incorporate a suitable communication process between the complainants and the office of the ombudsman.[401] The PPRs stipulate that senior management is responsible for the supervision and management of complaints.[402]

The provisions of the PPRs on complaints management are similar to the rules of the Good Practices which require FSPs to implement a complaints management which should be supervised by senior management.[403] Other provisions that are also comparable are the rules on a complaints process which allows the insurer to keep proper records of complaints, to communicate with the complaints, to report to senior management on the impact of complaints, and the ability to liaise with the office of the

[395] Rule 18.2 of the PPRs.
[396] *Ibid.*
[397] *Ibid.*
[398] *Ibid.*
[399] Rule 18.3 of the PPRs.
[400] *Ibid.*
[401] *Ibid.*
[402] *Ibid.*
[403] World Bank *Good Practices for Financial Consumer Protection* 2017 at 49-51 and Rule 18 of the PPRs.

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ombudsman.[404] This shows that the PPRs incorporate international standards to a large extent and will contribute to efficiency in the local and global markets.[405]

The provisions of the G20 High-Level Principles on handling of complaints are similar to the provisions of the PFA which establishes the Adjudicator.[406] The purpose of the Adjudicator is to provide a platform for retirement fund customers to lodge complaints and provide them with recourse on matters of dissatisfaction, at no cost charged.[407] The functions of the Adjudicator are, *inter alia*, to investigate complaints, to provide remedies to financial customers, and to issue an order which the same as an order of a court of law.[408] These requirements are aligned with the G20 High-Level Principles.

The Financial Services Tribunal ("FST") was established by the FSRA and is an "independent and impartial" body which executes its functions in terms of the FSRA.[409] The FST's functions are, *inter alia*, to review decisions made by a financial sector regulator or Ombud Council, including decisions made by the Adjudicator in respect of complaints lodged by financial customers.[410] The FST has the power to set aside a decision, refer the decision back to body that made the decision, reject an application, or review a decision if it deems it insignificant or distressful.[411] Where necessary, the FST may order an applicant to pay part or all of the costs incurred by the other party in the review process.[412] The functions and powers of the FST incorporate the G20 High-Level Principles to provide financial customers with a platform to get their complaints reviewed where they are dissatisfied with the decisions of the Adjudicator.[413] The costs charged by the FST where the need arise are "costs

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[404] *Ibid.*
[405] *Ibid.*
[406] Section 30D of the PFA.
[407] *Ibid.*
[408] Section 30D and E of the PFA.
[409] Section 219 of the FSRA.
[410] Section 230 of the FSRA.
[411] *Ibid.*
[412] *Ibid.*
[413] *Ibid.*

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reasonably and properly incurred by the other party", incorporates the principles of the G20 High-Level Principles that the costs should reasonable.[414]

The consolidated ombud system which will be implemented by the FSRA also incorporates the G20 High-Level Principles on complaints handling and redress.[415] The FSRA establishes an Ombud Council which will regulate and monitor all the ombud schemes, including the Adjudicator.[416] The objective of the Ombud Council is to provide financial customers with redress mechanisms that are affordable, effective, fair and impartial – a requirement of the G20 High-Level Principles.[417]

6.2.5. Competition

The G20 High-Level Principles state that the financial industry should be competitive for consumers to have a wide range of products to compare and select from.[418] This should enable consumers to explore and compare products, and to change from one product provider to another without difficulties.[419] One of the objectives of the FSCA is to advance competition in the financial industry through the products and services provided by financial institutions, in coordination with the Competition Commission.[420] The RDR implemented a regulatory framework which *inter alia* allows financial customers, intermediaries and brokers to gain from a competitive industry through selling, distribution and rendering advice.[421] COFI will implement consolidated market conduct regulation with the aim of promoting strong competition in the financial industry.[422] These steps incorporate the G20 High-Level Principles on competition, to provide financial customers with a wide range of products and services to compare.[423] It supports the protection of customers as competition supports efficiency and stability in the financial industry.[424]

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[414] *Ibid.*
[415] *A Known and Trusted Ombud System for All* September 2011.
[416] Section 175 of the FSR.
[417] *Ibid.*
[418] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 7.
[419] *Ibid.*
[420] Section 34(1)(d) of the FSRA.
[421] RDR status update December 2016 at 1.
[422] COFI at 2.
[423] *Ibid.*
[424] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 7.

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6.3. Discussion on the shortcomings of the market conduct regulatory reforms in South Africa versus the international best practices

As discussed above, COFI will introduce various market conduct laws which may result in further segmentation of the market conduct laws, in an effort to move away from the siloed legislation for retirement funds. I am of the view that the regulators should consider whether the consolidation of the market conduct laws will achieve the objectives of Principle 1 of the G20 High-Level Principles to implement a "strong and effective legal and judicial supervisory mechanism", and to properly regulate the conduct of retirement funds, the administrators, employers, financial advisors and relevant stakeholders.[425] As indicated in chapter 5, retirement funds have many areas which are rules-based and will also require rules-based regulatory methods. This should also be considered against international best practices to ensure efficient regulation.

The research identified above that the disclosures to members lack significant disclosures on legislative requirements for divorce orders and maintenance orders. The research also identified lack of adequate disclosures to members on the self-standing risk benefits which are provided to members under the employer group policies and are bundled with retirement funds, which creates unawareness for members and result in members not completing nomination forms. The study discussed that this causes inefficiency, delays and inconveniences for members where a member does not complete a nomination form and these risk benefits have to be paid to an estate.

The lack of member data also contributes to insufficient disclosures to members and unclaimed benefits and impedes the objectives of financial inclusion. This shortcoming on the lack of sufficient disclosures is not aligned with the G20 High-Level Principle of "Disclosure and Transparency", the Good Practices and Core Principle 5

[425] *Idem* at 5.

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of the OECD Core Principles which require retirement funds to provide adequate disclosures to their members.[426] The regulators should therefore consider best practices in respect of its regulatory mechanism and the market conduct laws on disclosures to members. However, customers are also responsible for providing accurate and sufficient data to the retirement funds, the administrators, employers and financial advisors, to ensure that their data is kept up to date and to enable the provisions of disclosures and communication in respect of their benefits, to align with international best practices.[427] Financial customers should therefore be reminded of their responsibility to become informed of their benefits and of their responsibility to provide accurate and update information.

The FSCA's role in respect of financial literacy programmes is to provide resources on financial literacy programmes and to issue regulatory requirements for financial institutions to provide training to their customers.[428] This strategy is not aligned with the requirements of the G20 High-Level Principles which require regulators to train financial customers.[429] The FSCA should therefore consider aligning its strategies on financial literacy programmes with international practices.[430]

6.4. Conclusion

The OECD Core Principles lay a foundation for market conduct principles for retirement funds, enhance the protection of fund members and their beneficiaries, and promote efficiency and stability of retirement funds to provide suitable and sufficient benefits to members and their beneficiaries.[431] These principles were adapted by the South African government and incorporated into the strategies to reform the financial laws and the regulation of the financial industry, including retirement funds.[432] The

[426] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5; World Bank *Good Practices for Financial Consumer Protection* 2017 at 65 and OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 15.
[427] World Bank *Good Practices for Financial Consumer Protection* at 63.
[428] FSCA Regulatory Strategy 2021 – 2025 at 20.
[429] G20 *High-Level Principles on Financial Consumer Protection* October 2011 at 5.
[430] *Ibid*.
[431] OECD *Recommendations on core principles of occupational pension regulation* June 2009 at 2.
[432] National Treasury *A safer financial sector to serve South Africa better* 2011 at 1 to 2 and National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014 at 8 and 18.

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purpose is to enhance the protection of financial customers, achieve financial inclusion, stability and efficiency in the financial industry, and to implement a strong market conduct regulation in the financial industry.[433]

The market conduct regulatory reforms in South Africa incorporate the OECD Core Principles as the objective is to support the protection of members, beneficiaries, the fund, assets of the retirement funds and their members to ensure proper growth investments for members to get good value for their benefits.[434] The objectives of the reformed market conduct laws are to *inter alia* implement consolidated market conduct regulation, which includes reforms on governance of retirement funds – an integral part in the management of retirement funds to manage the protection and interest of members, beneficiaries and their benefits.[435] COFI will implement a consolidated market conduct regime in the financial industry, including retirement, which will include the OECD Core Principles. This will place South Africa as a role player in the international market and will contribute to efficiency in the financial industry.[436]

Due to the high-level alignment with international principles, retirement funds and financial institutions such as product providers, administrators and financial advisers are able to operate their businesses along clear and strong market conduct regulation lines on an international level.[437] Retirement fund members, beneficiaries and retirement fund officers will ideally have access to a clear platform to make the product and service providers of retirement funds account for their conduct.[438] The objectives of the G20 High-Level Principles are to support the protection and fair treatment of consumers, which is aligned with the South African objectives on regulatory reforms and the twin peaks financial regulation.[439] The South African

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[433] *Ibid.*
[434] *Ibid.*
[435] *Ibid.*
[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid.*
[439] National Treasury *A safer financial sector to serve South Africa better* 2011, and National Treasury *Treating Customers Fairly in the Financial Sector: Draft Market Conduct Policy Framework* December 2014.

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financial regulation contains aligns with all the relevant G20 High-Level principles on market conduct regulation.[440]

The protection fair treatment of financial customers is central to the regulatory reforms in the financial industry which were designed by the government to enable South Africa to adhere to the G20 High-Level Principles as a member, recognize international principles, and to place South Africa on an international level.[441] The G20 High-Level Principles will also enable South Africa to compete internationally.[442] The overall regulatory structure incorporates the requirements of the World Bank's Good Practices which require that members are provided with sufficient information to assist them to make informed decisions, the requirement for retirement fund administrators to be licensed and registered, the requirement to establish a regulator to implement and supervise financial institutions to protect consumers.[443]

440 *Ibid.*
441 *Ibid.*
442 *Ibid.*
443 World Bank *Good Practices for Financial Consumer Protection* 2017 at 71, 166 and 168.

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CHAPTER 7: A COMPARATIVE ANALYSIS OF MARKET CONDUCT REGULATION OF RETIREMENT FUNDS IN AUSTRALIA AND SOUTH AFRICA

7.1. Introduction

In this chapter, I analyse the twin peaks regulatory model in Australia and compare it to South Africa, to the extent that it relates to market conduct regulation of the retirement fund industry. I also analyse the introduction of the twin peaks regulatory model in Australia. I discuss the evaluation of the Australian financial system by the FSI (Wallis Inquiry), its findings and recommendations to reform the Australian financial regulatory system. I also discuss the objectives of the FSI to recommend a suitable financial regulatory system to ensure an efficient, sound and fair financial industry in Australia, to provide consumers with products that are cost effective. This chapter thus builds on research questions three and four.

I also discuss the recommendations of the FSI to establish a separate market conduct regulator to address regulatory gaps in the Australian financial industry, to regulate the sale and distribution of financial products and the handling of complaints. I also discuss the recommendations of the FSI to establish a prudential regulator to regulate prudential regulation and licensing of financial institutions. I analyse how the FSI recommendations led to the establishment of the Australian twin peaks financial regulation and Australian statutes which implemented the twin peaks. I also analyse how the Australian twin peaks statutes established APRA and the Australian market conduct regulator ASIC and their regulatory functions.

I discuss the Australian market conduct regulation framework under ASIC and the ASIC Act. This includes the definition of financial products and financial services under the ASIC Act. The discussion also includes ASIC's powers to regulate the conduct of financial institutions, its powers to investigate such conduct and to monitor the protection of financial customers. I also analyse ASIC's risk-based regulatory method to identify regulatory risks, and conduct that is in contravention of legislation.

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I also discuss ASIC's financial literacy and information gathering programmes. This includes the objective to enhance integrity and financial literacy of consumers in the financial industry by providing sufficient information to financial customers, dispute resolution platforms, comprehensive regulation in the financial industry, thorough market conduct regulation, and financial literacy programmes to enhance the protection of financial customers. The discussion also includes ASIC's on-line education programmes, financial literacy strategy to assist customers to protect their money and to make sound financial decisions in savings and investments, to identify customer needs and the risks that customers face.

I also analyse the legal framework of the ASIC Act. This includes the prohibition of offering financial services in an unethical or dishonest manner, or contrary to the legislative requirements. The analysis includes prohibitions on conduct which is false or misleading in respect of financial products on the price, services, or false products or services. The analysis also includes the provisions of the ASIC Act on jurisdiction outside the borders of Australia and to institute claims for damages on transactions done outside Australia, including the recovery of commission on financial products.

Under the comparative analysis, I compare the Australian twin peaks financial regulation model with that of South Africa. The comparison includes the evaluations conducted in the financial industries of both countries to identity the regulatory gaps and recommendations to address the regulatory gaps and inefficiencies. I also analyse the objectives of the regulatory reforms in Australia and South Africa. I also analyse the statutes which established the twin peaks in Australia, and South Africa, the prudential regulators, market conduct regulators of both countries and their powers under the twin peaks statutes.

I also discuss the regulation of retirement funds in Australia. This analysis outlines the laws which regulate retirement funds in Australia, the definition of retirement funds and the structure and purpose of retirement funds in Australia. The discussion also includes regulation retirement funds in Australia which includes payment of contributions, payment of retirement fund benefits, data requirements, keeping of records and complaints procedures. This also includes the regulations on the taxation of retirement fund benefits, the protection of retirement benefits and reporting requirements to the regulators by retirement funds.

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Under the comparative analysis, I compare the structure of retirement funds and the market conduct regulation in Australia and South Africa. This comparison includes the definition of retirement funds under the South African laws and those of Australia, payment of benefits, data requirements, payment of contributions, complaints management and taxation of retirement fund benefits. The analysis also includes a comparison of the regulators' powers in Australia and South Africa, which includes supervision of retirement funds, reporting requirements, keeping of records.

7.2. Overview of the introduction of twin peaks in Australia

Twin peaks financial regulation model in Australia was introduced pursuant to the extensive recommendations made by the Wallis Inquiry ("the Inquiry"), found in 1996 to assess the Australian financial system.[1] The Inquiry was requested to evaluate the dynamics of the financial system in Australia, and to propose methods to reform the current regulatory framework.[2] It was noted that efficiency in the financial industry was fundamental for the development of a competitive market, to achieve consistency and protection of consumers, through a reformed regulatory system.[3] The objectives of the Inquiry were, *inter alia*, to propose an adaptable regulatory system which was suited to the dynamics of the financial system and could address the needs of financial institutions and consumers.[4] A further objective of the Inquiry was to make proposals to implement an efficient, stable and fair financial market for consumers – one which offers affordable products to consumers.[5]

The Inquiry sought to make recommendations to, *inter alia*, refine regulatory objectives, expand the duties of the regulatory bodies, and provide for the effective supervision of financial products which are in the same or similar category, to support competition.[6] The Inquiry Report recommended that regulatory reforms should include "conduct and disclosure" provisions that would require financial institutions to provide

[1] Godwin "Australia's Trek towards Twin Peaks – Comparisons with South Africa" 2017 *Law and Financial Markets Review* 184.
[2] The Financial System Towards 2010 at 1.
[3] *Ibid.*
[4] *Idem* at 2.
[5] *Ibid.*
[6] *Ibid.*

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sufficient information to consumers to assist them to make sound decisions on the financial products and services rendered.[7]

The Inquiry proposed that a "Single Regulator for Conduct and Disclosure" should be established.[8] It was noted that the existing Australian regulatory framework had proven to be inefficient due to various regulatory gaps, and was not suited to deal with the developing markets in the financial industry.[9] In this regard, the Inquiry highlighted that various countries had adopted a regulatory structure with a regulator focused on market conduct regulation – particularly due to the complex nature of financial industries and products.[10] This led to the establishment of the Corporations and Financial Services Commission ("CFSC").[11] It was recommended that the CFSC "establish a consistent and comprehensive disclosure regime" for the financial industry, and have the powers to regulate the sale and distribution of financial products, provide advice to financial customers, and "licens[e] […] financial advisors under a single regime".[12] It was also recommended that the CFSC regulate the handling and resolution of complaints, and implement a universal channel to this effect, for consumers.[13]

The Inquiry also proposed that the consumer protection laws which were regulated by the Reserve Bank of Australia ("RBA") be transferred to the CFSC, and that the CFSC be formally established by legislation.[14] It noted that legislation should prescribe the powers of the CFSC – specifically to regulate compliance with reformed "conduct and disclosure laws" and to address regulatory to ensure efficiency.[15] The Inquiry proposed that the Australian Prudential Regulation Commission ("APRC") be created to supervise prudential regulation as an independent prudential regulator under the RBA and consolidate the functions of the Financial Institutions and the

[7] *Idem* at 16.
[8] *Idem* at 17.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] *Idem* at 18.
[15] *Ibid*.

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Insurance and Superannuation Commission the (ISC).[16] The removal of prudential regulation from the ambit of the RBA was perceived to increase transparency, accountability, and to improve coordination between the regulators.[17]

It was recommended that legislation should prescribe the powers of the APRC to oversee prudential regulation, regulate licensed financial institutions, and prohibit unlicensed institutions from conducting insurance business.[18] This included, *inter alia*, authorising and cancelling licenses to conduct insurance business for life and general insurance policies, and supervising financial institutions which fail to comply with the requirements of financial soundness.[19]In respect of regulatory bodies, the Inquiry proposed that a board of directors comprised of "independent directors" should be appointed to supervise the functioning, management, and execution of the duties of the regulator.[20] It was recommended that the Council of Financial Regulators ("CFR") should coordinate various duties and collaborate with the RBA, APRC and the CFSC in respect of their regulatory duties.[21]

Pearson notes that the Report highlighted three general objectives for financial regulation in Australia, namely, "to ensure [that] these markets operate efficiently and effectively; to prescribe certain particular standards or qualities of service and promote financial safety; and to achieve certain social objectives".[22] She further notes that the Report highlighted the principal objective of financial regulation – to ensure "cost effectiveness, transparency, flexibility and accountability".[23] In this regard, the Report stipulated that the barriers to adequate disclosure were due to the financial illiteracy of financial customers which resulted in an inability to make sound decisions about financial products – a matter that contributed to market failure.[24]

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[16] *Idem* at 20.
[17] *Ibid*.
[18] *Idem* at 21.
[19] *Ibid*.
[20] The Financial System Towards 2010 at 68 and CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 7.
[21] The Financial System Towards 2010 at 70 and CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation* August 2015 at 7.
[22] Pearson *Financial Services Law and Compliance in Australia* (2009) at 20.
[23] *Ibid.*
[24] *Ibid.*

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As a result of the above, the Australian Prudential Regulation Authority Act of 1998 ("the APRA Act") was promulgated, and it established APRA.[25] The APRA Act became one of the first pieces of legislation to introduce regulatory reforms in the Australian financial industry.[26] The APRA Act referred to three essential objectives, namely, "financial stability", "the provision of specialised regulation of conduct, disclosure and dispute resolution for financial service providers and financial markets", and "prudential supervision of those parts of the financial system which require more intense regulation for safety and stability reasons".[27] The APRA Act provided for APRA to execute its duties and exercise its powers under a statute which implemented the prudential regulatory framework aimed at developing a secure, efficient, competitive, and stable financial sector, and in line with the proposals of the Wallis Inquiry.[28] It further provided for confidentiality and protection of information, and the exchange of such information between the regulatory bodies.[29]

The Act was amended in 2003 pursuant to the failure of one of the top insurers in Australia, HIH Insurance Limited.[30] The HIH Royal Commission was created in 2001 to investigate and assess the circumstances surrounding the failure of HIH Insurance Limited.[31] The findings of the HIH Royal Commission led to various fundamental amendments of the Australian financial regulatory model.[32] The HIH Royal Commission approved the twin peaks model for Australia and highlighted that it was a "two-agency" regulatory model with a separate prudential regulator and a separate market conduct regulator.[33] The HIH Report criticized the manner in which the regulatory bodies collaborated, and highlighted that collaboration in relation to duties and information sharing had to form part of the duties of management, but all levels of employees should contribute to it.[34] The HIH Report noted that the twin peaks

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[25] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 8.
[26] Ibid.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Idem* at 9.
[34] *Ibid.*

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regulatory model could deal with issues such as the lack of collaboration and information sharing between APRA and ASIC, the ambiguity surrounding the assignment of duties between APRA and ASIC and the alignment of their duties, and the manner in which APRA addressed the queries on the solvency status of HIH Insurance.[35] The Report further suggested that the Memorandum of Understanding between APRA and ASIC should be evaluated.[36] APRA was also required collaborate with foreign jurisdictions to share information on the conduct of Australian insurers who conducted business in foreign jurisdictions.[37]

Presently, the objectives of APRA are stipulated in section 8(1) of the APRA Act.[38] APRA's main objective is to promote stability in the Australian financial industry.[39] The supporting objectives of APRA are to supervise institutions in the financial industry in terms of prudential laws or laws that regulate retirement benefits, and to support prudential supervision.[40] In this regard, APRA "…should balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality…" when executing its regulatory duties.[41] ASIC is responsible for "…monitoring and promoting market integrity and consumer protection in relation to the Australian financial system".[42] The objectives of the ASIC Act are, *inter alia*, to prescribe the regulatory powers and duties of ASIC.[43] Section 1(2) of the ASIC Act determines that ASIC should sustain, support and enhance the operation of the financial industry and the financial institutions.[44] The ASIC Act further empowers ASIC to enhance the integrity of investors and financial customers, and to record, process, safely retain and protect the information in its custody, acquired through its regulatory powers and in

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[35] *Ibid.*
[36] *Idem* at 8.
[37] *Ibid.*
[38] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 8 and section 8(1) of the APRA Act 50 of 1998.
[39] *Ibid.*
[40] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 8 and section 8(2) of the APRA Act.
[41] *Ibid.*
[42] Section 12A(2) of the ASIC Act 51 of 1998.
[43] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 13 and section 1(1) of the ASIC Act 51 of 1998.
[44] Section 1(2) of the ASIC Act.

