

**LLM IN INSURANCE LAW AND GOVERNANCE
MINI-DISSERTATION**

**AN APPRAISAL OF THE COFI BILL AS AN APPROPRIATE INSTRUMENT TO
REGULATE MARKET CONDUCT FOR LIFE INSURANCE COMPANIES**

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TABLE OF CONTENT

CHAPTER 1: BACKGROUND, RESEARCH QUESTION, PROPOSED METHODOLOGY AND STRUCTURE	4	
1.1 Background.....	4	
1.2 Research question	7	
1.3 Research methodology	7	
1.4 Proposed structure.....	8	
1.5 Delimitations	8	
CHAPTER 2: THE CURRENT MARKET CONDUCT FRAMEWORK FOR LIFE INSURANCE	9	
2.1 Introduction	9	
2.2 FAIS.....	9	
2.2.1 Background and conceptual framework	9	
2.2.2 Obligations in terms of the GCC.....	10	
2.2.3 The impact of FAIS and the GCC.....	11	
2.3 The PPRs in terms of the Long-term Insurance Act.....	11	
2.3.1 Background.....	11	
2.3.2 Salient features of the PPRs	12	
2.3.2.1 The six TCF principles.....	12	
2.3.2.2 Residual principles	13	
2.3.3 The impact of the PPRs	13	
CHAPTER 3: THE PRODUCT-LIFE CYCLE, CURRENT MARKET CONDUCT RULES AND COFI	15	
3.1 Introduction	15	
3.2 PRODUCT AND SERVICE DESIGN.....	15	
3.2.1 General	15	
3.2.2 FAIS and the GCC	16	
3.2.3 The PPRs.....	16	
3.2.4 COFI	17	
3.2.5 Evaluation	17	
3.3 PROMOTION AND MARKETING.....	17	
3.3.1 General	17	
3.3.2 FAIS and the GCC	18	
3.3.3 The PPRs.....	18	
3.3.4 COFI	19	
3.3.5 Evaluation	19	
3.4 ADVICE.....	20	
3.4.1 General	20	
3.4.2 FAIS and the GCC	20	
3.4.3 The PPRs.....	21	
3.4.4 COFI	22	
3.4.5 Evaluation	23	
3.5 POINT-OF-SALE.....	23	
3.5.1 General	23	
3.5.2 FAIS and the GCC.....	24	
3.5.3 The PPRs.....	25	
3.5.4 COFI	26	
3.5.5 Evaluation	27	
3.6 INFORMATION AFTER POINT-OF-SALE.....	27	
3.6.1 General	27	
3.6.2 FAIS and the GCC.....	28	

3.6.3 The PPRs	30
3.6.4 COFI	32
3.6.5 Evaluation	33
3.7 COMPLAINTS AND CLAIMS HANDLING	34
3.7.1 General	34
3.7.2 The GCC and the PPRs	34
3.7.3 COFI	35
3.7.4 Evaluation	36
CHAPTER 4: DECISIONS BY JUDICIAL FORA.....	37
4.1 General	37
4.2 FAIS Ombud Determinations.....	39
4.2.1 Statutory framework	39
4.2.2 FAIS Ombud determinations	39
4.2.2.1 General.....	39
4.2.3 Evaluation of FAIS Ombud determinations	45
4.2.4 Conclusion	46
4.3 The Ombudsman for Long-term Insurance	46
4.3.1 Statutory framework	46
4.3.2 The Ombudsman for Long-term Insurance’s determinations	47
4.3.2.1 Introduction.....	47
4.3.2.2 Cases where the Ombudsman had to interpret the law.....	47
4.3.2.3 Cases where the Ombudsman had to interpret the law	51
4.3.3 Evaluation of the determinations of the Ombudsman for Long-term Insurance.....	52
4.3.4 Conclusion	53
4.4 The FSCA Enforcement Committee	53
4.4.1 Statutory framework	53
4.4.2 FSCA’s enforcement actions	54
4.4.2.1 General.....	54
4.4.3 Evaluation of FSCA’s enforcement actions.....	56
4.4.4 Conclusion	56
4.5 The Financial Services Tribunal.....	57
4.5.1 Statutory framework	57
4.5.2 Decisions that are relevant to this dissertation and conclusion	57
4.6 Court cases	57
4.7 Conclusion	59
CHAPTER 5: CONCLUSION AND ANSWER TO THE RESEARCH QUESTION	61
5.1 Pre-COFI success	61
5.1.1 Pre-COFI success regarding the provision of advice	61
5.1.2 Pre-COFI success regarding the responsibility of the insurer throughout the product life cycle	61
5.2 A comparison between the current market conduct rules and COFI	62
5.2.1 Market conduct issues dealt with exclusively by the PPRs	62
5.2.2 Market conduct issues which are best dealt with by the PPRs.....	62
5.2.3 Market conduct issues not dealt with by COFI	62
5.2.4 Market conduct issues where there is an overlap of regulation in the GCC, the PPRs and COFI	63
5.2.5 Market conduct issues which are not dealt with by the GCC.....	63
5.2.6 Conclusion	63
5.3 Decisions by judicial fora	63
5.3.1 Life insurance industry not the main culprits	63
5.4 Recommendations.....	64
Bibliography.....	66