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exercising its duties.[45] ASIC is further required to promote competition, enforce the ASIC Act, regulate the financial industry, and impose regulatory penalties.[46]

The Corporations Act prescribes additional powers to ASIC to aid the Panel,[47] the Disciplinary Board,[48] and the Review Board to conduct their duties and exercise their powers.[49] The Corporations Act further empowers ASIC to advise the Minister of any amendments to the corporations' legislation that it deems necessary to address any challenges or mitigate risks in conducting its duties or exercising its functions.[50] In addition to the powers and functions prescribed by the ASIC Act and the Corporations Act, ASIC is empowered by the following statutes: the ASIC Supervisory Cost Recovery Levy (Collection) Act 2017; the Insurance Contracts Act 1984; the Superannuation (Resolution of Complaints) Act 1993; the Life Insurance Act 1995; the Retirement Savings Accounts Act 1997; the Superannuation Industry (Supervision) Act 1993.[51] ASIC supervises capital markets, financial markets, products and services including investment schemes, financial advisors, managed investment scheme operators, market operators, clearing and settlement facility operators, auditors and liquidators.[52] ASIC took over the trade practices regulation which regulate life insurance, general insurance, superannuation and banking.[53] This led to the repeal of the Trade Practices Act of 1974, and the provisions were incorporated into the ASIC Act.[54] ASIC is required to collaborate with APRA when conducting its duties and exercising its powers, and to support APRA in conducting its duties and exercising its powers.[55]

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[45] *Ibid*.
[46] Sections 1(2) to 2(A) of the ASIC Act.
[47] Panel is defined in the ASIC Act as the Takeovers Panel.
[48] Disciplinary Board is defined in the ASIC Act as the Companies Auditors Disciplinary Board.
[49] Section 11(1) of the ASIC Act and section 5B of the Corporations Act 50 of 2001.
[50] Section 11(2) of the ASIC Act.
[51] Section 12A(1) of the ASIC Act.
[52] Pearson *Financial Services Law and Compliance in Australia* (2009) at 41.
[53] *Idem* at 45.
[54] *Ibid*.
[55] Section 12A(1) to(2) of the ASIC Act.

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7.3. Market conduct regulation in Australia

7.3.1. Regulatory framework

For purposes of discussing the functions and powers of ASIC, it is necessary to discuss the definitions of financial products and financial services. The ASIC Act provides a general definition of financial products and defines them as:

> "…a facility through which, or through the acquisition of which, a person does one or more of the following: (a) makes a financial investment (see subsection (4)); (b) manages financial risk (see subsection (5)); (c) makes non-cash payments (see subsection (6))."[56]

A financial investment includes purchasing shares in a company or depositing money in a registered investment scheme but excludes buying property or requesting a financial advisor to buy shares on behalf of a client, as the request itself does not constitute an investment.[57] Managing a financial risk includes taking out an insurance policy but excludes, for example, the appointment of a security company to prevent and manage theft.[58]

In terms of the ASIC Act, a financial product includes among others, a security, a derivative, an interest in an investment scheme, an insurance policy (but excluding a health insurance policy provided in terms the Private Health Insurance Act 2007 or through a health benefit fund), "a life policy, or a sinking fund policy, within the meaning of the Life Insurance Act 1995, that is not a contract of insurance", and "a retirement savings account within the meaning of the Retirement Savings Accounts Act 1997".[59] A financial service is defined to include, *inter alia*, a person who renders advice, provides a financial product, sells and distributes a financial product, provides a superannuation, or operates a registered investment scheme.[60]

[56] Section12BAA(1) of the ASIC Act.
[57] Section 12BAA(4) of the ASIC Act.
[58] Section 12BAA(5) of the ASIC Act.
[59] Section 12AAB(7) of the ASIC Act.
[60] Section 12BAB(1) of the ASIC Act.

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ASIC has the authority to supervise the disclosure of information on financial products and financial service providers - which includes selling, distribution and providing advice on financial products.[61] Financial institutions are also required to comply with reporting requirements of the ASIC Act.[62] The ASIC Act empowers ASIC to investigate conduct that is non-compliant with the ASIC Act and other laws, in respect of which it regulates conduct, supervise and monitor the protection of financial customers, and to issue regulations.[63] ASIC highlighted that it would achieve its objectives by employing a risk-based regulatory approach to identify regulatory risks, identify conduct that is in contravention of legislation, and consult with the market players and customers.[64] Pearson notes that, in order to implement its risk-based approach, ASIC identified specific areas to focus on.[65] This includes among others, “financial advice from not truly independent sources”, “direct selling by inadequately trained staff” of large entities such as big insurance companies, education programmes on insurance products, disclosures on insurance products - including exclusions and limitations on benefits, and alternative dispute resolution schemes.[66]

ASIC regulates the licensing for the provision of financial products by financial service providers, and the marketing of financial products, (among other things), in terms of section 119A of the Corporations Act.[67] The Corporations Act stipulates provisions for licensing of three financial activities, namely, operating a financial market, operating a clearing and settlement facility and conducting financial services business.[68] Licensing of Australian financial services is centred on “quality and competence” and is subject to requirements such as “fairness, honesty, and professionalism”.[69] It is also a requisite that the licensee should satisfy the fit and proper requirements stipulated by legislation.[70] Pearson contends that ASIC has

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61 Pearson *Financial Services Law and Compliance in Australia* (2009) at 43.
62 *Ibid.*
63 *Ibid* and sections 11, 12A and 13 of the ASIC Act.
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*
67 Pearson *Financial Services Law and Compliance in Australia* (2009) at 107 and section 119A of the Corporations Act.
68 *Ibid.*
69 Pearson *Financial Services Law and Compliance in Australia* (2009) at 107.
70 *Ibid.*

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implemented an effective licensing regulatory regime and imposed regulatory penalties on financial institutions who conduct their business outside of the parameters of their licensing requirements, and unlicensed financial institutions and providers.[71]

The ASIC Act stipulates that ASIC has powers to monitor and advance the stability of the market and the protection of customers by supporting and regulating approved industry codes.[72] Financial services providers are required to comply with the industry codes.[73] Examples of these codes are General Insurance Code of Practice October 2021.[74] The General Insurance Code of Practice was designed by the Insurance Council of Australia as a "voluntary Code" and is reviewed and revised regularly.[75] The principles of the General Insurance Code of Practice are:

- "provide value, transparency and fairness of products and service;
- promote trust, integrity and respect;
- provide accessibility and additional support; and
- resolve any concerns and work to prevent future concerns."[76]

One of the objectives of the General Insurance Code of Practice is "to provide fair and effective mechanisms for resolving Complaints..."[77] Other examples are the Insurance Brokers Code of Practice,[78] and the Financial Planners and Advisers Code of Ethics 2019.[79]

The Australian Financial Complaints Authority ("AFCA") is the ombudsman for the Australian financial industry.[80] AFCA Adjudicates complaints for financial customers and small business, as an alternative cost-effective external dispute resolution platform to tribunals and courts.[81] "AFCA is a one-stop shop for consumers

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[71] *Ibid.*
[72] Section 12A(3) of the ASIC Act.
[73] https://www.legislation.gov.au/Details/F2019L00117 and https://asic.gov.au/for-finance-professionals/afs-licensees/professional-standards-for-financial-advisers/code-of-ethics/
[74] Insurance Council Australia General Insurance Code of Practice October 2021 at 1.
[75] *Idem* at 3.
[76] *Idem* at 4.
[77] Idem at 9.
[78] National Insurance Brokers Association *Insurance Brokers Code of Practice* October 2022 at.
[79] Financial Planners and Advisers Code of Ethics 2019.
[80] The Australian Financial Complaints Authority annual review 2021 – 2022 at 15.
[81] *Ibid.* (Superannuation includes retirement funds).

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and small businesses that have a dispute with their financial firm over issues such as banking, credit, general insurance, financial advice, investments, life insurance and superannuation."[82] AFCA is an "impartial and independent" ombudsman which adjudicates the resolution of complaints between financial customers and financial institutions.[83] As an initial step, AFCA refers a new complaint to the financial institution for the parties to resolve the complaint.[84] If the customer and the financial institution fail to reach a resolution, AFCA investigates the complaint through "negotiation or conciliation".[85] If the complaints is not resolved, AFCA makes a ruling in terms of its rules.[86] Most of the complaints are however resolved between the financial customers and the financial institutions, and through "negotiation or conciliation" by AFCA, and through AFCA's initial reviews.[87]

The ACCC was established by the Trade Practices Commission in 1995, through the Trade Practices Act.[88] The Trade Practices Act was replaced by the Competition and Consumer Act 2010 (no. 51 of 1974) ("the CCA").[89] Section 6A of the CCA stipulates provisions for the establishment of the ACCC.[90] The ACCC's functions are to achieve the purpose of:

- "maintaining and promoting competition;
- protecting the interests and safety of consumers, and supporting fair trading in markets affecting consumers and small business;
- promoting the economically efficient operation of, use of, and investment in infrastructure, and identifying market failure;
- undertaking market studies and inquiries to support competition, consumer and regulatory outcomes."[91]

[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] https://www.accc.gov.au/about-us/accc-role-and-structure/about-the-accc.
[89] https://www.accc.gov.au/about-us/accc-role-and-structure/legislation-we-enforce
[90] Section 6A of the CCA.
[91] https://www.accc.gov.au/about-us/accc-role-and-structure/about-the-accc; and section 28 of the CCA.

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The ACCC regulates competition among other things, as well as certain industry codes[92] of conduct that it is empowered to regulate.[93] The ACCC also regulates the protection of financial customers and regulates conduct such as mis-selling, deceit, misrepresentation, or inducement in respect of financial products, pricing in respect of financial products.[94] However ASIC is the regulator for consumer protection of the Australian financial sector.[95]

7.3.2. Financial literacy and information gathering

ASIC aims to enhance integrity and financial literacy of consumers in the financial industry.[96] It undertook to achieve this by providing sufficient information to financial customers, providing customers with dispute resolution platforms, comprehensive regulation in the financial industry, adaptable and thorough market conduct regulation, and financial literacy programmes to enhance the protection of financial customers.[97] ASIC established an on-line customer education programme in 2000 known as the Financial Information Directory ("FIDO").[98] This on-line programme provided "about 300 consumer education resources provided by government, industry and consumer groups".[99] Pearson notes that the FIDO programme was removed in 2004 as it was alleged that it was compiled using outdated information gathered in 1999.[100]

ASIC subsequently designed its own financial literacy strategy.[101] The financial education strategy determines that "ASIC's consumer education strategy is focused on helping consumers look after their money and their financial future. Its object was

[92] According to the section 51ACA(1) of the Trade Practices Act "***industry code*** means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry."
[93] Pearson *Financial Services Law and Compliance in Australia* (2009) at 54.
[94] See the ASIC Act Division 2—Unconscionable conduct and consumer protection in relation to financial services from section 12A to 12HG of the ASIC Act.

[95] Section 1 of ASIC.

[96] Pearson *Financial Services Law and Compliance in Australia* (2009) at 45.
[97] *Ibid.*
[98] *Idem* at 46.
[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.*

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also to assist customers to make sound financial decisions in savings and investments".[102] The strategy later included consumer literacy programmes with the object of determining the needs of the customers and deal with the risks that they face.[103] One of the risks subsequently identified was remuneration for unsuitable financial products which encouraged ASIC to analyse the remuneration models in the Australian financial industry.[104] The analysis assisted ASIC to gather information on financial products, intermediaries, compliance, and enforcement measures.[105] Various regulatory methods were employed to identify the risks associated with the protection of customers, including information gathered from complaints lodged by customers.[106]

The ASIC National Financial Literacy Strategy Annual Highlights Report of 2016-2017 (published in February 2018) ("ASIC NFLS Annual Highlights Report") states that the "National Financial Literacy Strategy" is "a practical framework for action, led by ASIC to guide and encourage all those with a role to play in improving Australians' financial literacy."[107] The ASIC NFLS Annual Highlights Report also states that "financial literacy is a combination of financial knowledge, skills, attitudes and behaviours necessary to make sound financial decisions, based on personal circumstances, to improve financial wellbeing."[108] The vision of the strategy is to "improve the financial wellbeing of Australians by advancing their financial literacy."[109] The "core principles" of the strategy are:

- "Shared responsibility;
- Engagement and effectiveness;
- Encouragement of good practice;
- Diversity and inclusiveness."[110]

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[102] *Ibid.*
[103] *Idem* at 47.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] Australian Securities and Investments Commission NFLS Annual Highlights Report 2016–17 (February 2018) at 4.
[108] *Idem* at 5.
[109] *Ibid.*
[110] *Ibid.*

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The "Strategic" priorities of the strategy are "individuals, families and communities."[111] This includes the following:

- "Giving teachers the support they need to effectively teach financial literacy using a curriculum-based approach; and extending opportunities to engage students in post-compulsory education."
- "Giving people the tools and guidance they need at different life stages or in changing personal circumstances (including Indigenous Australians, pre-retirees, seniors and women)." [112]
- Fostering good practice in programmes and services to meet the range and complexity of needs of specific community target groups, particularly those who are disadvantaged and/or vulnerable."[113]

The "policy and program development" includes information sharing and assessing financial behaviour for a certain period to evaluate the impact of the financial literacy programmes.[114] With regard to financial literacy for school pupils, the 2016-2017 highlights reflect the following:

- "over 60% of schools engaged with ASIC's MoneySmart Teaching program;
- over 11,900 teachers engaged in ASIC's MoneySmart Teaching professional development; and
- over 650,000 students participated in other school-based programmes."[115]

In respect of Information, tools and resources, over 7.9 million people made good financial decisions after visiting the ASIC's MoneySmart website.[116] ASIC's MoneySmart website provides authentic information to Australians on financial affairs through "articles, case studies, videos, infographics, tools and calculators to suit different learning styles", free of charge.[117] In February 2017, ASIC's MoneySmart

[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] *Idem* at 6.
[117] *Idem* at 19.

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website reflected that the users took the following decisions in respect of their finances:

- "keeping a closer eye on spending;
- preparing or updating a budget;
- shopping around for a better deal becoming more confident about making financial decisions;
- reviewing their financial situation or reassessing their investments."[118]

In February 2022, the Australian government published the National Financial Capability Strategy ("the NFSC").[119] The NFSC states that the Australian Government is obliged to develop the financial abilities of Australians.[120] Due to this reason, the Australian government took over this obligation from ASIC, ("an independent government agency"), and handed over to the Treasury, and developed a new financial capability strategy.[121] The NFSC states that financial literacy will firstly be aimed at providing guidance and resources to the youth and to design mechanisms to assess whether it is achieving its purpose.[122] In 2020 and 2021, the Australian government liaised with the agents of the "financial capability community" and incorporated their input into the strategy.[123] The strategy outlines the methods of financial capability and the "guiding principles"; the functions of the government on financial capability, "financial capability monitoring and evaluation framework", and "the approach to implementation of the Strategy for four target cohorts: young Australians; women; people in or near retirement; and Aboriginal and Torres Strait Islander peoples."[124] The strategy is aligned with the recommendation of the OECD Council on financial literacy.[125]

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[118] *Ibid.*
[119] Australian Government *National Capability Strategy* (February 2022) at 1.
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.* "In October 2020, the OECD Council adopted a new recommendation regarding financial literacy. The recommendation presents a comprehensive instrument on financial literacy to assist governments, public authorities and relevant stakeholders in their efforts to design, implement and evaluate financial literacy policies. The recommendation covers three main areas: national strategies,

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7.3.3. Legal framework

The ASIC Act prohibits the offering of financial services in an unethical or dishonest manner, or contrary to the legislative requirements.[126] The Australian courts consider factors such as whether the customer was required to accept conditions which were not favourable to them, the impact of the influence on the customer, including undue influence, the costs of the service by other suppliers, and industry and regulatory standards.[127] Section 12DB of the ASIC Act deals with false or misleading representations and prohibits “the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services”.[128] ASIC also prohibits the provision, or the marketing, or use of financial services in a “false or misleading” manner, projecting that the services are of a certain “standard, quality, value or grade” or that a customer has consented to purchase services, present a “false or misleading” statement in respect of services.[129]

Section 12DG of the ASIC Act prohibits the marketing and promoting of financial services at a specific price and for a certain period if there is a possibility that the person may not be able to provide the services.[130] A person who contravenes this requirement will be required to offer the services at the correct price and for a specific period.[131] In respect of referrals, the ASIC Act prohibits inducing a customer to purchase financial services by misleading the customer that they will receive a commission or a fee for referring potential customers or assisting with the provision of financial services to other customers.[132]

Section 12AC of the ASIC Act stipulates provisions to extend jurisdiction outside Australian borders, in respect of business conducted in Australia by a legal

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the various sectors of the financial landscape and the effective delivery of programmes. It also looks at how to address the needs of vulnerable groups and takes into account the increased digitalisation of finance. The recommendation has been considered in the development of this Strategy and will inform its ongoing implementation.”

[126] Section 12CB(1) of the ASIC Act.
[127] Section 12CC of the ASIC Act.
[128] Section 12DB(1) of the ASIC Act.
[129] *Ibid.*
[130] Section 12DG(1) of the ASIC Act.
[131] Section 12DG(2) of the ASIC Act.
[132] Section 12DH of the ASIC Act.

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entity or an individual.[133] Section 12AC makes provision for a person to institute a claim recover damages suffered for business conducted outside Australia, in accordance with the enabling provisions under section 12GF.[134] A person can also recover commission paid for financial services provided outside Australia if it exceeds the prescribed commission maximums, in accordance with the enabling provisions of section 12GFA.[135]

The ASIC Act stipulates that it is an offence to contravene, try to contravene, or be associated with the contravention of sections 12DA to 12DN of the ASIC Act.[136] This includes, among others, misleading or deceptive conduct, and false statements or misrepresentations in respect of financial products.[137] A person who is convicted is liable to pay a fine imposed by a court, or the court can issue a non-punitive order against the person, which includes community services, a probation period, among other things, or a punitive order, which is an order which can either require disclosure to third parties or the public on the offence or a warning to the public regarding the offence.[138] A court order can include a pecuniary penalty payment by the person who has "contravened a civil penalty provision".[139]

7.3.4. Comparative notes

The introduction of the Australian twin peaks model of financial regulation was motivated by the Wallis Inquiry following the assessment of the Australian financial system and the recommendations made to the Australian government to reform its financial laws.[140] The Inquiry highlighted the significant contribution of the Australian financial sector to the economy and the need to implement an adaptable regulatory framework to advance efficiency in the market and protect financial customers.[141] In

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[133] Section 12AC(1) of the ASIC Act.
[134] Section 12AC(2) to (4) of the ASIC Act.
[135] *Ibid.*
[136] Section 12GB of the ASIC Act.
[137] *Ibid.*
[138] Section 12GB, 12GLA and 12GLB of the ASIC Act.
[139] Section 12GBB of the ASIC Act.
[140] Godwin "Australia's Trek towards Twin Peaks – Comparisons with South Africa" 2017 *Law and Financial Markets Review* 184.
[141] The Financial System Towards 2010 at 1.

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comparison, the change to the twin peaks model of financial regulation in South Africa and the pursuant regulatory reforms were motivated by the findings of the National Treasury on various abuses in the financial sector – high and obscure fees, improper remuneration of financial service providers, etc.[142] The abuses were perceived to contribute to poor customer outcomes.[143] The regulatory reforms in South Africa were also driven by the fundamental contribution that the financial sector makes to an efficient economy, and the need for the continuous advancement and stability of the economy.[144] The catastrophes resulting from the 2008 financial global crisis also motivated the South African government to initiate regulatory reforms in the financial industry.[145] South Africa and Australia both acknowledged the importance of the financial sector for their respective economies and identified the need to reform financial regulation to achieve the objectives of progressive efficiency, stability, and growth of the economies.[146] One of the main objectives for regulatory reforms in both countries was to advance the protection of financial customers.[147]

The Wallis Inquiry identified key objectives for regulatory reforms such as enhanced regulatory strategies, and the efficient regulation of financial products which supports competition.[148] The Inquiry also proposed regulatory reforms to ensure efficiency, stability and cost-effective products for financial customers.[149] Additional regulatory reforms regarding adequate disclosures for customers were proposed, as inadequate disclosures contributed to the financial illiteracy of customers and resultant inefficiency in the market.[150]

The establishment of a "Single Regulator for Conduct and Disclosure" was proposed due to the regulatory gaps in the current regulatory framework.[151] This

[142] National Treasury *A safer financial sector to serve South Africa better* 2011 at 2 and 44.
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] Godwin "Australia's Trek toward Twin Peaks – Comparisons with South Africa" 2017 *Law and Financial Markets Review* 184 and The Financial System Towards 2010 at 1 and National Treasury *A safer financial sector to serve South Africa better* 2011 at 2 and 44.
[147] *Ibid.*
[148] The Financial System Towards 2010 at 2.
[149] *Ibid.*
[150] *Idem* at 16.
[151] *Idem* at 17.

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proposal was inspired by market conduct regulation models adopted by several countries, believed to be suited to the complex nature of the financial industry and financial products.[152] Consequently, the APRA Act implemented prudential regulation and established APRA as the prudential regulator to ensure a stable, effective and competitive financial industry.[153] The ASIC Act established ASIC as the market conduct regulator.[154]

In South Africa, prudential and market conduct regulation were separated, which resulted in the implementation of the twin peaks financial regulation model through the FSRA.[155] The purpose of the twin peaks model is to achieve financial stability, to advance the protection of financial customers, and to offer them cost-effective financial products and services, which includes retirement benefits and life insurance benefits.[156] The PA, as the prudential regulator, and the FSCA, as the market conduct regulator, are established by the FSRA which prescribes their regulatory functions. The FSCA's objectives are to ensure fair treatment of customers, to promote the protection of customers, and advance the growth of the financial sector.[157]

The South African twin peaks regulation is similar to Australia as both countries have a prudential regulator and a market conduct regulator. The objectives of the regulatory reforms in South Africa, namely, to ensure stability and efficiency of the financial industry, to achieve the fair treatment of customers, and advance the protection of customers, are also similar to those of Australia.[158]

APRA and ASIC regulate the prudential supervision and market conduct of retirement funds, which is similar to the South African prudential and market conduct regulation model in relation to the supervision of the stability and conduct of retirement

[152] *Ibid.*
[153] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 8.
[154] Section 1(2) of the ASIC Act.
[155] National Treasury *A safer financial sector to serve South Africa better* 2011 at 23.
[156] *Ibid.*
[157] Section 56, 57, 58 of the FSRA.
[158] *Ibid.*

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funds.[159] The difference is, however, that the Australian prudential regulator is established by the APRA Act and the market conduct regulator is established by the ASIC Act.[160] The APRA Act and the ASIC Act confer powers on the Australian twin peak regulators and prescribes their regulatory duties.[161] In South Africa, there is currently one statute that establishes both regulators although the authority of the FSCA can also be found in other substantive laws administered by the FSCA.[162] For example, the FSCA will administer COFI, which will introduce a consolidated market conduct regulation framework.[163]

The objectives of the FSCA, namely, to ensure fair treatment of customers, enhance protection the protection of customers, and provide financial customers with financial literacy to advance the efficiency and integrity of financial markets, are similar to the objectives of ASIC.[164] In South Africa, the protection of financial customers and regulation of market conduct is regulated by substantive market conduct regulation such as FAIS, the LTIA and the regulations, and will also be regulated by COFI. However, COFI will repeal the LTIA, FAIS and the sub-legislation under these laws which will be incorporated into COFI, with the objective of establishing a consolidated market conduct regulation framework.[165]

ASIC launched a financial literacy programme to provide financial customers with adequate information on financial products and services, and information on dispute resolution forums, in order to promote the protection of customers.[166] This is comparable to the objectives of the FSCA on financial literacy programmes.[167] The ASIC financial literacy programme has been in place for many years and its objectives are to assist financial customers to make sound decisions on their finances such as

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[159] Section 7 to 15 of the APRA Act, Section 1 of the ASIC Act.
[160] *Ibid.*
[161] *Ibid.*
[162] Section 32 to 34 and 56 to 58 of the FSRA.
[163] COFI.
[164] Section 57 of the FSRA and the ASIC Act.

[165] Part 7 and 12 of Schedule 2 of COFI.

[166] Pearson *Financial Services Law and Compliance in Australia* (2009) at 45.
[167] Section 57 of the FSRA.

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savings and investments.[168] The financial literacy programme is fundamental to the interests of financial consumers.[169] The ASIC financial literacy programme is comprehensive and it is designed to provide financial literacy nationally, to all citizens, including school pupils, vulnerable community members, the youth, middle aged and senior citizens.[170]

The ASIC's MoneySmart website has created awareness among the Australian citizens and has helped them to make sound financial decisions, to spend lessor, create a budget for expenses, and to review their financial circumstances.[171] ASIC's MoneySmart Market has also assisted ASIC to evaluate the performance and impact of the financial literacy program.[172] The Australian government developed an updated national financial literacy strategy which outlines the methods of financial literacy, the regulatory requirements, the functions of the government on financial capability, and the supervisory framework, which is aligned with the recommendation of the OECD Council on financial literacy.[173] The Australian government (under its Treasury) took over the responsibility of financial literacy from ASIC as it views it as the obligation of the government on behalf of Australia and not the responsibility of one regulatory agent.[174]

As the FSCA is in the process of formulating the financial literacy programme in terms of the FSRA, it may be worthwhile for the FSCA to consider some of the tools and processes devised by ASIC in its financial literacy programme.[175] The objectives of the ASIC financial literacy programme such as identifying the risks associated with remuneration for unsuitable financial products and information gathering on remuneration models can set precedent for the FSCA as a market conduct regulator

[168] *Ibid.*
[169] *Ibid.*
[170] Australian Securities and Investments Commission NFLS Annual Highlights Report 2016–17 (February 2018) at 5.
[171] *Idem* at 19.
[172] *Idem* at 5, 6 and 19.
[173] Australian *Government National Capability Strategy* (February 2022) at 1.
[174] *Ibid.*
[175] Section 57(b)(ii) of the FSRA and Pearson *Financial Services Law and Compliance in Australia* (2009) at 46.

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on the regulatory tools and methods to employ.[176] South Africa can learn some of the methods of the Australian financial literacy programme such as its objectives and principles to target the school pupils to teach children about financial literacy and providing tools and resources to teachers to achieve this.[177]

I am of the view that the financial literacy program can be included in the South African school syllabus and at higher education level for universities, to continuously create awareness.[178] South Africa can also learn the principles of the Australian financial literacy on the ASIC's MoneySmart and the methods to reach out to many people to make a positive impact on financial literacy and evaluate the performance of programme.[179] In addition, South Africa can also learn from the new Australian National Financial Capability Strategy which is aligned with the OECD recommendations and how the Australian government has now taken over the task of financial literacy from ASIC.[180] I am of the view that by doing this, the Australian government has expanded and improved its financial literacy programme to reach out to all Australian citizens from a very young age, which South Africa can also learn from, instead of placing the financial literacy obligation on the FSCA.[181] I am of the view that this will help to create awareness to the South African citizens and will in the long run contribute to stability, efficiency, financial inclusion, and alleviate poverty, to meet the objectives of the government of South Africa.

I am also of the view that the FSCA's strategy to require financial institutions to educate financial customers should be done by the South African government as I am of the view that it is not the correct approach to place such an obligation on financial institutions. It is already difficult for retirement funds, administrators, financial advisors and relevant stakeholders to make retirement fund members understand the financial products and services provided to them as many members do not pay attention to the communication, the presentations or read up on these products and services on the websites of the financial institutions. Requiring financial institutions to carry out the

[176] *Ibid*.
[177] Australian Securities and Investments Commission NFLS Annual Highlights Report 2016–17 (February 2018) at 4 and 5.
[178] *Ibid*.
[179] *Idem* at 19.
[180] Australian *Government National Capability Strategy* (February 2022) at 1.
[181] *Ibid*.

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financial literacy programmes will add to the burden of the compliance obligations under the various regulatory reforms and the various laws which regulate financial services in South Africa. I am also of the view that this may increase administration and consulting fees for members in the long run, due to the costs that will be incurred by retirement funds, administrators and relevant stakeholders to educate their clients.

ASIC's risk-based regulatory approach to identify regulatory risks, conduct that is contrary to legislation, and gathering information from industry players and customers, is similar to the FSCA's risk-based regulatory approach.[182] The FSCA identifies regulatory risks by gathering information, through the monitoring of the conduct of financial institutions and gathering information from customers, in order to ascertain the risks on the execution of its regulatory functions and the risks that the customers face.[183] This is comparable to ASIC's risk-based regulatory approach.[184]

The ASIC Act prescribes provisions that establish jurisdiction outside of Australia to institute claims for damages and to recover commission higher than the prescribed maximums.[185] By contrast, the South African legislation prescribes provisions for licencing to conduct business in South Africa and does not make provision to, for example, to conduct insurance business outside South Africa. ASIC's powers and functions to regulate financial products and services are similar to the powers and duties of the FSCA under the FSRA, the LTIA and COFI.[186] ASIC's powers and duties to conduct investigations on the conduct of financial institutions, and to regulate and monitor the protection of financial customers, are also similar to the powers and duties of the FSCA.[187]

[182] Pearson *Financial Services Law and Compliance in Australia* (2009) at 45 and FSCA Regulatory Strategy 2018 at 53-54.
[183] FSCA Regulatory Strategy 2018 at 53-54.
[184] Pearson *Financial Services Law and Compliance in Australia* (2009) at 45 and FSCA Regulatory Strategy 2018 at 53-54.
[185] Section 12AC(1) of the ASIC Act.
[186] Pearson *Financial Services Law and Compliance in Australia* (2009) at 43, Section 56 to 58 of the FSRA, the objectives of the LTIA, the objectives of COFI and clauses 20 to 23 of COFI.
[187] Pearson *Financial Services Law and Compliance in Australia* (2009) at 43 and section 11, 12A and 13 of the ASIC Act, section 56 to 58 of the FSRA.

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ASIC's authority to supervise the disclosure of financial products is comparable to the provisions of the PPRs on disclosure requirements.[188] ASIC's powers and duties to supervise financial service providers on selling, distribution and providing advice on financial products, is comparable to the provisions of FAIS and the FAIS General Code of Conduct.[189] The PPRs requirements on disclosures to members on their benefits and financial products, and the provisions of the FAIS General Code of Conduct on selling and distribution of products and providing advice to customers, will be incorporated into COFI and will be regulated by COFI.[190] These provisions of COFI will be comparable to the ASIC Act.[191] The provisions of ASIC which prohibits the promotion and supply of financial products in a false or misleading manner are similar to the requirements of the PPRs and the FAIS General Code of Conduct on advertising and promotion of financial products.[192] The provisions of the PPRs and the FAIS General Code of Conduct will be incorporated into COFI and will be comparable to the provisions of the ASIC Act.[193]

ASIC's powers to regulate licensing for the provision of financial products by financial service providers, marketing of financial products, among others, are similar to the provisions of the FSRA, FAIS and COFI.[194] The licensing requirements under AISC on "quality and competence, fairness, honesty and professionalism" are comparable to the fit and proper requirements under the FAIS Act.[195] The fit and proper requirements under the FSRA include the establishment of proper financial resources, fit and proper requirements for the financial institution's key persons, proper governance and risk management processes, and verification that the applicant's submissions are not false or misleading.[196] The FSRA has powers to a grant license,

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[188] Pearson *Financial Services Law and Compliance in Australia* (2009) at 43 and Rule 11 of the PPRs.
[189] Pearson *Financial Services Law and Compliance in Australia* (2009) at 43, FAIS and the FAIS General Code of Conduct.
[190] Chapter 4 of COFI.
[191] *Ibid.*
[192] Section 12DB(1) of the ASIC Act, Rule 10 of the PPRs and section 14 of the FAIS General Code of Conduct.
[193] Section 12DB(1) of the ASIC Act, Rule 10 of the PPRs and section 14 of the FAIS General Code of Conduct and clause 20 of COFI.
[194] Pearson *Financial Services Law and Compliance in Australia* (2009) at 107, sections 111-128 of the FSRA, sections 7-11 of FAIS, FAIS Fit and Proper Requirements, Schedule 1 of COFI.
[195] *Ibid.*
[196] Section 115 of the FSRA.

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to revoke, suspend and vary a licence, which powers are also similar to those of ASIC.[197]

7.4. The regulation of the Australian retirement fund industry

(i) Legal framework

The Australian Retirement Savings Account Act 61 of 1997 ("the RSA Act") regulates retirement funds in Australia.[198] One of the objectives of the RSA Act is to enable licensed financial institutions, supervised as such, to provide retirement savings accounts ("RSA") to customers – which will provide benefits upon retirement or death.[199] Another objective of the RSA Act is to regulate the concessional taxation of RSAs according to income tax regulations.[200] The RSA Act defines a retirement savings account as "an account" or "a policy" identified as an RSA, provided by an RSA institution when "the account is opened or the policy is issued", "held by a person [who] is an eligible person at the time the account is opened or the policy is issued" and with guaranteed capital.[201] The RSA Act defines an eligible person as a person who meets the specified standards.[202]

An RSA is required to comply with the provisions of section 15 of the RSA Act, which stipulates the type of benefits offered by an RSA, and additional specified requirements.[203] The RSA Act stipulates that "a retirement savings account can only be provided by a life insurance company as a policy".[204] Section 9 of the RSA Act defines a holder of an RSA as the person in whose name the account is opened and the person who holds the retirement savings account.[205] A holder of a policy is defined as the owner of the policy and the person who holds the policy.[206] A provider is defined

[197] Sections 111-128 of FSRA and Pearson *Financial Services Law and Compliance in Australia* (2009) at 107.
[198] Section 7 of the RSA Act.
[199] *Ibid.*
[200] *Ibid.*
[201] Section 8 of the RSA Act.
[202] Section 13 of the RSA Act.
[203] *Ibid.*
[204] Section 8(2) of the RSA Act.
[205] Section 9(1) of the RSA Act.
[206] Section 9(2) of the RSA Act.

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as a person who provides an RSA and is deemed to provide an account if the person accepts or has accepted contributions to the account.[207] A provider of a policy is defined as the person who issues the policy.[208] An RSA provider is defined as a provider of one or more RSAs (the RSA Act notes that most RSA providers are also RSA institutions).[209]

An RSA institution is defined as an institution approved in terms of section 26 of the RSA Act, whose approval is in force and the approval has not been suspended or revoked in terms of section 33 of the RSA Act.[210] Approval to conduct business as an RSA institution can only be granted to an authorised deposit institution, a life insurance company, or a prescribed financial institution.[211] An RSA capital guaranteed account is one in terms of which "the balance of the account may not be reduced by the crediting of any negative interest".[212] An RSA policy is "capital guaranteed if the contributions and accumulated earnings may not be reduced by negative investment returns or any reduction in the value of assets in which the policy is invested".[213]

Section 15 of the RSA Act determines that the purpose of a retirement savings account is to provide benefits to the holder of the RSA on or after retiring from business or employment, or upon the holder reaching the age specified in the legislation.[214] The benefits provided under a retirement savings account or a policy include death benefits before the holder's retirement or before the holder attains the age specified in the legislation.[215] This also includes benefits provided to the dependants of the holder by the holder's legal representative.[216] An RSA further provides benefits to a holder who paid contributions to the retirement savings account, and upon the termination of employment, the termination of a business, trade or profession, or due to the ill-health

[207] Section 10(1) of the RSA Act.
[208] Section 10(2) of the RSA Act.
[209] Section 12 of the RSA Act.
[210] Section 11(1) of the RSA Act.
[211] Section 11(2) of the RSA Act.
[212] Section 14(1) of the RSA Act.
[213] Section 14(2) of the RSA Act.
[214] Section 15(1) and (2) of the RSA Act.
[215] Section 15(3) of the RSA Act.
[216] *Ibid*.

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of the holder.[217] The RSA Act provides that the reason for approval of RSA institutions is to ensure that only an RSA institution may offer RSAs.[218] "An ADI, a life insurance company or prescribed financial institution" are allowed to apply to APRA to obtain approval to provide RSAs.[219] The application should be submitted in the prescribed format and should include the required information and the prescribed fee.[220]

APRA has 60 days to decide on, and communicate the outcome of, the application for approval, and must issue an approval certificate to the institution if all the requirements are met.[221] If an institution does not meet the requirements, APRA must issue a certificate of refusal and provide reasons for the refusal.[222] The approval of an RSA becomes effective on the date that the approval is granted, or on a date specified by APRA, and will remain in force until amended or revoked by APRA.[223] The RSA Act states that regulations may stipulate standards on the supervision of RSAs.[224] This includes standards in respect of "the persons who may hold RSAs, the circumstances under which an RSA institution may accept contributions to an RSA", "the minimum benefits to be provided [in terms of] an RSA", and "the form in which benefits may be provided by RSA providers".[225] This also includes payment of benefits from an RSA, payment of death benefits, "the fees that may be charged for the provision of RSAs", "the keeping and retention of records in relation to RSAs", "the disclosure of information to holders of RSAs", "the disclosure of information about RSAs to the Regulator", and dispute resolution mechanisms.[226] These regulations must promote the objective of providing RSAs that are affordable.[227] RSAs are required to comply with these standards at all times.[228] Failure to comply with the standards amount to a contravention which is a punishable offence.[229]An RSA provider is

[217] Section 15(4) of the RSA Act.
[218] Section 22(2) of the RSA Act.
[219] Section 23(1) of the RSA Act.
[220] Section 23(2) of the RSA Act.
[221] Sections 25-26 of the RSA Act.
[222] Section 26(6) of the RSA Act.
[223] Section 27 of the RSA Act.
[224] Section 38(1) of the RSA Act.
[225] Section 38(2) of the RSA Act.
[226] Section 38(2) of the RSA Act.
[227] Section 38(3) of the RSA Act.
[228] Section 39(1) of the RSA Act.
[229] Section 39(2) of the RSA Act.