CHAPTER 1

BACKGROUND, RESEARCH QUESTION, PROPOSED METHODOLOGY AND THE PROPOSED STRUCTURE

1.1 Background

In 2011, National Treasury published a paper entitled: “*A safer financial sector to serve South Africa better.*”¹ In this paper Treasury reasoned that the closely interlinked, globalised economy resulted in increased risks to financial stability, which, in turn, increased the “need for enhanced supervision.”² The International Monetary Fund (IMF) attributed the global financial crisis to “weak financial institutions, inadequate regulation and supervision, and lack of transparency.”³ The IMF proposed preventative measures that are directed at implementing strategies to ensure that financial systems are well regulated and well supervised⁴, in order to ensure that “(p)olicymakers (...) strike the right balance between promoting the safety of the financial system and keeping it innovative and efficient.”⁵ The IMF defines a country's financial system as including “its banks, securities markets, pension and mutual funds, insurers, market infrastructures and central bank, as well as its regulatory and supervisory authorities.”⁶ In short, this is all of the infrastructure that is needed for the carrying out of economic transactions in a country. Therefore, the need for a resilient financial system is thus “at the heart of the South African economy and touches the life of each and every citizen.”⁷ Insurance, and more specifically, life insurance, is one of the key components (or products) of a financial system and as such needs to be subjected to proper regulation and control.

At the outset, it must be stated that the life insurance industry has always been highly regulated. Before the promulgation of the Insurance Act (IA)⁸, the Long-term Insurance Act (LTIA)⁹ contained Policyholder Protection Rules (PPRs), which rules contained market conduct standards for

¹ National Treasury A safer financial sector to serve South Africa better; Issued 23 February 2011 (A Safer Financial Sector) available at www.treasury.gov.za/twinpeaks/20131211%20-%20Item%20%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf, accessed on 19 October 2021.

² A Safer Financial Sector 5.

³ International Monetary Fund: Financial System Soundness, available at <https://www.imf.org/en/About/Factsheets/Financial-System-Soundness>, accessed on 19 November 2021.

⁴ *Ibid.*

⁵ The Global Financial Stability Report: Meeting New Challenges to Stability and Building a Safer System vii; available at <https://www.imf.org/en/Publications/GFSR/Issues/2016/12/31/Meeting-New-Challenges-to-Stability-and-Building-a-Safer-System>, accessed on 19 November 2021.

⁶ International Monetary Fund: Financial System Soundness, available at <https://www.imf.org/en/About/Factsheets/Financial-System-Soundness>, accessed on 19 November 2021.

⁷ A Safer Financial Sector 1.

⁸ The Insurance Act 18 of 2017.

⁹ The Long-term Insurance Act 52 of 1998.

insurance companies.¹⁰ The PPRs were updated from time to time and the 2018 PPRs are still in place due to the fact that the IA did not repeal the LTIA in its entirety. These rules are product-specific and cover several aspects of life insurance. Another highly regulated aspect of life insurance is contained in the Financial Advisory and Intermediary Services Act (FAIS).¹¹ This statute regulates services pertaining to all financial products and its General Code of Conduct for authorised Financial Services Providers and their Representatives (GCC)¹² is binding on all authorised Financial Service Providers (FSPs) and representatives¹³ in the insurance industry. This statute had been in place for almost two decades and applies to life insurers as FSPs. It is therefore safe to say that all the aspects of life insurance, including market conduct, have been regulated for quite some time.