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required to submit an audit report annually to APRA, audited by an approved auditor.[230] Failure to submit an audit report to APRA amounts to a contravention and constitutes a punishable offence.[231]

Part 4A of the RSA Act stipulates provisions on data and payment regulations and standards for RSAs.[232] The purpose of the provisions is to enhance the protection of RSA holders by developing the revenues of the RSAs, and by providing standards on payments and information on the conduct of RSA providers and institutions.[233] The regulations stipulate provisions which relate to data and payment processes for RSAs in respect of RSA providers, and employers on their conduct with RSA providers.[234] The regulations can stipulate different standards for categories of RSAs or employers.[235] The data and payments requirements relate to payments and information in respect of an RSA holder, contributions for an employee made by the employer, and the conduct of an RSA provider or institution.[236] The types of payments and information are in respect of payment of benefits, contributions, transfers, refunds, documents, reports, and any payments or information stipulated by legislation.[237] RSA providers are required to comply with the payments and information regulations in respect of an RSA holder or person contributing to an RSA.[238] Failure to comply with the data and payments requirements amounts to a contravention of the RSA and related legislation and is an offence.[239]

Employers are required to comply with the payments and information regulations in respect of employees' contributions to an RSA.[240] Failure to comply with the regulations amounts to a contravention of the RSA and related legislation and an offence.[241] Part 5A of the RSA Act deals with the duties of RSA providers and

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230 Section 44(1) of the RSA Act.
231 Section 44(2) of the RSA Act.
232 Part 4A of the RSA Act.
233 Section 45(1) and (2) of the RSA Act.
234 Section 45B(1) of the RSA Act.
235 Section 45B(2) of the RSA Act.
236 Section 45B(5) of the RSA Act.
237 *Ibid.*
238 Section 45D(1) of the RSA Act.
239 Section 45D(2) of the RSA Act.
240 Section 45E(1) and (2) of the RSA Act.
241 *Ibid.*

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employers.[242] An RSA provider is obliged to be a member of the AFCA and must implement an internal complaints procedure in accordance with the Corporations Act and regulatory standards for licensed financial service providers.[243] An RSA provider is further obliged to provide the same information to ASIC as required by the Corporations Act for licensed financial service providers and must provide reasons for an outcome in respect of a complaint.[244] Failure to comply with the dispute resolution provisions amounts to a contravention and is a punishable offence.[245] An RSA provider must keep and store reports of all RSA holders in its records for 10 years and provide the information to the regulator for inspection when required to do so.[246] Failure to comply with the requirements to retain and store information amounts to a contravention and is a punishable offence.[247]

(ii) Regulatory framework

APRA, ASIC and the Commissioner of Taxation are empowered by the RSA Act to regulate retirement funds in Australia.[248] APRA has the authority to administer Part 3 of the RSA Act (which regulates the approval of RSA institutions), and Part 4 of the RSA Act (which regulates operating standards, including provisions on capital guarantee by an RSA institution, prohibition of certain uses of RSAs, and payment of benefits after the death of an RSA holder).[249] APRA also has the ability to administer Division 2 and 3 of Part 4A in respect of compliance with data and payment regulations and standards relating to RSAs, and can issue infringement notices.[250]

ASIC is responsible for the supervision of Part 5 on the regulation of duties of RSA providers and employers, and Part 7 which regulates prohibited conduct in relation to RSAs.[251] ASIC has general powers to supervise compliance with sections

[242] Part 5A of the RSA Act.
[243] Section 47(1) of the RSA Act.
[244] *Ibid.*
[245] Section 47(3) of the RSA Act.
[246] Section 49(1) of the RSA Act.
[247] Section 49(2) of the RSA Act.
[248] Section 3 of the RSA Act.
[249] Sections 22-44 of the RSA Act.
[250] Sections 45D and 45N of the RSA Act.
[251] Sections 47-49 and 74-79 of the RSA Act.

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37 to 39 and section 49 on "the keeping and retaining of records in relation to RSA's", "the disclosure of information to holders of RSA's", "the disclosure of information to ASIC about RSA's", and any other relevant matters.[252] The Commissioner of Taxation supervises, *inter alia*, section 144(2A) on tax file numbers, data and payment regulations and standards relating to RSAs, compliance with data and payment regulations and standards relating to RSAs in relation to employers, payments, and section 38 of the RSA on operating standards for RSAs.[253]

The RSA Act provides powers to APRA and ASIC under Part 10, which regulates monitoring and investigations.[254] This includes the monitoring of an RSA provider by requiring the provider to provide information to the regulator, including the production of books, access to premises, inspections, and examinations.[255] The RSA Act further empowers APRA and ASIC to administer Parts 12 to 15, which provides for contraventions relating to the records of customers, and the powers of the court to make orders relating to contraventions of the RSA Act in respect of the disclosure of information and advertisements.[256] The RSA Act also empowers APRA and ASIC to administer Part 16 of the RSA Act (excluding section 183), which includes orders by a regulator to prohibit an RSA to accept contributions by an employer, the conduct of directors, employees and agents, and payment of benefits from RSAs in terms of the Bankruptcy Act of 1966.[257]

7.5. Comparative notes on the regulation of Australian and South African retirement funds

The objectives of the PFA "to provide for the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto" are similar to the objectives of the RSA on the regulation of RSAs.[258] The definition of a retirement fund in South Africa is comparable to the definition of an RSA in Australia, to the extent that

[252] Sections 37-39 and section 49 of the RSA Act.
[253] Section 38, sections 45-45G and 144(2A) of the RSA Act.
[254] Sections 91-129A of the RSA Act.
[255] *Ibid.*
[256] Sections 148-180 of the RSA Act.
[257] Sections 181-200 of the RSA Act.
[258] Section 7 of the RSA Act and the PFA.

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it is an instrument that enables customers to save income on a monthly basis during their terms of active service, in order to provide an income upon reaching retirement, ill-health or death.[259] The definition of a retirement fund under the PFA is also similar to the definition of an RSA to the extent that it provides benefits to members or former members upon death or retirement.[260] The reference in the definition of an RSA to a "policy" can be compared to a retirement annuity which provides retirement benefits to individual members.[261]

The difference between the definition of an RSA and a retirement fund or pension fund organisation is that the definition of a retirement fund in South Africa refers to a group of people or scheme arrangement designed to offer retirement benefits or "receive, administer, invest" and pay benefits to members or beneficiaries on their retirement, ill-health or death.[262] The other difference is that there are different types of retirements funds under the PFA and the ITA, whose objectives are to provide retirement or death benefits to their members.[263] The different types of retirement funds under the PFA and the ITA are a pension fund, a pension preservation fund, a provident fund, a provident preservation fund, a retirement fund, and a beneficiary fund.[264]

Despite the differences in the definitions of an RSA or policy under the RSA Act, and the retirement funds in terms of the PFA and the ITA, the operation of these funds are similar as they are established from the retirement savings or income contributed by the members or financial customers. In addition, the retirement funds have the same objectives, namely, to provide retirement benefits to customers.[265] The definition of a holder of an RSA or a policy owner under an RSA can be compared to a member or former member of a fund under the PFA.[266] A member of a retirement

[259] The PFA, ITA, Hanekom *et al Manual on retirement funds and other employee benefits* (2020) at 4.2.2, Geral *Pensions* (2009) at 208, and section 7 of the RSA Act.
[260] Section 1 of the PFA, ITA, Hanekom *et al Manual on retirement funds and other employee benefits* (2020) at 4.2.2, Geral *Pensions* (2009) at 208, section 7 of the RSA Act.
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] Section 1 of the ITA and section 7 of the RSA Act.
[265] *Ibid.*
[266] Section 9(1) of the RSA Act and section 1 of the PFA.

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fund under the PFA is defined as a member or former member of the fund or a person who belongs to the fund, which is comparable to the holder of an RSA defined as the person in whose name the account is opened or a policy owner in respect of a policy.[267]

The definition of a provider under the RSA or a provider of a policy is equivalent to a South African product provider or supplier of retirement funds and related products and commercial sponsors of retirement funds.[268] The definition of an RSA institution is similar to a product provider, insurer or a commercial sponsor of a retirement fund in South Africa.[269] The licensing requirements for RSA institutions are similar to the licensing requirements of product providers and commercial sponsors under COFI.[270] The RSA requirements on the standards of supervision of RSAs are comparable to the provisions of the FSRA when it comes to the powers of the FSCA to issue conduct standards for financial products, services or financial institutions.[271] RSA providers are required by the RSA to submit audit reports in a similar manner as retirement funds, product providers and commercial sponsors of retirement funds under the PFA and the FSRA.[272]

The requirements of the RSA Act on data and payment regulations and standards for RSAs are comparable to the POPIA requirements on the processing of personal information, the PPRs on data management, and the FSCA conduct standards on conditions prescribed for pension fund benefit administrators.[273] The objectives of the RSA Act on data and payment standards are to enhance the protection of RSA holders by providing standards on payments and information on the conduct of RSAs, which objectives are also similar to data requirements in respect of retirement fund members.[274] The RSA Act stipulates regulations on data and payment

[267] Section 9(2) of the RSA Act, and section 1 of the PFA.
[268] Section 10(1) of the RSA Act, section 1 of the FSRA, section 1 of FAIS, and COFI.
[269] *Ibid*.
[270] Section 15(3) of the RSA Act and schedule 1 of COFI.
[271] Section 38(1) and (2) of the RSA Act and section 106 of the FSRA.
[272] Section 44(1) and (2) of the RSA Act, section 9 of the PFA, and section 252 of the FSRA.
[273] Part 4A of the RSA Act, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 13 to 15 and 23 to 25, Chapter 3 of POPIA and Rule 13 of the PPRs.
[274] Section 45(1) and (2) of the RSA Act, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 13 to 15 and 23 to 25, Chapter 3 of POPIA and Rule 13 of the PPRs.

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processes for RSA providers and employers in a similar manner as the FSCA draft conduct standard on the payment of pension fund contributions, and the requirements for employers to provide data with contribution payments (member data must be included in the monthly reconciliation for contributions).[275] RSA providers are required to comply with the payments and information regulations similar to how pension fund administrators, retirement funds and employers must comply with the conduct standards.[276] Contravention of the South African legislation amounts to an offence, as is the case under the RSA Act.[277] The RSA provisions, which require employers to comply with the payments and information regulations in respect of employees' contributions to an RSA, are comparable to the requirements of the PFA on the obligations of the employer regarding payment of contributions.[278]

The requirements of an RSA provider to implement an internal complaints procedure in accordance with the regulatory standards and the Corporations Act are similar to the obligation of pension fund administrators to implement complaints management frameworks and processes.[279]

However, the difference between the RSA Act and the Australian complaints regulations is that an RSA provider is required to be a member of the AFCA.[280] The AFCA is a centralised ombudsman for financial customers in Australia which provides an alternative dispute resolution platform for financial customers of banks, insurance companies, RSA holders, and investment holders.[281] South Africa is in the process of establishing a consolidated ombudsman system.[282] The FSRA will implement the consolidated ombudsman system.[283] The complaints of financial customers are still

[275] Section 45B of the RSA Act and the FSCA "Conduct standard on requirements related to the payment of pension fund contributions" (29 May 2021).
[276] Section 45D of the RSA Act, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) and Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021).
[277] Section 45D of the RSA Act and Chapter 10 of the FSRA.
[278] Section 45E of the RSA Act and Section 13A of the PFA.
[279] Section 47(1) of the RSA Act, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 19 to 23.
[280] Section 47(1) of the RSA Act.
[281] *Ibid.*
[282] Chapter 14 of the FSRA, *A Known and Trusted Ombud System for All* September 2011.
[283] The ombuds system in South Africa currently consists of voluntary and statutory ombud system. The consolidated ombuds system under the FSRA will include the voluntary and statutory ombuds to ensure

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handled by the Adjudicator, the Ombudsman for Long-term Insurance, and the Ombudsman for Banks.[284] It is encouraging to see that South Africa is following the footsteps of Australia, which has experience on the operation of the twin peaks model and a centralised ombudsman system.[285] There are many lessons to learn, including the most suitable processes and regulatory methods to implement.[286]

The duty of an RSA provider to keep and store reports of all RSA holders in its records for 10 years and to provide the information to the regulator for inspection when required to do so, are similar to the requirements of the FSCA draft Conduct Standard on the requirements for pension fund administrators, FAIS General Code of Conduct and the PPRs.[287] The difference, however, is that the South African legislation requires financial institutions to keep records of financial customers for five years after the termination of a financial transaction.[288]

In respect of the regulation of retirement funds in Australia, RSAs are regulated by APRA, ASIC and the Commissioner of Taxation, which is similar to retirement funds in South Africa, which are regulated by the PA, the FSCA and SARS.[289] APRA's authority to administer the approval of RSA institutions, and operating standards on, *inter alia*, the prohibition of certain uses of RSAs and the payment of benefits after the death of the RSA holder, are analogous to the powers and functions of the FSCA in respect of section 37C and 37D of the PFA.[290] APRA's powers to supervise compliance with data and payment regulations and standards relating to RSAs, are also analogous

a consolidated regulatory framework for the adjudication of complaints, to create awareness and easy access for financial customers, including retirement fund customers. (See paragraph 3.8.3 above and chapter and chapter 14 of the FSRA).

[284] Chapter 14 of the FSRA, *A Known and Trusted Ombud System for All* September 2011.

[285] *Ibid*.

[286] *Ibid*.

[287] Section 49(1) of the RSA Act, Section 3(2) of the FAIS General Code of Conduct, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 24, and Rule 16.4 of the PPRs.

[288] Section 3(2) of the FAIS General Code of Conduct, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 24, and Rule 16.4 of the PPRs.

[289] Section 3 of the RSA Act, the ITA, sections 33, 34, 57 and 58 of the FRSA, the PFA.

[290] Sections 22-44 of the RSA Act, sections 37C and 37D of the PFA.

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to the powers of the FSCA on data requirements and regulations in respect of retirement benefits.[291]

ASIC's powers and functions relating to the supervision of the conduct of RSA providers and employers, and prohibited conduct in relation to RSAs, are similar to the FCA's market conduct regulation powers relating to retirement funds.[292] In addition, ASIC's powers to supervise "the keeping and retaining of records in relation to RSA's", "the disclosure of information to holders of RSA's", "the disclosure of information to ASIC about RSA's", and any other relevant matters, are also comparable to the FSCA's powers and functions to supervise data requirements for retirement funds and disclosures to retirement fund customers.[293]

The powers of the Australian Commissioner of Taxation to supervise section 144(2A) on tax file numbers, data and payment regulations and standards relating to RSAs, and compliance with data and payment regulations and standards relating to RSAs are similar to the functions of SARS on tax regulations for retirement funds and retirement fund customers.[294]

The powers of APRA and ASIC to monitor and investigate the conduct of RSA providers, the provision of information to the regulators by the RSA providers, producing of books, access to premises, investigations of RSA providers, inspections and examinations, etc. are analogous to the functions of the PA and the FSCA in respect of their investigation and inspection powers, which includes information gathering, access to premises and books.[295] This is in respect of financial institutions, including retirement funds and retirement fund administrators, and applies to market conduct regulation where the FSCA uses its powers and conducts its duties to oversee retirement funds, retirement fund administrators and FSPs.[296] The powers of ASIC to

[291] Sections 45D and 45N of the RSA Act and the FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021) at 13 to 15 and 23 to 25, and Rule 13 of the PPRs.
[292] Sections 47-49 and 74-79 of the RSA Act, sections 57 and 58 of the FSRA, the PFA and COFI.
[293] Sections 37-39 and section 49 of the RSA Act, FSCA "Draft conduct standard conditions prescribed in respect of pension fund benefit administrators" (July 2021), Rule 11 and 13 of the PPRs.
[294] Section 38, sections 45-45G and 144(2A) of the RSA Act and the ITA.
[295] Sections 91-129A of the RSA Act, sections 131-140 of the FSRA.
[296] *Ibid*.

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impose penalties on *inter alia* contraventions relating to the keeping records of customers, the disclosure of information, advertisements, payment of contributions by the employer, conduct of directors, employees and agents of RSA providers, and payment of benefits from RSAs, are similar to the enforcement powers of the FSCA.[297]

However, the powers and duties of APRA to administer the approval of RSA institutions, operating standards regarding the prohibition of certain uses of RSA, and regulations relating to the payment of benefits after the death of an RSA holder, appear to relate to market conduct regulation.[298] Furthermore, APRA's powers to supervise compliance with data and payment regulations and standards relating to RSAs, also appear to relate to market conduct reglation.[299] ASIC and APRA seem to share regulatory powers and functions on the market conduct regulation of RSAs.[300]

By contrast, the South African regulatory framework vests the market conduct regulation powers and functions in the FSCA.[301] The PA is responsible for prudential regualtion regarding the financial soundness of financial institutions, solvency reguirements, licensing of financial institutions underwriting of financial products.[302] However, the PA and the FSCA share regulatory powers and functions in respect of the joint standards that they issue, and in respect of the provisions of the FSRA which require them to collaborate with each other.[303] Some of these functions relate to market conduct regulation.[304] Examples include the joint conduct standard on outsourcing requirements, and the joint communication on the maximum benefit amount payable under a funeral benefit.[305] By observation, the twin peaks regulatory framework in South Africa allows the prudential and market regulator to share regulatory powers and functions through collaboration, the powers conferred on the respective regulators under substantive statutes, and the requirements to issue joint standards and regulations.[306] Nevertheless, unlike in Australia, the market conduct regulator remains

[297] Section 148-180 of the RSA Act, Chapters 10 and 13, and sections 267-276 of the FSRA.
[298] Sections 22-44 of the RSA Act.
[299] *Ibid.*
[300] *Ibid.*
[301] Sections 57-58 of the FSRA, COFI and the PFA.
[302] Sections 33-34 of the FSRA and objectives of the Insurance Act at 1.
[303] Sections 76-86 and section 107 of the FSRA.
[304] *Ibid.*
[305] *Ibid*
[306] *Ibid.*

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involved in all matters relating to market conduct – the prudential regulator does not make decisions on market conduct without the input of the market conduct regulator.

I am of the view that the powers and duties of APRA which relate to market conduct regulation contradict the purpose of the twin peaks financial regulation model in that its purpose is to separate prudential supervision and market conduct regulation to support the protection of financial customers and to achieve better fair outcomes. I am also of the view that the structure of the Australian twin peaks financial regulation on the market conduct regulation by APRA may cause regulatory overlaps and may not achieve the objectives of the twin peaks to ensure efficiency and to support the fair treatment of customers. I am also of the view that Australia can learn from South Africa on its twin peaks financial regulation framework which does not stipulate provisions for the PA to have market conduct regulation functions. South Africa is also in the process of introducing a consolidated market conduct laws through COFI to enhance the protection of customers through market conduct regulation of financial institutions, including retirement funds. This is also something that Australia can learn from.

7.6. Conclusion

Australia introduced the twin peaks model of financial regulation in 1998 and was one of the first the countries to adopt it.[307] By comparison, South Africa only introduced the twin peaks financial regulation model through the FSRA in 2017.[308] The Australian twin peaks financial regulation structure has been in force for many years, and has been reviewed by the HIH Commission and the Financial System Inquiry (”the FSI”).[309] The Australian twin peaks model has served as an example for other countries worldwide, as Australia had many years of experience.[310] South Africa can learn from Australia's experiences such as the need to appoint independent bodies to regularly and holistically review the twin peaks financial regulation model to identify regulatory gaps

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[307] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 8.
[308] The FSRA.
[309] CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 3 and 8.
[310] *Idem* at 3.

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and areas that require further reform.[311] Such regular reviews can contribute to regulatory efficiency and stability in the financial industry and advance the protection of customers as evidenced by the reviews conducted for the Australian twin peaks financial regulation model.[312]

The twin peaks regulatory model appears to be one of the most effective models of financial regulation.[313] The Australian twin peaks model has been rated as one of the most effective when compared to all the countries that have adopted this model – it was also one the first countries to have adopted it and has had the opportunity to identify strengths and weaknesses and reform the structures.[314]

Australia nevertheless experienced catastrophes notwithstanding the adoption of the twin peaks model.[315] This is fundamental to take cognisance of in respect of the South African market conduct regulator.[316] I am of the view that the twin peaks regulatory framework remains vulnerable in a crisis, and the collapse of the HIH Insurance company, one of the largest insurance companies in Australia, necessitated the need for a risk-based regulatory approach in Australia.[317] The Australian experiences are significant to South Africa to apply to its regulatory processes as its twin peak regulatory framework is similar to Australia.[318] In this regard, this chapter highlighted the similarities between Australian and South African market conduct regulation – establishing Australia firmly as a jurisdiction that South Africa may observe to learn about the advantages of mitigating risks to prevent the catastrophes experienced by Australia.[319] This may contribute to greater efficiency of market conduct regulation, stability and efficiency in the financial industry, including retirement funds, and can contribute to the protection of financial customers.[320]

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311 *Ibid.*
312 *Ibid.*
313 *Ibid.*
314 *Ibid.*
315 *Idem* at 24-25.
316 *Ibid.*
317 *Idem* at 29-31.
318 CIFR Research Working Paper Series *Twin Peaks – the Legal Regulatory Anatomy of Australia's System of Financial Regulation August* 2015 at 29-31, the FSRA, the PFA and COFI.
319 *Ibid.*
320 *Ibid.*

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CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

8.1. Overview of the thesis

8.1.1. Research questions

In chapter 1, the following main research question was asked: Does the legal framework pertaining to market conduct regulation of the retirement fund industry in South Africa endorse regulation that enhances the protection of customers in the retirement fund industry in an internationally acceptable manner? In order to answer this question, a number of sub-questions were asked:

- Which market conduct laws regulate the retirement fund industry in South Africa and how do these laws apply to retirement funds and customers of the retirement fund industry in South Africa?
- How does the legal framework enable market conduct regulation of the conduct of financial institutions in the retirement fund industry?
- Which international best practices and practices in foreign jurisdictions enable proper market conduct regulation of retirement fund industries?
- How does the South African regulation of its retirement fund industry compare to international standards and practices?
- How can the South African position be enhanced to align with international standards and practices?

The study analysed the framework through the lens of market conduct regulation and provides detailed recommendations to enhance the framework in order to integrate regulatory principles and standards and meet the intended outcomes. The main themes that were assessed include:

- the integrity of the financial industry in light of the challenges that customers face;
- market conduct regulation of retirement funds prior to the introduction of the twin peaks model of regulation (hereafter referred to as “twin peaks”);

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- market conduct regulation of retirement funds under the twin peaks model of regulation, including considerations relating to COFI that will implement a consolidated market conduct regulation and supervision of retirement funds;
- international best practices and how they compare to the South African regulatory regime in the retirement industry, including a comparison of the Australian and South African twin peaks financial regulatory framework and the market conduct regulation in the retirement industries of Australia and South Africa; and
- proposed regulatory reforms to address regulatory misalignments and enhance consumer protection, conduct of business, and the regulation of the retirement fund industry.

8.1.2. Breakdown of main components discussed

Against this background, chapter two provided an overview of the various retirement funds related to the retirement fund industry. This section discussed the different types of retirement funds in South Africa. These funds are commonly referred to as occupational funds and retirement annuity funds, but exclude government regulated retirement funds such as the GEPF and Transnet Retirement Fund. The retirement funds briefly analysed in the section included pension funds, provident funds, pension and provident preservation funds, retirement annuity funds, beneficiary funds, umbrella funds, unclaimed benefit funds, defined benefit funds, defined contribution funds and stand-alone funds. The section also discussed how these retirement funds provide and pay benefits to the members under the PFA and the ITA, how the benefits are taxed, and the payment of benefits when a member reaches retirement age.

Chapter 2 further analysed the stakeholders of retirement funds namely, the fund, the employers and the members of the fund, being the main stakeholders of a retirement fund. This is because the retirement fund is the one that provides the benefits to the members, the employer is the one that negotiates the benefits on behalf of the members and the members are the ones who contribute to the retirement fund and are recipients and beneficiaries of the benefits. The members' dependants and nominees are beneficiaries of the benefits upon the death of a member or under spouse's or children's benefits provided by the fund.

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The insurer or service provider, administrator of the retirement fund and the intermediary are significant stakeholders who are the service providers of the retirement funds and their members. The insurer/product provider underwrites and provides the retirement and risk benefits provided to the members. The administrator is a significant stakeholder who administers the fund by collecting contributions, invests the contributions paid by the members, manages the investments on behalf of the fund and pays the benefits to the members on behalf of the fund. The intermediary is responsible for selling, distributing the retirement benefits and for rendering intermediary services such as collecting premiums, lodging claims, queries or complaints on behalf of the member, and providing financial advice to the fund and its members. The fund officers namely the board members, principal officers, valuator and auditor are important stakeholders as officers of the fund who manage the affairs of the fund. The board members have a fiduciary duty to manage the affairs of the fund on behalf of the members and act in the best interests of the fund and the members.

Thereafter, the chapter dealt with the regulators of retirement funds namely the FSCA, SARS and the Adjudicator, who regulate and monitor the provision of retirement funds. The FSCA is the market conduct regulator of retirement funds, whose functions are to monitor the conduct of retirement funds, administrators of retirement funds, insurers/service or product providers, intermediaries and relevant stakeholders of retirement funds. SARS is the income tax regulator which regulates the tax of retirements benefits. The Adjudicator is responsible for adjudicating complaints lodged by members and their dependants or beneficiaries.

In chapter 2, I also considered the reasons why market conduct regulation was introduced by the government and the meaning of market conduct regulation. The discussion highlighted the objectives of introducing the twin peaks regulatory reforms to ensure efficiency in the South African financial sector and the retirement fund industry. The section discussed how market regulation was introduced through the twin peaks and the market conduct regulation of retirement funds before and after the introduction of the twin peaks. The section also discussed the proposed market conduct regulatory reforms for retirement funds, the government objectives on regulatory reforms for retirement funds to promote the fair treatment of retirement fund

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members by enhancing preservation of benefits, governance of retirement funds, adequate disclosures to members, harmonising the regulations of public sector and private sector retirement funds and encouraging good value of benefits. The section then dealt with the successes and failures of the proposed regulatory reforms for retirement funds – the main findings, together with my recommendations, are dealt with later in this chapter eight.

In chapter 3, I considered the powers and officers of retirement funds and governance of retirement funds. This section analysed the appointment, powers and duties of board members prior to the twin peaks. The chapter dealt with the governance of retirement funds under the PF circular 130 and the powers and functions of board members. It also analysed the governance of retirement funds under the King IV Report on Corporate Governance for Southern Africa in relation to retirement funds. The section considered the powers, functions of board members and fund governance after the twin peaks under the FSCA guidance notices and directives on fund governance, which prohibit board members from being unduly influenced by administrators or stakeholders to prevent corruption, and require board members to fulfil their fiduciary duties as required by the PFA, to meet the fit and proper requirements, and to implement governance processes on behalf the retirement funds and their members.

As part of chapter 3, I analysed the administration of retirement funds, payment of contributions, appointment and duties of a principal officer and auditor before and after the twin peaks under the old PFA directives/circulars and the new FSCA conduct standards under the twin peaks and the regulatory reforms. The administration of retirement funds includes the obligations of an administrator to collect contributions, invest, administer and pay the benefits to the members, to implement a claims and complaints process and to manage the clients' data. The administrator is responsible for implementing governance processes for the administration of the benefits, claims and complaints process, and data management processes. The board members are responsible for the oversight and management of the administrator's obligations on behalf of the fund and its members. The administrator is required to enter into an administration agreement with the fund, and the board members are responsible for assisting the fund to enter into the agreement. The section also discussed the

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successes and failures of the regulatory reforms for the administration of retirement funds, payment of contributions, appointment of and duties of the principal officer and an auditor. The main findings, together with my recommendations, are dealt with later in this chapter eight.

Chapter 3 concluded with a discussion on the regulation and adjudication of complaints, before and after the twin peaks. In this part of the thesis, I discussed the introduction of the consolidated ombuds system under the FSRA in order to promote transparency and accountability, and to enhance consumer protection. The chapter also discussed the successes and failures of the regulatory reforms in respect of the adjudication of complaints.

Chapter 4 commenced with the analyses of the regulation of retirement funds under FAIS before and after the twin peaks. The section highlighted that FAIS regulates the market conduct regulation of retirement funds through the regulation of the sale and distribution of retirement funds, rendering of advice and by stipulating skills, competence and proficiency requirements. However, there were regulatory gaps under the FAIS requirements before the twin peaks which resulted in the lack of adequate advice to retirement fund members, unsuitable products, lack of proper remuneration for the services rendered to retirement funds and their members. The RDR was introduced as part of the twin peaks regulatory reforms to regulate the sale and distribution of financial products, including retirement products, the rendering of advice and remuneration for the services provided by financial service providers, including financial advisors/intermediaries. The objectives of the RDR are to advance the sale, distribution of financial products and the remuneration of intermediaries, to provide better protection to customers and led to various amendments of existing legislation and sub-legislation like the FAIS General Code of Conduct and the FAIS Fit and Proper requirements. The objectives of the reformed laws under FAIS are to ensure that members of retirement funds are provided with adequate and suitable advice, suitable products and services and to ensure remuneration of financial services and products which provide better protection to members. The section also discussed the successes and failures of the regulatory reforms under FAIS – the main findings, together with my recommendations, are dealt with later in this chapter eight.

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Further in chapter 4, I discussed the market conduct regulation of retirement funds under the LTIA before and after the twin peaks. The section highlighted that the LTIA regulates the conduct of business of some of the activities of insurers and intermediaries as service and product providers of retirement funds. The LTIA regulates disclosure requirements provided to members on their benefits, intermediary services such as collection of premiums, payment of premiums, commission and fees payable for financial services and products. The LTIA also regulates the termination of long-term insurance policies, binder and outsourcing services. Prior to the twin peaks, there were regulatory gaps which resulted in inadequate disclosures to members, improper remuneration such as excessive and unjustified fees and commission for financial products and services, improper remuneration and lack of proper governance for binder and outsourcing services as well as poor data management. These regulatory gaps resulted in regulatory reforms discussed under this section introduced by the RDR as part of the twin peaks to address the inefficiencies noted above, to achieve better protection for retirement fund members. This section also discussed the successes and failures of the regulatory reforms for the market conduct regulation of retirement funds under the LTIA. The main findings, together with my recommendations, are dealt with later in this chapter eight.

As the last part of chapter 4, I discussed the TCF Principles for retirement funds before and after the twin peaks. The discussion on the position before the twin peaks analysed the TCF guidelines for retirement funds and administrators. This relates to TCF Principles on complaints management for retirement funds, and administrators. These guidelines incorporate the six TCF Principles and how retirement funds and administrators should apply them to complaints management for retirement funds. The position after the twin peaks discusses the regulatory reforms introduced by Regulation 28 of the PFA and the application of POPIA to retirement funds. This part analysed the objectives of Regulation 28 to regulate the investment of the members' benefits in a manner that achieves TCF outcomes. This requires the board members to provide members with an option to preserve their benefits in the fund on retirement and to design investment portfolios for this purpose, with suitable fees. Regulation 28 was also amended to require board members to design annuity strategies for members to purchase annuities in the fund and provide members with benefit counselling at least three months before they reach retirement. This part of the chapter

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also discussed the requirements of POPIA for retirement funds for the protection of the clients' personal information and how the various requirements of POPIA have been incorporated into the regulatory reforms to require retirement funds, administrators and relevant stakeholders to comply with POPIA. This section dealt with the successes and failures of the regulatory reforms in respect of TCF and retirement funds. The main findings, together with my recommendations, are dealt with later in this chapter eight.

In chapter 5, the objectives of COFI to advance the market conduct regulation of the financial industry and enhance the protection of consumers through market conduct regulations were discussed. The section considered how COFI will replace existing conduct legislation through principles-based, outcomes-based, activity-based, risk-based and proportionate approaches, and that COFI will codify TCF Principles. This chapter analysed how COFI will apply to retirement funds and how it will implement market conduct laws. These market conduct laws will stipulate requirements on governance and culture for retirement funds, licensing requirements for retirement funds, market conduct provisions on product design, sale and distribution of retirement products. The chapter also discussed the COFI provisions for trustees and principal officers to fulfil their obligations and act in the best interest of customers to ensure their fair treatment. The chapter dealt with the successes and failures of COFI in respect of retirement funds – the main findings, together with my recommendations, are dealt with later in this chapter eight. In this chapter, ESG considerations were used as an example to illustrate some of the shortcomings of the framework for the regulation of market conduct.

In chapter 6, international best practices relating to the market conduct regulation of retirement funds are considered. The purpose is to determine the extent to which the South African framework aligns with these principles. The analysis is undertaken against the background of the discussion of the South African position and constitutes a high-level evaluation of the framework. The main findings together with my recommendations are dealt with later in this chapter eight.

In chapter 7, I analysed the twin peaks regulatory model in Australia and compared it to South Africa to the extent that it relates to market conduct regulation of the retirement fund industry. I also analysed the introduction of the twin peaks

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regulatory model in Australia. I discussed the evaluation of the Australian financial system by the FSI, its findings and recommendations to reform the Australian financial regulatory system. I also discussed the objectives of the FSI to recommend a suitable financial regulatory system to ensure an efficient, sound and fair financial industry, to provide consumers with products that are cost effective. I also discussed the recommendations of the FSI to establish a separate market conduct regulator to address regulatory gaps in the Australian financial industry, to regulate the sale and distribution of financial products and the handling of complaints. I also discussed the recommendations of the FSI to establish a prudential regulator to regulate prudential regulation and licensing of financial institutions. I analysed how the FSI recommendations led to the establishment of the Australian twin peaks financial regulation and Australian statutes which implemented the twin peaks. I also analysed how the Australian twin peaks statutes established APRA and the Australian market conduct regulator –ASIC and their regulatory functions. I also discussed the Australian market conduct regulation framework under ASIC and the ASIC Act. This includes the definition of financial products and financial services under the ASIC Act. The discussion also includes ASIC's powers to regulate the conduct of financial institutions, its powers to investigate such conduct and to monitor the protection of financial customers. I also analysed ASIC's regulatory risk-based method to identify regulatory risks and conduct that is in contravention of legislation.

I also discussed ASIC's financial literacy and information gathering programmes. This includes the objective to enhance integrity and financial literacy of consumers in the financial industry by providing sufficient information to financial customers, dispute resolution platforms, comprehensive regulation in the financial industry, thorough market conduct regulation, to enhance the protection of financial customers. The discussion also includes ASIC'S on-line education programmes, financial literacy strategy to assist customers to protect their money and to make sound financial decisions in savings and investments, to identify customer needs and the risks that customers face.

I also analysed the legal framework of the ASIC Act. This includes the prohibition of offering financial services in an unethical or dishonest manner, or contrary to the legislative requirements. The analysis includes prohibitions on conduct which is false

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or misleading in respect of financial products on the price, services, or false products or services. The analysis also includes the provisions of the ASIC Act on jurisdiction outside the borders of Australia and its powers to institute claims for damages on transactions conducted outside Australia, including the recovery of commission on financial products.

I compared the Australian twin peaks financial regulatory model with that of South Africa. The comparison includes the evaluations conducted in both countries in the financial industry to identity the gaps and recommendations to address the gaps and inefficiencies. I also analysed the objectives of the regulatory reforms in Australia and South Africa and the similar objectives to achieve efficiency, stability and growth in the financial industry. I also analysed the statutes which established the twin peaks in Australia, and South Africa, the prudential regulators, market conduct regulators of both countries and their powers under the twin peaks financial regulation. I also discussed the regulation of retirement funds in Australia. This analysis outlines the laws which regulate retirement funds in Australia, the definition of retirement funds and the structure and purpose of retirement funds in Australia. The discussion also includes regulation of retirement funds in Australia, which includes payment of contributions, payment of retirement benefits, data requirements, keeping of records and complaints procedures. This also includes the regulation of the taxation of retirement fund benefits, the protection of retirement benefits and reporting requirements to the regulators by retirement funds.

Under the comparative analysis on the regulation of retirement funds, I compared the structure of retirement funds and the market conduct regulation in Australia and South Africa. This comparison includes the definition of retirement funds under the South African laws and those of Australia, payment of benefits, data requirements, payment of contributions, complaints management and taxation of retirement benefits. The analysis also includes a comparison of the regulators' powers in Australia and South Africa, which includes supervision of retirement funds, reporting requirements and keeping of records. The main findings together with my recommendations are dealt with later in this chapter eight.

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8.2. Summary of the findings on the successes and failures of market conduct regulation of retirement funds

Finding 1: The FSCA as the market conduct regulator manages and regulates the conduct of retirement funds, the product and service providers of retirement funds and the risk benefits provided to members of retirement funds and their beneficiaries or dependants, through a functional and activity-based market conduct regulation.[1] The study also found that market conduct regulation is achieved by the adequate licensing of financial institutions and compliance with high standards of fit and proper requirements.[2] The study identified that the regulatory reforms will introduce new requirements for retirement funds to be classified as financial institutions and to be licensed for the provision of retirement fund benefits and the regulation of their activities to support the fair treatment of retirement fund customers.[3] This regulatory approach appears favourable to achieving fair outcomes for customers through the pre-emptive and proactive techniques.[4]

The thesis established that market conduct regulation enables retirement funds and relevant stakeholders to evaluate how they conduct their business, whether such conduct is compliant with the legislation, and whether it enables them to achieve fair customer outcomes.[5] The thesis also observed that market conduct regulation is about the monitoring of conduct and activities of retirement funds and their stakeholders through regulatory techniques which are activity-based, principle and outcome-based, to identify and address weak/harmful market practices, to ensure the protection of retirement fund customers, achieve financial inclusion and transformation.[6] The research has also found that market conduct regulation aims to enhance financial literacy of retirement fund customers by providing them with detailed and simplified information on their benefits and services that they receive.[7]

[1] See paragraph 2.9.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*

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The thesis observed that TCF Principles are significant to achieve the market conduct regulation of retirement funds and financial products and services provided to retirement fund customers, and have been embedded into regulatory reforms to achieve and enhance the fair treatment of customers.[8] TCF Principles influence the regulation of retirement funds through market regulation and will also advance the governance of retirement funds, administration of retirement funds, payment of contributions, duties of a principal officer, under FAIS and the LTIA.[9] The study has ascertained that one of the objectives of market conduct regulation is to ensure that retirement fund customers are provided with adequate and suitable advice, suitable products and to support and enable retirement fund members to have sufficient retirement savings.[10]

Finding 2: The study established that the twin peaks regulatory model may be onerous on retirement funds, administrators and the product and service providers, and may present regulatory gaps and inefficiencies where the regulators do not properly collaborate with each other to clarify their respective roles.[11] The objectives of the twin peaks to introduce a strong market conduct regulation for retirement funds is yet to be achieved. COFI, the market conduct regulation statute has not yet been promulgated, as well as the relevant retirement fund and financial laws which need to be aligned with COFI. In addition, the research found that the amended laws will implement additional regulatory changes in the retirement fund industry. I am of the view that there are too many laws that have been introduced by the twin peaks and consequently by the market conduct laws which will need to be complied with by the retirement funds and the relevant stakeholders. This aggravates the complexity of retirement funds as they may become over-regulated. These laws may be difficult for the stakeholders to keep up with and for the retirement fund members to comprehend. I am therefore of the view that the twin peaks and market conduct regulation of retirement funds are more than a dual regulation as argued by Godwin, and is arguably a multiple regulation as there are various laws which will regulate the conduct of

[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] See paragraph 2.10.

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retirement funds namely the FSRA, COFI, the PFA, the ITA, POPIA, the LTIA, the Competition Act 89 of 1998, the Companies Act 71 of 2008, among others.[12]

I am also of the view that the regulatory changes have created high costs for retirement funds, product providers, insurers, administrators and intermediaries to comply with and implement changes on administration processes and systems, which will result in high costs to administer the retirement funds, in addition to the existing costs. Some of these costs will be borne by the members and will reduce retirement savings, and may consequently impede the objectives of financial inclusion, sufficient retirement savings and the objective to alleviate poverty.

I found that the regulatory reforms and its various laws also create larger regulatory functions and powers for the regulators. This implies that the regulators and their employees should know the market conduct laws and the relevant statutes to be able to execute their regulatory functions efficiently.