The Financial Services Regulation Act (FSRA)¹⁴ established the Twin Peaks regulatory structure. Twin Peaks essentially differentiates between market conduct regulation on the one hand and prudential regulation on the other. As a result of Twin Peaks, several statutes have already been amended (including insurance legislation) and more amendments are expected. The most revolutionary change for the financial services industry came with the publication of the Conduct of Financial Institutions Bill. COFI is the foundational instrument in government's Twin Peaks financial industry transformation project/plan.¹⁵ After the publication of the first draft of the Conduct of Financial Institutions Bill in December 2018 (First COFI Bill), numerous comments were submitted by industry stakeholders. These comments received consideration and changes were made to the second draft of the Conduct of Financial Institutions Bill. The Response Document¹⁶ sets out the main amendments that were made.

On 29 September 2020, National Treasury published the second draft of the Conduct of Financial Institutions Bill (COFI)¹⁷ for public comment. The aim of COFI is set out in its preamble:

“To provide for a regulatory framework for the conduct of financial institutions that will-

¹⁰ Millard D 'Fair play? The Conduct of Financial Institutions Bill and the new face of the financial services industry' in S du Toit and C Hugo Annual Banking Law Update 2019: Recent Legal Developments of Special Interest to Banks (2019) 138.

¹¹ The Financial Advisory and Intermediary Services Act 37 of 2002.

¹² The General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003, published in Board Notice No. 80 of 2003, as amended by GN 706/2020 w.e.f. 26 June 2020.

¹³ S 14 of FAIS.

¹⁴ The Financial Sector Regulation Act 9 of 2017.

¹⁵ A Safer Financial Sector 39.

¹⁶ National Treasury Response document supporting the revised Conduct of Financial Institutions Bill (September 2020) (2020 Response Document), available at [http://www.treasury.gov.za/public%20comments/2020%2010%20008%20COFI%20Response%20Document%20V4_FINAL%20published%20\(commentators%20updated\).pdf](http://www.treasury.gov.za/public%20comments/2020%2010%20008%20COFI%20Response%20Document%20V4_FINAL%20published%20(commentators%20updated).pdf), accessed on 12 February 2021.

¹⁷ Unless otherwise indicated, "COFI" refers to the current Bill.

- protect financial customers, including by promoting the fair treatment and protection of financial customers by financial institutions;
- support fair, transparent and efficient financial markets;
- promote trust and confidence in the financial sector;
- support innovation and the development of and investment in sustainable innovative technologies, processes and practices;
- support sustainable competition in the provision of financial products and financial services;
- promote financial inclusion;
- promote transformation of the financial sector; and
- assist the South African Reserve Bank in maintaining financial stability; and to provide for matters connected therewith.”

The primary purpose of COFI is to rationalise and simplify market conduct regulation and to make the Treating Customers Fairly (TCF) principles legally binding throughout the whole financial services industry.¹⁸ COFI’s main goal is to establish “better financial customer outcomes in the South African financial sector.”¹⁹ It details the obligations/regulations that all financial institutions have to adhere to, as well as the outcomes that they are required to produce.²⁰ COFI envisages the fair treatment of customers in all areas of the financial services sector.²¹ COFI is applicable to all financial institutions that provide financial products²² or financial services.²³ Market conduct supervision is required in order to protect customers from being taken advantage of by exploitative financial practices.²⁴ The imbalance of power and knowledge that exists between customers and financial institutions provides opportunities for unscrupulous financial institutions to exploit

¹⁸ A Safer Financial Sector 39.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² COFI defines a "financial product" with reference to s 2(1) of the FSRA, which defines it as: “(a) a participatory interest in a collective investment scheme; (b) a long-term policy as defined in section 1(1) of the Long-term Insurance Act or a life insurance policy as defined in section 1 of the Insurance Act; (c) a short-term policy as defined in section 1(1) of the Short-term Insurance Act or a non-life insurance policy as defined in section 1 of the Insurance Act; (d) a benefit provided by:- (i) a pension fund organisation, as defined in section 1(1) of the Pension Funds Act, to a member of the organisation by virtue of membership; or (ii) a friendly society, as defined in section 1(1) of the Friendly Societies Act, to a member of the society by virtue of membership; (e) a deposit as defined in section 1(1) of the Banks Act; (f) a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act; (g) except for the purposes of Chapter 4 and section 106, the provision of credit provided in terms of a credit agreement regulated in terms of the National Credit Act; (h) a warranty, guarantee or other credit support arrangement as provided for in a financial sector law; (i) a facility or arrangement designated by Regulations for this section as a financial product; and (j) a facility or arrangement that includes one or more of the financial products referred to in paragraphs (a) to (i).”