Finding 3: The research has revealed that the proposed regulatory reforms for retirement funds are also aimed at implementing the objectives of the NSSF.[13] The objectives of the NSSF are to supplement the social security funds and private retirement funds which provide retirement fund benefits to members when they retire and to provide an income to their dependents[14]

Finding 4: The study has found that regulatory reforms are being implemented by the government through various amendments to laws, conduct standards and guidance notices to achieve the government objectives of providing adequate disclosures and proper advice to retirement fund members. This is also to reform market conduct regulation of retirement funds through TCF Principles, and to enhance governance of retirement funds. Some of these are Guidance Notice No. 2 of 2018 on Directive 8 on the prohibition of acceptance of gratification by board members, Guidance Notice No 4 of 2018 issued to implement the government objectives to

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[12] *Ibid.*
[13] See paragraph 2.12.
[14] *Ibid.*

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promote efficiency in the governance of retirement funds.[15] Other regulatory reforms achieved to date are the changes introduced by the amendments to regulation 28 of the PFA to provide guidance to members exercising choice and facilitating the payment of pensions by the funds.[16] These new developments are aligned with the objectives of the twin peaks and reflect the regulators' commitment to implement the government's objectives of enhancing the fair treatment of customers of retirement funds.[17]

Finding 5: One of the successes of the proposed regulatory reforms for retirement funds is the proposed two-pot retirement system.[18] The National Treasury paper notes that many South African households do not save enough money for urgent circumstances or financial difficulties, and they do not have enough retirement savings when they retire or leave their jobs due to ill-health or retrenchment, and they do not preserve their benefits when they withdraw from the fund while in service.[19]

The impact of the two-pot retirement system is that retirement funds, administrators and service providers will be required to implement compliance measures for the two-pot retirement system, align their administration systems to cater for the two pot retirement systems, for the collection of the one third contributions for the savings component and the two third contributions for the retirement component.

Another impact will be on the investment portfolios for the savings component and the retirement component, amendments to the fund rules and administration contracts, training of various stakeholders by retirement funds and the administrators, communication of the two-pot system to the members and relevant stakeholders. These changes will result in additional costs for the provision and administration of retirement funds, and some of these costs will be borne by the members and their beneficiaries, which may contribute to lessor retirement savings for members.

[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

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Finding 6: The study found that to achieve the proposed regulatory reforms on retirement funds, the government also proposes to design laws to implement "automatic/mandatory" enrolment to provide retirement benefits to contract and temporary employees like domestic employees, seasonal workers and uber drivers.[20]

A large number of formal employees and those represented by labour unions belong to retirement funds, but the employees in the informal sector do not belong to retirement funds.[21] Auto-enrolment entails "making the employer enrol all employees in a workplace pension scheme or another approved scheme, to which the employer must make a minimum contribution; employees have the option of opting out of the scheme".[22] The purpose of auto-enrolment is to mitigate the insufficient retirement savings for many employees in the informal sector who do not belong to retirement funds mostly because they are not members of labour unions or are temporary or contract workers, as discussed above.[23] This is due to the current retirement system which allows voluntary participation in a retirement fund.[24] It is also believed that merging small retirement funds can reduce costs for retirement fund members and improve economies of scale, enhanced management of retirement funds and streamlined disclosures for members.[25]

The research has established that many low-income employees in the informal sector namely "seasonal workers, part-time workers, informal sector workers, independent contractors, sole proprietors, probationary employees" (commonly classified as "vulnerable workers") do not belong to retirement funds.[26] Many vulnerable employees earn variable income, which has posed a challenge to provide retirement benefits to them for many countries internationally, with the preference to provide retirement benefits to the formal and government employees who contribute

[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

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retirement funds each month.[27] The research found that, affordability can be a challenge for employees in the formal sectors who can contribute to retirement funds regularly, where their employers are liquidated and can no longer afford to employ the employees and pay the retirement contributions.[28] This means that the employer though obliged to continue paying contributions on behalf of the members, cannot continue to pay the contributions due to financial difficulties.[29] The question therefore is whether auto-enrolment is practical and achievable in South Africa given the challenges experienced by other countries on the informal sectors and the issue of affordability to contribute to retirement funds.

Finding 7: The study has revealed that the delays in implementing the NSSF may delay the achievement of its objectives of providing citizens with an income on retirement or disability, alleviate poverty and achieving the objective of financial inclusion.[30] This also means that the government will continue to be burdened by citizens with insufficient income on retirement and citizens with financial hardships, and may impact the efficiency and stability of the economy.[31] Despite that the current retirement fund industry provides an income to the members and their beneficiaries, there is a need to implement the NSSF to bridge the discrepancies and the inefficient retirement savings under the current retirement system.[32] The NSSF is needed to achieve bigger objectives and provide better income to the citizens.[33]

Finding 8: The study found that the current laws allow members of a pension or provident fund to withdraw their full retirement benefits on resignation or retrenchment and to withdraw their full benefit once-off from a preservation fund after they transfer the benefit.[34] This aggravates the risk of future financial difficulties and insufficient retirement savings and "low replacement rates and poor outcomes on retirement".[35] The study has also found that the three main areas for retirement fund

[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] See paragraph 2.13.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*

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reforms namely coverage, preservation and costs still need to be addressed by the government."[36]

Finding 9: The study has found that where an employer fails to add an employee who qualifies for benefits under a fund that the employer participates, the member will not have access to retirement benefits.[37] This will result in the member not having retirement benefits or deprive the member's family access to the death benefits on the member's death.[38] This may contribute to the obstruction of achieving the objectives of the twin peaks and market conduct regulation, to achieve fair treatment of members or providing financial products to customers, and financial stability in the financial industry. If an employer fails to add an eligible employee timeously to the fund, the impact is that the member or his family will have lessor benefits and may result in unfair outcomes for the member and his family. In other instances, an employer can pay contributions for a member based on a lower pensionable salary. In some instances, an employer can erroneously remove an employee who is ill from the fund, when the employee should be on break in service. Should the employee die after the employer exited them from the fund, they will not be covered for risk death benefits provided by the fund or self-standing risk benefits that members qualify for by virtue of their membership to the fund. This is because the employer will not have paid the risk premiums and the member's cover will have been terminated by the insurer. This can be prejudicial to the member and his family and can result in unfair outcomes for the member and their family.

Finding 10: The FSCA Guidance Notices implement the government's objectives to enhance the governance of retirement funds.[39] Guidance Notice 2 of 2018 is a market conduct regulatory tool which regulates and mitigates corruption and prevents fund officers from being unduly influenced by service providers, to protect the assets of the retirement funds, members' interests and benefits, and it enhances the fit and proper requirements of board members.[40] Guidance Notice 2 of 2018 is a market

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[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] See paragraph 3.2.3.
[40] *Ibid.*

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conduct regulatory instrument which protects the interests of the members by ensuring that the fund appoints fit and proper board members and to act independently without undue influence.[41] It promotes compliance by retirement funds who are not properly constituted, timeous payments of benefits, and ensure that the board is properly constituted.[42] Guidance Notice 2 of 2020 is a market conduct regulatory instrument which requires board members to carry out the fiduciary duties that they owe to fund and its members, and to ensure that assets are managed properly, and to act in the best interests of members.[43] Guidance Notice 2 of 2020 will in the long-run assist to mitigate a high number of unclaimed benefits.[44]

Finding 11: The study has revealed that despite the few regulatory reforms on fund governance discussed above, there are many areas that still need to be addressed to achieve better customer outcomes and promote the protection of retirement fund members and their beneficiaries.[45] The regulations on governance of retirement funds are still largely segmented, and it is difficult, not only for the fund officers but for stakeholders such as participating employers, retirement fund members, employees of the administrators, financial advisors among others, to identify and understand the regulations on the governance of retirement funds as they are contained in different pieces of regulations.[46]

The King IV Report depicts a retirement fund similar to a company with directors and shareholders.[47] If retirement fund members are deemed to be shareholders, it is important for them to understand the laws that regulate the fund officers who manage their benefits.[48] It is also crucial for participating employers who negotiate the retirement benefits on behalf of the members to understand the regulations on the governance of retirement funds.

[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

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Finding 12: The study found that the provisions on the appointment of member representatives under a participating employer in an umbrella fund (as an example) are only stipulated in the fund rules.[49] There are currently no laws or regulations which regulate the appointment and duties of representatives of the members under the participating employer in an umbrella fund.

Finding 13: The draft Conduct Standard on communication of benefit projections to members of pension funds is a market conduct regulatory tool as it places an obligation on retirement funds and administrators to provide benefit projections to members, to assist members to make informed decisions on their benefits and see their projected benefits.[50] This will assist to achieve the government's objectives to provide members with vital and enhanced disclosures to members to assist them to get good value for their benefits, to create awareness and provide members with financial literacy.[51]

Finding 14: The draft Conduct Standard on conditions prescribed for pension fund benefit administrators supports the government's objectives to strengthen market conduct regulation which incorporates TCF.[52] It supports the government's objectives on the proposed governance reforms for retirement funds to achieve consistency between the trustees of retirement funds and the service providers/and or administrators of retirement funds through governance requirements.[53] It will also help to achieve the government's objectives to mitigate conflict of interest by improving governance reporting obligations for sponsored services and to effect regular review and assessment of governance of retirement funds.[54] This will also assist to implement the government's objective to "encourage good value retirement products and services."[55] The requirements of the draft Conduct Standard will also help to implement the government's objectives to provide harmonised disclosures to members by

[49] *Ibid.*
[50] See paragraph 3.3.3.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*

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requiring administrators to provide members with vital information and better customer outcomes.[56]

The draft Conduct Standard introduces market conduct requirements for benefit administrators to ensure that they conduct themselves in a manner which promotes the fair treatment of customers.[57] The requirements to communicate with clients on complaints also support the fair customer outcomes as clients will be kept appropriately informed.[58] Data management requirements, processing of information, data retention and privacy also align with POPIA and the requirements under the PPRs.[59]

Finding 15: Some employers, their representatives or trade unions who negotiate retirement benefits for their members are still not cooperating with insurers and service providers on providing the required member data.[60] This is despite the efforts by financial institutions such as insurers and retirement funds to communicate and emphasise the legislative requirements and the importance of providing client data.[61] Some of these stakeholders are not fully conversant with the legislative requirements and are hesitant to provide the member data as they believe that the data will not be protected and that providing it is contrary to the legislative requirements. Other stakeholders do not respond to the data requests and in certain instances where there is a trade union involved as an example, it is difficult for the insurer to ascertain the contact person, or to get a response. Some of this data may never be obtained. This results in the financial institutions facing challenges to communicate with customers to provide them with the required disclosures on their benefits or provide them with benefit projections as required by legislation. This also impacts the payment of benefits and causes delays in processing claims. This also affects the ability of the financial institution to implement data management processes to manage, retrieve or retain data as required by legislation. This may impede the

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[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] See paragraph 3.4.3.
[61] *Ibid.*

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objectives of market conduct regulation to achieve stability, efficiency, providing benefits to customers and to achieve fair customers.

Finding 16: In some instances, delays in processing claims are caused by customers who do not provide required claims documents such as death certificate, marriage certificate, proof of education, proof of permanent life partnership.[62] In some instances, the customers do not respond to requests from financial institutions.[63] Some delays in processing on boarding process, claims or section 14 transfers are caused by a large number of clients who do not register for tax with SARS timeously or attend to their tax returns timeously. This impedes fair outcomes to the customers and their families and causes challenges to the financial institutions in fulfilling their obligations.

Finding 17: There also appears to be a notion that the employer or the fund owns the data, and this may contribute to the hesitancy in providing the data.[64] This commonly evident in respect of service level agreements or administration agreements where the fund or employer insists on stipulating provisions in the agreement to state that the fund or the employer owns the data and the insurer, product or service provider must return the data to the fund on termination of the agreement.[65] These provisions appear to be contrary to the legislative requirements and may limit the insurer's obligations to implement data management processes. In addition, the client data is regulated by strong data laws which require the insurer or financial institution to implement data management processes, manage store the data in accordance with the legislative requirements. It is therefore not possible for the insurer or a financial institution to return the data to the fund or employer as this will be in contravention of the legislation. Stakeholders who provide data to the insurer or financial need to understand the purpose of providing data and the legislative requirements for the insurer or financial institution to fulfil its obligation to provide benefits or services to the customers.

[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*

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Finding 18: The outsourcing requirements align with the FSCA and PA the Joint Standard of 2021 on outsourcing by insurers.[66] An insurer remains liable for the outsourced functions in the same manner as the administrator under the draft Conduct Standard.[67] Other similarities are that the insurer or administrator can only enter into an outsourcing agreement with a third party if the insurer or administrator is satisfied that the third party is licensed to conduct administration services and is able to perform the functions.[68] Another similarity is the requirement for the administrator's governing body to implement the governance requirements for outsourcing arrangements and ensure governance and oversight of the outsourced arrangements.[69] The requirements for an administrator to implement and maintain a contingency plan to back up and recover data in the event of any system failure and data loss, are also similar to the requirements of the PA and the FSCA Joint Standard which require the third party outsourced by an insurer to have a contingency plan.[70]

Finding 19: I am of the view that the provision of disclosures to members lack some essential requirements such as the legislative requirements on divorce orders, where a member should be informed that his benefits can be deducted to pay a benefit to his or her spouse in terms of a decree of divorce.[71] Some of the essential requirements relate to the deduction of a member's benefit to pay a maintenance order or to pay amount that a member will have caused damages to his employer.[72] Many members are not aware of these requirements, and they provide incorrect divorce or maintenance orders to the administrator of the fund or to the fund, resulting in many delays in the payment of their withdrawal benefits or the payment of the benefits to the non-member spouse or an applicant of a maintenance order. This also places a burden on the administrator of the fund that must provide guidance to the members on the requirements for a correct divorce or maintenance order which is binding on a

[66] See paragraph 3.3.3.
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*

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fund, by stipulating the legislative requirements for the fund to deduct the member's retirement benefit to comply with the court order.

Finding 20: The draft Conduct Standard on communication of benefit projections to members of pension funds is a disclosure requirement to provide estimated benefits to members to inform members of their benefits.[73] The requirements of the draft Conduct Standard for retirement fund administrators to communicate with members and provide them with essential information on their benefits and services provided is also a disclosure requirement.[74] The disclosure requirements apply to retirement fund benefits and risk benefits provided by the fund. However, many members covered for retirement benefits are also covered for risk benefits bundled with the retirement benefits. Some of these risk benefits are provided by the fund whereas several benefits, namely lump sum death benefits, total and permanent disability benefits, income disability benefits, critical illness benefits, spouse's benefits and funeral benefits are self-standing benefits which are bundled with the retirement benefits provided to the members. The risk benefits provided by the fund (the fund is the policyholder)[75] and the self-standing risk benefits (the employer or association is the policyholder)[76] are regulated by different statutes,[77] but the disclosure requirements for both benefits are regulated by the PPRs.[78] This creates different regulatory, compliance and payment obligations under these group risk policies, which may be onerous for the regulated entities and may also cause a regulatory gaps /overlaps and awareness gap, and require proper monitoring.

Finding 21: The intervals and requirements to provide disclosures for the benefit projections for retirement funds may differ from those of the risk benefits under the PPRs.[79] The study has found that it is a common challenge in the retirement fund industry that many members seem to be only aware of the benefits under the

[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*

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retirement funds and are not aware of the self-standing risk benefits and the requirements to complete nomination forms for the payment of their risk benefits.

Section 37C of the PFA requires the board members to use a member's nomination form as a guidance, only to see and trace the dependants and nominees of the member, whereas the insurer of the self-standing group risk benefits must pay the benefits in terms of the Insurance Act, the group policy and the nomination form.[80] Where a member did not complete a nomination or if the nomination is invalid, the beneficiaries or heirs must approach the Master of High Court to get an executor or authorised person appointed for the insurer to pay the risk benefits to the deceased member's estate. The study has found that this is impractical where a funeral benefit is payable, as the benefit is needed to cover the funeral costs for a member and should be paid within 48 hours for the member's family to finalise the funeral arrangements of a member.[81]

The study established that these challenges are due to the regulatory reforms introduced by the Insurance Act which appear to create unreasonable post sales barriers.[82] There seems to be an imbalance in respect of the objectives to achieve financial inclusion, the fair treatment of customers and the objectives to alleviate poverty.

Finding 22: In addition to the discrepancies flowing from the regulatory requirements on the risk benefits discussed above, the ASISA Retirement Fund Standard is not codified into the statutes or conduct standards and is not part of the FSCA draft conduct standard on benefit projections.[83] This may be difficult for ASISA members and may also create a regulatory gap for the ASISA members who are also required to comply with the requirements of the draft Conduct Standard on benefit projections.

[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*

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Finding 23: The requirements for pension fund administrator to implement and maintain a complaints escalation and review process are similar to the requirements of the PPRs for an insurer to implement and maintain a complaints process.[84] The requirements of the complaints management process under the PPRs apply to the self-standing risk benefits that are not provided by fund, if members have retirement fund benefits bundled with self-standing benefits. Complaints for fund benefits are adjudicated by the Adjudicator and are regulated by the PFA and the FSRA, whereas the long-term insurance self-standing risk benefits are adjudicated by the ombudsman for long-term insurance, which may be onerous for administrators to comply with.

Finding 24: The governance requirements under the draft conduct standard for retirement fund administrators implement additional legislative requirements on governance of retirement funds for the administrators' governing boardy.[85] This aligns with the requirements of the King IV Report and the Circular which require the board to appoint an administrator and to enter into an agreement with the administrator.[86] When COFI is promulgated, it will also introduce governance obligations for the retirement fund administrators to comply with.[87] These various laws may be tedious for the regulated entities to comply with and complex for customers to understand. The successes of the regulators' powers under the reformed laws, are yet to be measured and achieved.

Finding 25: The Conduct Standard on payment of contributions incorporates market conduct tools to ensure that non-payment of contributions is reported to the FSCA, and members are kept adequately informed.[88] This will assist to achieve fair customer outcomes, as the fund is required to inform the employer of its obligations under section 13A and will assist employers to understand their obligations under section 13A.[89] The data requirements will also assist to gather and obtain data and to

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[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] See paragraph 3.4.3.
[89] *Ibid.*

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store member data, to enable the fund to communicate with members and keep them informed on their benefits.[90]

The requirements on outsourcing of collection of contributions will assist to mitigate unnecessary costs and exorbitant fees to protect the members' benefits from being used to cover improper remuneration.[91] The requirements of the Conduct Standard also align with the objectives of the twin peaks under the PPRs and other conduct standards such as the draft Conduct Standard on retirement fund administrators.[92] This reflects alignment and consistency under the regulatory requirements.[93] TCF Principles are also incorporated in the draft Conduct Standard, which aligns with the objectives of the twin peaks to achieve better customer outcomes and afford better protection to retirement fund customers.[94]

Finding 26: The legislative provisions on the duties of the principal officer are an essential market conduct regulation tool as they assist in monitoring the conduct of the principal officer as an officer of the fund, and to ensure that board members account for their conduct.[95] The requirements will also assist to enhance governance of retirement funds through the obligations of the principal officer to monitor the conduct of the board members.[96] The FSCA has not yet issued a Conduct Standard on the appointment of and duties of a principal officer. The appointment of and duties of a principal officer are still regulated by Directive PF 8.[97]

Finding 27: The requirements to appoint an auditor to report on the affairs of the fund support the provisions of the PFA and they help the board to monitor its conduct to ensure that pension funds are properly managed.[98] These are included in the draft Conduct Standard and have been expanded to specify the duties of the

90 *Ibid.*
91 *Ibid.*
92 *Ibid.*
93 *Ibid.*
94 *Ibid.*
95 Paragraph 3.7.
96 *Ibid.*
97 *Ibid.*
98 *Ibid.*

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auditor.[99] This differs from the previous position where an auditor was appointed in terms of section 9A of the PFA[100] These expanded and clearer provisions align with the objectives of the twin peaks to promote efficiency in the financial industry and close the regulatory gaps by requiring the accounting records and financial statements to be in line with the Companies Act.[101] This is an important market conduct regulatory instrument which will aid to properly monitor the financial affairs of retirement funds.[102]

Finding 28: The adjudication of complaints is a market conduct regulatory instrument which monitors the conduct of retirement funds and financial institutions and assists to make them account for their conduct.[103] It provides retirement fund members/customers with an opportunity to have their grievances addressed.[104] It implements market conduct regulation and the fair treatment of customers, is cost effective.[105]

Finding 29: Determinations on complaints such as directing an employer to add a member to the fund will make it easier for the regulator to regulate the employer's conduct when COFI is promulgated.[106] Complaints relating to non-payment of contributions will also be inter-linked with market conduct regulation requirements on payment of contributions.[107] This implies that the adjudication of complaints will contribute to market conduct regulation through the complaints received and the determinations issued. The referral of decisions to the FST provides members with an opportunity to get a second chance to present their grievances.[108] Where the review of a decision is in favour of the member, it provides a member with better protection in that the FST will have overturned the decision of the Adjudicator who may have aired in reaching her decision.[109]

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99 *Ibid.*
100 *Ibid.*
101 *Ibid.*
102 *Ibid.*
103 See paragraph 3.8.4.
104 *Ibid.*
105 *Ibid.*
106 *Ibid.*
107 *Ibid.*
108 *Ibid.*
109 *Ibid.*

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The consolidated ombuds system which will be implemented by the FSRA is a market conduct regulatory system which promotes the fair treatment and protection of customers.[110] The function of creating awareness and access to financial customers will assist the customers to know their recourse against the financial institutions and make them account for their conduct.[111] A consolidated ombuds system will assist to ensure consistency on the regulatory requirements and will harmonise the conduct of the ombuds and enhance the fair treatment and protection of customers.[112] The easy access to the ombuds system will mitigate barriers to dispute resolution and will support efficiency in the financial industry.[113]

Finding 30: Under the previous FAIS regulatory regime, there were regulatory gaps on the lack of requirements to conduct needs analysis for retirement fund members.[114] The rendering of advice to retirement funds as the clients and not the fund members may have led to unfair treatment of customers. The regulatory requirements implemented by the RDR and the ensuing amendments of the FAIS General Code of Conduct demonstrate how the regulatory regime evolved from the former regime to the current regime.[115] The study is of the view that the regulatory reforms are a new regulatory framework which focuses on the needs of the retirement fund members by shifting the focus from the fund as the client to the end user who is the customer/member of the fund.[116] This is a market conduct regulatory tool which offers protection to retirement fund customers and will contribute to efficiency in the retirement fund industry.[117]

Finding 31: The FAIS Fit and Proper Requirements on "low advice" create additional obligations on the product supplier and the adviser to ensure that members are provided with appropriate advice.[118] The requirements of Proposal D on "low advice" places more responsibility on product suppliers and intermediaries to ensure

[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] See paragraph 4.3.1.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] FSB "Retail Distribution Review Proposal B" (November 2014) at 44 to 46.

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that the distribution model and level of advice provided is appropriate to the riskiness/complexity of the product".[119] These additional obligations are aimed at promoting fair outcomes for members.[120]

Finding 32: The purpose of the amendments on the binder and outsourcing arrangements is to monitor the remuneration of outsourcing and binder services, to address abuses and inconsistencies established by the regulator and to enhance the protection of financial customers including retirement fund customers.[121] This is a market conduct regulatory mechanism which forms part of the government objectives on remuneration of financial service providers.[122] Regulation 6.2A(1)of the LTIA Regulations stipulates governance and oversight requirements on binder agreements which include *inter alia*, the ability by an insurer to exercise effective oversight over the binder holder on an on-going basis, complete accuracy, validity and security of information provided by the binder holder.[123] The binder holder is also required to satisfy the fit and proper requirements, to provide the insurer with access to up-to-date accurate data, and the insurer must have access to any data held by the binder holder.[124] The data requirements will also aid in efficiency on providing disclosures to fund members on their benefits and the necessary communication in terms of the PPRs requirements.[125]

Finding 33: The requirements of Rule 20.2 introduce new market conduct regulations which monitor the conduct of insurers on termination of group policies, to ensure that retirement fund members are aware of the changes under their policies and are kept well informed.[126] The requirement to notify the FSCA implements checks and balances by also ensuring that the FSCA is made aware of the termination, to exercise its authority to protect the members of the fund under the group policy and ensure that members are not left without cover due to termination of the group policy.[127]

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[119] *Ibid.*
[120] *Ibid.*
[121] See paragraph 45.
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*

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The changes introduced by the reformed sub-legislation are to ensure that members of group schemes, (including fund members) are provided with appropriate advice, products and adequate information on their benefits.[128]

Finding 34: The reformed legislation such as the guidance notices and draft Conduct Standards incorporate TCF Principles for retirement funds.[129] TCF Principles are no longer guiding principles only but have been codified into the various pieces of the new and reformed legislation.[130] The regulatory reforms on benefit projections to members, communication to members, collection of contributions, requirements for administrators among others, which incorporate governance and fit and proper requirements for retirement fund administrators incorporate TCF Principles, with the objectives of achieving better customer outcomes.

Finding 35: The regulatory reforms under the RDR, PPRs, LTIA Regulations, the FAIS General Code of Conduct and the FAIS Fit And Proper requirements implement the government objectives to address abuses in the financial industry and to implement proper remuneration requirements for retirement and risk benefits provided to members, to achieve better customer outcomes. [131] The PPRs incorporate all the six TCF outcomes discussed above, as well as claim and complaints processes discussed above, to ensure better outcomes for members.

Finding 36: The retirement fund default regulations aim to protect the members' benefits to ensure that the benefits are properly invested, members are provided with guidance and benefit counselling before they purchase annuities, and members are kept appropriately informed in on the investments of their benefits.[132] POPIA will apply to retirement funds to ensure the protection of personal information for retirement funds, members and their dependants. This aligns with the government objectives and the TCF Principles for retirement funds discussed above.

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[128] *Ibid.*
[129] See paragraph 4.6.3.
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid.*

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Finding 37: Benchmarking the South African system against international principles is important because the South African financial industry makes a significant contribution to the South African economy and to the global economy.[133] Market conduct regulation, as one of the peaks of the twin peaks model adopted by the South African government was introduced by many of South Africa's international counterparts, with the objective to ensure sufficiency and effectiveness in the financial sector.[134] South Africa and international role players continue to strive to achieve economic stability internationally and locally as part of the G20.[135] As market conduct supports financial stability,[136] the framework for the market conduct regulation of the retirement fund industry becomes relevant.

Finding 38: International financial regulation continuously strives towards achieving global and economic stability – which requires dedication from the respective international bodies.[137] In order to achieve its objective of continuous contribution to the global and local economy, the South African government identified objectives for regulatory reforms from international standards.[138] The government based many of its objectives of regulatory reforms on international standards in order to ensure that the laws are internationally appropriate.[139] Many South African financial laws are aligned with international standards and jurisdictions in order to ensure efficiency and enable the South African financial industry to participate in, and contribute to the global economy.[140]

Finding 39: Despite existing financial laws, it is necessary to continuously reform and strengthen these laws to promote the protection of financial customers.[141] This is motivated by the risks and complications associated with financial services and products, the evolution of technology, the limitation to access financial products, and

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[133] See paragraph 6.1.
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*

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financial illiteracy of consumers.[142] Reform is further motivated by the risks of "fraud, abuse and misconduct" that financial customers are exposed to due to regulatory gaps in the supervision of financial products and services, and irregular remuneration for financial products and services.[143] This necessitates the strengthening of customer protection combined with "financial inclusion and financial education policies" to achieve efficiency and solidarity in the financial industry.[144] Reform of financial laws should prescribe requirements for the fair treatment of financial customers, adequate disclosures, advanced financial literacy, honourable business conduct by service providers and financial service providers, suitable financial advice, data protection requirements, sound governance measures by financial institutions, and processes to manage complaints by consumers.[145]

Finding 40: All G20 members (including South Africa) and related countries were invited to adopt the principles to improve the protection of financial customers, and to align their financial laws with these principles.[146] As a member of the G20, South Africa adopted the G20 High-Level Principles when designing its objectives to reform and introduce new laws for the financial industry.[147] The government's objective to separate prudential and market conduct regulation through the twin peaks model of financial regulation, with the objectives of making the financial sector safer, are linked to the G20 High-Level Principles.[148]

Finding 41: The 2008 global catastrophe emphasized the significance of the protection of financial customers to achieve solidarity in the global financial market.[149] The World Bank highlighted that "…financial stability, financial integrity, financial inclusion, and financial consumer protection objectives…" have been adopted by many countries who have developed regulatory structures to deal with the protection of financial customers.[150] The protection of financial customers has been a significant

[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.*

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consideration for many years and increases access to financial products and services.[151] The protection of financial customers has an effect on the ability of customers to make informed decisions in respect of financial services and products, which results in the efficiency and stability of, and competition in, the financial markets.[152]

Finding 42: The objectives of the FSRA are similar to the Good Practices in that the legislation includes provisions on collaboration and coordination between regulators, and confers investigative powers on the regulators, such as on-site visits, gathering information and imposing administrative penalties.[153] It can be argued, at least on theoretical and principled basis, that the FSRA is on par with international standards and is an efficient financial statute which will enhance stability in the local and global markets.[154] The FSCA's supervisory principles are similar to the Good Practices' recommendations on supervisory activities which require a regulator to design and document a strategy, outlining its regulatory functions and focus areas.[155] The FSCA's transparent and consultative approach outlines this approach and incorporates the principles of the Good Practices which require a regulator to implement a strong market regulation through industry research and information gathering.[156] The FSCA's powers to supervise and regulate the delivery of fair customer outcomes by financial institutions using an outcome-based approach is similar the principles of the Good Practices which stipulate that a regulator must monitor the conduct of financial institutions regularly using a risk-based-proactive approach to achieve fair customer outcomes.[157] The FSCA has incorporated the Good Practices to strengthen market conduct regulation through off-site and on-site monitoring.[158] The operational requirements for retirement fund administrators under Section 13(B) of the PFA and the draft Conduct Standard on conditions prescribed for pension fund administrators on "operational ability" are aligned with the requirements

[151] *Ibid.*
[152] *Ibid.*
[153] See paragraph 6.2.2,(iii).
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] See paragraph 6.6.2(iii).

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of OECD Core Principles on the principles of occupational pension regulation on governance of retirement funds and with international standards.[159] The licensing guidelines under Core Principle 2 are also similar to the provisions of section 4 of the PFA and the COFI licensing requirements for retirement funds.[160]

Finding 43: Some of the notable similarities between Core Principle 6 and the Circular are the requirements that the governing body must conduct itself with integrity, due diligence, and appropriate skills, and must act with good faith towards the fund and its members.[161] Both documents require the fund to offer benefits to the members and their beneficiaries in terms of the fund rules.[162] The data requirements for retirement fund administrators on the processing of personal information are aligned with POPIA and incorporate the provisions of the G20 High-Level Principles on the processing of their personal information.[163]

Finding 44: In order to provide suitable and efficient products and services to their clients, customers should be reliable.[164] Customers are responsible for providing insurers with the necessary information to enable them to assess the risk posed by these customers and provide them with suitable insurance cover.[165] A culture of responsibility must be developed where financial customers in South Africa are reminded of their responsibility to become informed and to provide correct information. This will better align the South African system with this Good Practice suggested by the World Bank. In order to enable proper flow of info information, it is important to ensure that the requirements for data accumulation and exchange are adequately regulated, otherwise fraudulent activities such as fraudulent claims and increased risk of insolvency of the insurers may ensue.[166]

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[159] See paragraph 6.2.2(iv).
[160] *Ibid.*
[161] See paragraph 6.2.3.
[162] *Ibid.*
[163] See paragraph 6.2.4 (ii)
[164] See paragraph 6.2.4(iii).
[165] *Ibid.*
[166] *Ibid.*

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Finding 45: The G20 requirements on distribution models are similar to the provisions of the RDR.[167] The principal purpose of the RDR is to stipulate a regulatory structure on the distribution models for financial products, which achieve the fair treatment of customers.[168] This also includes requirements that remuneration for financial products and services, including the rendering of advice should be structures in a manner that is affordable and achieves fair customer outcomes.[169] These requirements also include financial products and services offered to retirements funds and their customers and relate to the distribution requirements of the G20 High-Level Principles.[170] The objectives of COFI incorporate the G20 High-Level Principles on the fair treatment of customers.[171] The objectives of COFI are, *inter alia*, to regulate and supervise the protection of financial customers by financial institutions through a regulatory structure that supports the fair treatment of customers.[172] These requirements will also extend to the financial products designed, the services rendered and the sale and distribution of the products.[173] This will include products and services provided to retirement funds, their members and beneficiaries.[174]

Finding 46: The functions and powers of the FST incorporate the G20 High-Level Principles to provide financial customers with a platform to get their complaints reviewed where they are dissatisfied with the decisions of the Adjudicator.[175] The costs charged by the FST (where the need arises) are "costs reasonably and properly incurred by the other party", incorporates the principles of the G20 High-Level Principles that the costs should reasonable.[176] The consolidated ombud system which will be implemented by the FSRA also incorporates the G20 High-Level Principles on complaints handling and redress.[177] The FSRA establishes an Ombud Council which

[167] See paragraph 6.2.4(iv).
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*
[177] See paragraph 6.2.4(v).

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will regulate and monitor all the ombud schemes, including the Adjudicator.[178] The objective of the Ombud Council is to provide financial customers with redress mechanisms that are affordable, effective, fair and impartial – a requirement of the G20 High-Level Principles.[179]

Finding 47: The RDR implemented a regulatory framework which *inter alia* allows financial customers, intermediaries and brokers to gain from a competitive industry through selling, distribution and rendering advice.[180] COFI will implement consolidated market conduct regulation with the aim of promoting strong competition in the financial industry.[181] These steps incorporate the G20 High-Level Principles on competition, to provide financial customers with a wide range of products and services to compare. It supports the protection of customers as competition supports efficiency and stability in the financial industry.[182]

Finding 48: South Africa and Australia both acknowledged the importance of the financial sector for their respective economies and identified the need to reform financial regulation to achieve the objectives of progressive efficiency, stability, and growth of the economies.[183] One of the main objectives of regulatory reforms in both countries was to advance the protection of financial customers.[184] The South African twin peaks regulation is similar to Australia as both countries have a prudential regulator and a market conduct regulator. The objectives of the regulatory reforms in South Africa, namely, to ensure stability and efficiency of the financial industry, to achieve the fair treatment of customers, and advance the protection of customers, are also similar to those of Australia.[185]

Finding 49: APRA and ASIC regulate the prudential supervision and market conduct of retirement funds, which is similar to the South African prudential and market conduct regulation model in relation to the supervision of the stability and conduct of

178 *Ibid.*
179 *Ibid.*
180 See paragraph 6.2.4(v).
181 *Ibid.*
182 *Ibid.*
183 See paragraph 7.3.4.
184 *Ibid.*
185 *Ibid.*

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retirement funds.[186] The difference is, however, that the Australian prudential regulator is established by the APRA Act and the market conduct regulator is established by the ASIC Act.[187] The APRA Act and the ASIC Act confer powers on the Australian twin peak regulators and prescribe their regulatory duties.[188] In South Africa, there is currently one statute which established both regulators, although the authority of the FSCA can also be found in other substantive laws administered by the FSCA. For example, the FSCA will administer COFI, which will introduce a consolidated market conduct regulation framework.[189]

Finding 50: ASIC's risk-based regulatory approach to identify regulatory risks, conduct that is contrary to legislation, and gathering information from industry players and customers, is similar to the FSCA's risk-based regulatory approach.[190] The ASIC Act prescribes provisions that establish jurisdiction outside of Australia to institute claims for damages and to recover commission which exceeds the prescribed maximums.[191] By contrast, the South African legislation prescribes provisions on licensing to conduct business in South Africa and does not make provision to, for example, conduct insurance business outside South Africa. ASIC's powers and functions to regulate financial products and services are similar to the powers and duties of the FSCA under the FSRA and the LTIA.[192] ASIC's authority to supervise the disclosure of financial products is comparable to the provisions of the PPRs on disclosure requirements.[193] The provisions of ASIC which prohibits the promotion and supply of financial products in a false or misleading manners are similar to the requirements of the PPRs and the FAIS General Code of conduct on advertising and promotion of financial products.[194] The provisions of the PPRs and the FAIS General

[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.*

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Code of Conduct will be incorporated into COFI and will be comparable to the provisions of the ASIC Act.[195]

Finding 51: ASIC's powers to regulate licensing for the provision of financial products, marketing of financial products, among others, are similar to the provisions of the FSRA, FAIS and COFI.[196] The licensing requirements under AISC on "quality and competence, fairness, honesty and professionalism" are comparable to the fit and proper requirements under the FAIS Act.[197] The FSRA has powers to a grant license, to revoke, suspend and vary a license, which powers are also similar to those of ASIC.[198]

Finding 52: The ASIC financial literacy programme has been in place for many years and its objectives are to assist financial customers to make sound decisions on their finances, such as savings and investments.[199] The financial literacy programme is fundamental to the interests of financial consumers.[200] The ASIC financial literacy programme is comprehensive and is designed to provide financial literacy nationally, to all citizens, including school pupils, vulnerable community members, the youth, middle aged and senior citizens.[201]

ASIC's MoneySmart website has created awareness among the Australian citizens and has helped them to make sound financial decisions, to spend lessor, create a budget for expenses, and to review their financial circumstances.[202] ASIC's MoneySmart Market has also assisted ASIC to evaluate the performance and impact of the financial literacy programme.[203] The Australian government developed an updated national financial literacy strategy which outlines the methods of financial literacy, the regulatory requirements, the functions of the government on financial capability, and the supervisory framework, which is aligned with the recommendation

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195 *Ibid.*
196 *Ibid.*
197 *Ibid.*
198 *Ibid.*
199 *Ibid.*
200 *Ibid.*
201 *Ibid.*
202 *Ibid.*
203 *Ibid.*

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of the OECD Council on financial literacy.[204] The Australian government (under its Treasury) took over the responsibility of financial literacy from ASIC as it views it as the obligation of the government on behalf of Australia and not the responsibility of one regulatory agent.[205]

Finding 53: The objectives of the PFA "to provide for the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto" are similar to the objectives of the RSA Act on the provision of RSAs.[206] The definition of a retirement fund in South Africa is comparable to the definition of an RSA in Australia, to the extent that it is an instrument that enables customers to save income on a monthly basis during their terms of active service, to provide an income on reaching retirement, ill-health or death.[207] The definition of a retirement fund under the PFA is also similar to the definition of an RSA to the extent that it provides benefits to members or former members upon death or retirement.[208] The reference in the definition of an RSA to a "policy" can be compared to a retirement annuity which provides retirement benefits to individual members.[209]

The difference between the definition of an RSA and a retirement fund or pension fund organisation is that the definition of a retirement fund in South Africa refers to a group of people or scheme arrangement designed to offer retirement benefits or "receive, administer, invest" and pay benefits to members or beneficiaries on their retirement, ill-health or death.[210] The other difference is that there are different types of retirements funds under the PFA and the ITA, whose objectives are to provide retirement or death benefits to their members.[211] The different types of retirement funds found under the PFA and the ITA are a pension fund, a pension preservation fund, a

[204] *Ibid.*
[205] *Ibid.*
[206] See paragraph 7.5.
[207] *Ibid.*
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*

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provident fund, a provident preservation fund, a retirement fund, and a beneficiary fund.[212]

Despite the differences in the definitions of an RSA or a policy under the RSA Act, and the retirement funds under the PFA and the ITA, the operation of these funds are similar as they are established through the retirement savings or income contributed by the members or financial customers. In addition, retirement funds have the same objectives, namely, to provide retirement benefits to customers.[213] The definition of a holder of an RSA or a policy owner under an RSA can be compared to a member or former member of a fund under the PFA.[214] A member of a retirement fund under the PFA is defined as a member or former member of the fund or a person who belongs to the fund, which is comparable to the holder of an RSA defined as the person in whose name the account is opened or a policy owner in respect of a policy.[215]

8.3. Recommendations

Recommendation 1: The regulatory reforms and the larger regulatory functions necessitates the regular monitoring of the regulatory framework and the functions, market conduct regulation and protection of customers, to assess the risks and regulatory gaps. It also necessitates focused regulator industry consultations on areas of concern to identify gaps.

Recommendation 2: Retirement funds, administrators and financial advisors should educate members on the two-pot retirement system and encourage members not to withdraw their benefits from the savings component as this may have a negative impact on members when they retire. This is because a member will not have the one third cash component when they retire if a member withdraws the benefits regularly from the cash component.

Recommendation 3: I am of the view that where an employer has failed to add a member who qualifies for membership to the fund, market conduct regulations should be implemented to oblige an employer to compensate the member or his family

[212] *Ibid.*
[213] *Ibid.*
[214] *Ibid.*
[215] *Ibid.*

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for the retirement benefits that the member would have qualified for under the fund. Where the employer delayed adding the member to the fund and the member exits the fund due to retirement or ill-health or death, regulations should be implemented to oblige the employer to pay the shortfall benefits. Where the member is still a member of the fund, the regulations should oblige the employer to rectify the error without the member having to obtain assistance from the Adjudicator to order the employer to pay the full contributions for the said period together with late payment interest. In the instance where the employer exited the member from the fund and the member's risk benefits were terminated by the insurer, regulations should be implemented to require the employer to pay the risk benefits that the member was covered for. Implementing regulations to oblige the employer to pay the benefits to the members or their families in respect of the employer's conduct in the circumstances indicated above can achieve better fair outcomes for customers. This can also assist to afford customers the protection and fair outcomes envisaged by the twin peaks and market conduct regulation.

Recommendation 4: The delays due to the customers' failure to provide the required claim documents can be addressed through literacy programmes to the stakeholders responsible for providing the data, and literacy programmes to the customers. The customers have a major role to play in ensuring that they provide their employers or financial institutions with accurate information and to update the information where changes occur in respect of their personal information or their lives and must be continuously informed of this. Customers should also be informed of the significance of registering for tax and attending to their tax returns.

Recommendation 5: I am of the view that the regulations on the governance of retirement funds should be consolidated into a manual which incorporates the King IV Report, the Circular, the provisions of the PFA, the provisions of COFI, the Conduct Standards and guidance notices on governance of retirement funds and the references to these. This will assist to achieve efficient regulation and advance governance of retirement funds, enhance knowledge on governance of retirement funds for members as shareholders, participating employers and relevant stakeholders. I also recommend that this and should also be included in the FSCA's financial literacy programmes, seminars, and workshops for stakeholders.

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Recommendation 6: The study found that the provisions on the appointment of member representatives under a participating employer in an umbrella fund (as an example) are only stipulated in the fund rules. There are currently no laws or regulations which regulate the appointment and duties of representatives of the members under the participating employer in an umbrella fund. The requirements and duties of these representatives should be codified into the statutes as they represent the members on a member level and the board members are responsible for the management of the fund and have minimal interaction with the members. I am of the view that this will support good governance of retirement funds and literacy for members and will provide members with an opportunity to ask questions and raise their concerns in respect of their benefits.

Recommendation 7: The study recommends that the regulators should consider incorporating the disclosure requirements for self-standing benefits in the benefit projections and member communication to close the regulatory gap and unfair outcomes that appear to be caused by the requirements to nominate a beneficiary for self-standing risk benefits. The regulators should also review the post sales barriers created by the requirements of the Insurance Act to nominate a beneficiary for funeral benefits and consider amending Schedule 2 of the Insurance Act to include that the benefit can be paid to the member's spouse, adult child, parents or the person responsible for the funeral arrangements or the person who covered the funeral costs. This will address the practical operation of a funeral benefit and will ensure fair customer outcomes.

Recommendation 8: I am of the view that the regulators should consider incorporating the requirements of the ASISA Retirement Fund Standard into the conduct standard on benefit projections to achieve efficiency, transparency and consistency and for the disclosure requirements to apply to all stakeholders.

Recommendation 9 based on finding 24: these many laws will need to be properly consolidated and harmonized to achieve efficiency and fair customer outcomes and may be difficult and tedious for the regulated entities to comply with and complex for customers to understand. (Finding 24: The governance requirements under the draft conduct standard for retirement fund administrators implement additional legislative requirements on governance of retirement funds for the

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administrators' board of trustees. This aligns with the requirements of the King IV Report and the Circular which require the board to appoint an administrator and to enter into an agreement with the administrator.[216] When COFI is promulgated, it will also introduce governance obligations for the retirement fund administrators to comply with.[217] These various laws may be tedious for the regulated entities to comply with and complex for customers to understand. The successes of the regulators' powers under the reformed laws, are yet to be measured and achieved.)

Recommendation 10 In respect of shortcomings regarding the payment of contributions: Despite the successes discussed, there are shortcomings which may impede the objectives of the Conduct Standard to ensure that retirement contributions are paid timeously.[218] Although the data requirements were implemented, the collection of data is still a challenge for retirement funds, administrators and other relevant stakeholders such as the product providers and financial advisors.[219] There is still a lot of data missing in respect of existing members, which makes it difficult for retirement funds and administrators to communicate with members. The objectives of gathering the member data may be successful for new members who are being enrolled but will be difficult to achieve for existing members. Some of this data may never be obtained and will continue to hamper the payment of benefits to members, resulting in a high number of unclaimed benefits. This matter needs to be addressed with urgency.

Recommendation 11 on shortcomings in respect of the liquidation of retirement funds: Many employers fail to pay contributions due to financial hardships in their business and will no longer afford to pay contributions, which result in liquidation and subsequent termination of the retirement fund or a retirement scheme, forcing a large number of members to withdraw from the fund and access their benefits.[220] This will result in the members having insufficient savings on retirement. The liquidation and termination of retirement funds also hampers the government

[216] See finding 24.
[217] *Ibid.*
[218] See paragraph 3.4.3.
[219] *Ibid.*
[220] *Ibid.*

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objectives to provide benefits to members and may contribute to poverty.[221] This may remain a challenge until such time that the two-pot and auto-enrolment retirement systems are implemented and the laws which prohibit members from withdrawing their benefits before retirement are implemented. However, the issue of affordability and financial hardships by participating employers will remain a challenge.

Recommendation 12 on the revocation process on liquidation of funds: The FSCA should consider reviewing its processes on the revocation of the liquidation of retirement funds to achieve better customer outcomes, in consideration of the members' interests and the participating employer who will be eager to continue contributing to the fund for its employees.[222] This should include highlighting the significant requirements to the administrator, the fund and the employer to prevent unnecessary delays. This will also enhance efficiency on the process for revocation of the liquidation of funds given its complexities and the interests of the members, the fund and the administrators.

Recommendation 13 on the shortcomings relating to the segmented legislative requirements of market conduct regulation for auditors. The requirements for a fund to appoint an auditor are stipulated in the PFA, the King IV Report, the Circular, the draft Conduct Standard conditions prescribed in respect of pension fund benefit administrators and will also be regulated by COFI.[223] The market conduct regulation requirements which will be introduced by COFI will also require the provisions of the PFA on the appointment of an auditor to be amended and will need to be properly aligned and consolidated.[224]

The regulators should issue a conduct standard or sub-legislation for the auditors to ensure efficiency, transparency and prevent regulatory overlaps and gaps which may arise from various pieces of legislation.[225] This is in addition to the many laws and sub-legislation that retirement funds, administrators, product providers, financial advisors, participating employers and relevant stakeholders have to comply

[221] *Ibid.*
[222] *Ibid.*
[223] See paragraph 3.7.
[224] *Ibid.*
[225] *Ibid.*

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with. It increases the complexities and the number of laws that should be complied with and may also be difficult for customers to understand. Consolidation and harmonisation of these laws will also make it easier for the FSCA as the market conduct regulator to exercise its powers to regulate retirement funds and auditors of the fund. Clearer laws will further support efficient regulation.

Recommendation 14 on the shortcomings relating to adjudication of complaints: The consolidated ombud system will take some time to be implemented to the extent that it achieves the objectives of efficiency, easy access by members and to create awareness.[226] Many members are still unaware of the Adjudicator and their rights to lodge complaints, even though they are provided with disclosures, they should be educated about this through literacy programmes.[227] Many complaints such as delays on non-payment of benefits get resolved upon receipt of the complaint by the fund or the administrator, which implies that there are gaps in the service delivery by the administrators or service providers. Service providers should not wait to receive a complaint to address queries. This may contribute to the high number of complaints in the Adjudicator's office. Complaints on delays on non-payment of benefits can be prevented if service providers address the clients' queries timeously.

Proper coordination mechanisms, in the form of Memoranda of Understanding, must be established between the FSCA and the Adjudicator or the Ombuds Council to enable the FSCA to address the market conduct gaps which arise from, and are identified by, the adjudication of complaints.

Recommendation 15 on the rendering of advice to retirement funds as the clients, and not the fund members. I am of the view that the regulatory reforms are a new regulatory framework which focuses on the needs of the retirement fund members by shifting the focus from the fund as the client to the end user who is the customer/member of the fund.[228] This is a market conduct regulatory tool which offers

[226] See paragraph 3.8.4.
[227] *Ibid.*
[228] *Ibid.*

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protection to retirement fund customers and will contribute to efficiency in the retirement fund industry.[229]

However, the challenge is that financial products are complex in nature, and it may be difficult for the members to comprehend the advice that they are given as a group.[230] The research recommends that the focus on rendering advice should also be on the individual members to achieve a better understanding of the advice and for members to be able to make an informed decision as some retirement funds are big and it may be difficult for financial advisors to reach all members. Members with their own individual advisers may get better and proper advice as the financial adviser's focus is not on a group not the individual member, even though the member is covered under a retirement fund in a group of other members. It may assist the members to encourage them to liaise with the "group" financial adviser regularly or to encourage them to appoint their own financial adviser to obtain regular financial advice and guidance.

Recommendation 16 on the FAIS Fit and Proper Requirements on "low advice": Where the members' benefits are amended to increase their risk benefits provided by the fund and the bundled self-standing risk benefits as an example, the financial advisers should make an extra effort to ensure that they hold sessions to inform members of these changes and provide members with sufficient disclosures to help members to understand the changes on their benefits.[231] Insufficient information to members or lack of proper disclosures and clarity to explain the changes to members may result in unfair outcomes for members under their risk benefits when they are faced with circumstances where they only find out about the changes when the insured event occurs.[232] This may also be caused by changes in emails or cellphone numbers where a member does not receive the changes to their benefits. Members should be informed of benefit changes through various channels including the employer's intranet and notice boards. Employers must provide updated data to the product provider or administrator with the monthly premium reconciliation for the insurer or financial adviser to be able to communicate the changes to the members.

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[229] *Ibid.*
[230] *Ibid.*
[231] See paragraph 4.3.2.
[232] *Ibid.*

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In respect of an execution sale as an example, if the transaction reduces a member's investments, the adviser should try to inform the members of such decisions.

Recommendation 17: On retirement fund benefits and risk benefits provided by the fund and the bundled self-standing benefits. These are costly to invest and administer. In addition to commission charged, there is also usually advice fees, administration fees, asset management fees, and consulting fees charged on the retirement and risk benefits provided to members.[233] This results in lower retirement savings for members.[234] The regulations should also include provisions on the sale, distribution and remuneration for products bundled with retirement fund benefits to mitigate inconsistency and unfair treatment of customers. Bundled fees and commission should be properly regulated so that they are not only favourable to large schemes but should be well balanced for members of small schemes for them to also enjoy any discounts on the bundled fees and should apply to all type of schemes to achieve fair customer outcomes.

Recommendation 18 on the lack of data and failure to pay premiums: Data will remain a challenge when it comes to disclosures to members.[235] Some group policies terminate due to non-payment of premiums resulting in members not having risk cover. There is also a challenge of failure to complete nomination forms by members specifically for the self-standing funeral benefits and lumpsum death benefits which are usually bundled with retirement benefits.[236] Despite disclosures are provided to members in terms of the PPRs, but some members simply ignore the communication. Some members may not fully understand the need to complete nomination forms. In addition to providing disclosures to members, employers, brokers and consultants should be encouraged to hold sessions to explain the importance of completing nomination forms to members. Claim requirements and data management provisions under the PPRs and those under the PFA need to be properly aligned to prevent overlaps and regulatory gaps.

[233] See paragraph 4.5.
[234] *Ibid.*
[235] See paragraph 4.6.3.
[236] *Ibid.*

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Recommendation 19: The TCF guidelines for retirement administrators must be applied together with the new and reformed legislation on the conduct for administrators, retirement funds and stakeholders discussed above as this adds to the burden of the existing segmented legislation on market conduct legislation as indicated in the previous chapters.[237] The reformed legislation and the TCF guidelines for retirement funds and administrators have many similarities and may be burdensome to comply with.[238] This may also result in regulatory overlaps and gaps. This implies that an administrator is required to implement compliance measures to comply with all the pieces of legislation. When COFI is promulgated, it will also implement requirements on product design, sale and distribution, complaints and claims requirements among others.

There is a need to properly align the various pieces of legislation and consolidate to ensure efficiency and to achieve better customer outcomes.[239] This will also be vital to achieve the objectives of market conduct regulation for the regulators to monitor the conduct of retirement funds, administrators, stakeholders and for members to be able to hold them accountable.

Despite the achievements on the default regulations discussed above, there should be an emphasis on an ongoing counselling and financial literacy programmes to educate members on their options on reaching retirement, while members are still actively employed.[240] There should also be ongoing sessions on the emphasis and the importance of members to save up for retirement from an early age, given that our laws have not implemented compulsory preservation of retirement benefits when members exit their retirement funds while they are still employed. Small asset managing companies who manage the investments of retirement funds should be properly managed as their conduct can prejudice members when some these companies are liquidated due to financial difficulties.

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[237] *Ibid.*
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid.*

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Recommendation 20: It is debatable whether the new regulatory system is conducive ("suitable" to use the OECD terminology") to the regulation of the retirement fund industry due to the numerous laws, guidelines, etc. that exist and apply to retirement funds irrespective of overlaps and the generality of application (due to the need to remove a "siloed" approach to regulation).[241] It is also not clear whether COFI will resolve this issue through the consolidation of various market conduct laws as additional conduct standards may still be issued by the regulator and special conduct rules may remain necessary to protect retirement fund beneficiaries.[242] It would be disappointing to see a future generation of beneficiaries, dependent on retirement fund income, be neglected in an attempt to consolidate as many laws as possible and without considering that certain areas, such as retirement funds, may require stricter, specialised, rule-based regulation over and above regulatory oversight.[243] I am of the view that this sphere of the financial sector cannot be left to the supervision of the regulator without a proper legal framework.

Recommendation 21: I am of the view that it may be difficult to achieve fair outcomes for members and beneficiaries, given that the real need of a member on reaching retirement is to have sufficient savings and be able to live comfortably on that income and continue to provide an income to their family.[244] Where a member's retirement and risk benefits are low, the member's family will not have sufficient income on the death of the member. In my view, the financial products do not therefore achieve fair customer outcomes in these instances.

Recommendation 22: I am of the view that the regulators should consider whether the consolidation of the consolidated market conduct laws under COFI will achieve the objectives of Principle 1 of the G20 High-Level Principles for Consumer Protection to implement a "strong and effective legal and judicial supervisory mechanism" and to properly regulate the conduct of retirement funds, the administrators, employers, financial advisors and relevant stakeholders.[245] As indicated in chapter 5, retirement funds have many areas which are rules-based and

[241] See paragraph 6.2.1.
[242] *Ibid.*
[243] *Ibid.*
[244] See paragraph 6.2.4(iv).
[245] Paragraph 6.3.

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will also require a rules-based regulatory methods and this should also be considered against international best practices to ensure efficient regulation.

Recommendation 23: I am of the view that the disclosures to members lack significant disclosures on legislative requirements for divorce orders and maintenance orders, and on the self-standing risk benefits which are provided to members under the employer group policies and are bundled with retirement funds.[246] This shortcoming on the lack of sufficient disclosures is not aligned with the principle of "Disclosure and Transparency" of the G20 High-Level Principles for Consumer Protection, the Good Practices and Core Principle 5 of the OECD Recommendations on core principles of occupational pension regulation, which require retirement funds to provide adequate disclosures to their members.[247] The Regulators should therefore consider best practices in respect of its regulatory mechanism and the market conduct laws on disclosures to members.

Recommendation 24: The FSCA's role in respect of financial literacy programmes is to provide resources on financial literacy programmes and to issue regulatory requirements for financial institutions to provide training to their customers."[248] This strategy is not aligned with the requirements of the G20 High-Level Principles which require regulators to train financial customers.[249] The FSCA should therefore consider aligning its strategies on financial literacy programmes with international practices.

Recommendation 25 on the comparative analysis between South Africa and Australia on the financial literacy programmes: I am of the view south Africa can copy the Australian national literacy strategy to include the financial literacy programme in the primary and high school syllabus and provide teachers with tools and resources to teach children at a very young age and at higher education level for universities, to continuously create awareness.[250]

[246] See paragraph 3.3.3 and 6.3.
[247] *Ibid.*
[248] See paragraph 6.3.
[249] *Ibid.*
[250] See paragraph 7.3.4.

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South Africa can also learn the principles of the Australian financial literacy on the ASIC's MoneySmart and the methods to reach out to many people to make a positive impact on financial literacy and evaluate the performance of program.[251] I am also of the view that South Africa can copy the Australian strategy and hand over financial literacy to the National Treasury (on behalf of the government) and not place the obligation on the FSCA, to reach out to all South African citizens to create awareness to achieve the objectives of financial inclusion, efficiency and alleviate poverty.[252]

I am also of the view that the FSCA's strategy to require financial institutions to educate financial customers should be done by the South African government and that it is not the correct approach to place such an obligation on financial institutions.[253]

Recommendation 26 on the comparative analysis between South Africa and Australia on the adjudication of complaints: South Africa is in the process of establishing a consolidated ombudsman system, while Australia has already implemented the consolidated ombuds system.[254] The FSRA will implement the consolidated ombudsman system.[255] The complaints of financial customers are still handled by the Adjudicator, the Ombudsman for Long-term Insurance, and the Ombudsman for Banks.[256] South Africa can learn from Australia's consolidated ombuds system. It is encouraging to see that South Africa is following the footsteps of Australia, which has experience on the operation of the twin peaks model and a centralised ombudsman system.[257] There are many lessons to learn, including the most suitable processes and regulatory methods to implement.[258]

Recommendation 27 on APRA's powers and functions on market conduct regulation: I am of the view that the structure under the Australian twin peaks financial regulation on the market conduct regulation by APRA can cause regulatory overlaps

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[251] *Ibid.*
[252] *Ibid.*
[253] *Ibid.*
[254] See paragraph 3.8.3 and paragraph 7.5.
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*

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and may not achieve the objectives of the twin peaks to ensure efficiency and support the fair treatment of customers.[259] I am also of the view that Australia can learn from South Africa on its financial regulation framework which does not stipulate provisions for the PA to have market conduct regulation functions.[260] South Africa is also in the process of introducing consolidated market conduct laws through COFI, to enhance the protection of customers through market conduct regulation of financial institutions, including retirement funds[261]. This is also something that Australia can learn from.

Recommendation 28: The Australian twin peaks model has served as an example for other countries worldwide, as Australia had many years of experience.[262] South Africa can learn from Australia's experiences such as the need to appoint independent bodies to regularly and holistically review the model and identify regulatory gaps and areas that require further reform.[263] Such regular reviews can contribute to regulatory efficiency and stability in the financial industry and advance the protection of customers as evidenced by the reviews conducted in respect of the Australian twin peaks model of regulation.[264]

Recommendation 29: The twin peaks regulatory model appears to be one of the most effective models of financial regulation.[265] The Australian twin peaks model has been rated as one of the most effective when compared to all the countries that have adopted this model – it was also one the first countries to have adopted it and has had the opportunity to identify strengths and weaknesses and reform the structures.[266] Australia nevertheless experienced catastrophes, notwithstanding the adoption of the twin peaks model.[267] This is fundamental to take cognisance of in respect of the South African market conduct regulation.[268] I am of the view that the twin peaks regulatory framework remains vulnerable in a crisis and necessitates the need

[259] See paragraph 7.5.
[260] *Ibid.*
[261] *Ibid.*
[262] See paragraph 7.6.
[263] *Ibid.*
[264] *Ibid.*
[265] See paragraph 7.5.
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*

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for regular review to mitigate risks and regulatory failure.[269] The Australian experiences are significant to South Africa to apply to its regulatory processes as its twin peak regulatory framework is similar to Australia.[270] This may contribute to greater efficiency of market conduct regulation, stability and efficiency in the financial industry, including retirement funds, and can contribute to the protection of financial customers.[271]

[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*

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