²³ S 4(1) of COFI.

²⁴ A Safer Financial Sector 39.

customers.²⁵ Such abuses occur on a spectrum from minor grievances, such as giving inadequate financial advice, to shameless cases of dishonesty and unscrupulous profiteering.²⁶

Treasury's media statement²⁷ indicated that they envisaged having the bill promulgated for approval by early 2021. Once promulgated, the COFI Act will constitute the final piece that will complete the Twin Peaks framework for the regulation of the financial services industry.

As was stated before, market conduct for life insurance had been regulated for a considerable time. Whilst the TCF principles have legislative effect in the insurance sector, they do not have legislative effect on all financial institutions.²⁸ Therefore, whilst COFI may be necessary in order to make the TCF principles legally binding with regard to other financial institutions and to fulfil its other aims, it is submitted that the current market conduct regulatory framework for life insurance is, in fact, already adequate for this purpose. The purpose of this dissertation is therefore to establish whether or not, once FAIS is repealed with the promulgation of the COFI Act,²⁹ market conduct in the life insurance industry will be markedly different and much improved.

1.2 Research question

In essence, the research question that has to be answered is whether or not the replacement of FAIS (and the GCC) and/or the PPRs by the COFI Act³⁰ will have a marked or significant impact on market conduct in the life insurance industry.

1.3 Research methodology

This thesis will use a doctrinal approach. The current market conduct regulation in the life insurance industry is derived from common law and legislation. In addition, precedents and determinations from the Ombud for Financial Services Providers (FAIS Ombud), the Ombudsman for Long-term Insurance, the Financial Services Conduct Authority (FSCA) Enforcement Committee and Financial Services Tribunal provide valuable sources to create a clear picture of the current market conduct landscape. At the outset it needs to be mentioned that while the FAIS Ombud, the Ombudsman for Long-term Insurance, the FSCA Enforcement Committee and the Financial Services Tribunal have

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ National Treasury Media Statement issued on 29 September 2020: Second draft of the Conduct of Financial Institutions Bill published for public comment (September 2020 Media Statement) 1, available at http://www.treasury.gov.za/comm_media/press/2020/2020092901%20MEDIA%20STATEMENT%202ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf, accessed on 19 November 2021.

²⁸ A Safer Financial Sector 39.

²⁹ Schedule 1 of COFI.

³⁰ Schedule 1 of COFI.

made extensive use of legislation, the courts employ common law rules pertaining to agency and representation and the principles of insurance to adjudicate cases. It may be argued that these alternative adjudication structures relieve the burden on the courts and that only the more “serious cases” end up in the courts. That provides one explanation of why court cases to date rely almost exclusively on common law principles. With this in mind, the dissertation will outline the effectiveness of the current regulatory framework (as is evidenced through determinations and cases). The next step will then be to evaluate the proposed legislative structure under the COFI Bill and to establish whether this Bill, once enacted, will improve the market conduct framework for life insurance.

1.4 Proposed structure

Chapter one (the current chapter) outlines the background, research question, the proposed research methodology, the proposed structure and the delimitations of the study.

Chapter two sets out the current market conduct framework for the life insurance industry.

Chapter three makes a comparison between the current market conduct regulation for each phase of the product life cycle as derived from legislation on the one hand and COFI on the other. It also examines whether COFI will bring about any change to the market conduct regulation in the life insurance industry.

Chapter four investigates the prevalent market conduct issues in the life insurance industry as evidenced by the cases/actions in front of the five fora that hear/take action on insurance law matters in South Africa: the FAIS Ombud, the FSCA Enforcement Committee, the Ombudsman for Long-term Insurance, the Financial Services Tribunal and court cases.

Chapter five provides a conclusion and an answer to the research question.

1.5 Delimitations

This dissertation will only focus on life insurance, excluding funeral insurance.

CHAPTER 2

THE CURRENT MARKET CONDUCT FRAMEWORK FOR LIFE INSURANCE

2.1 Introduction

Chapter one pointed out that the insurance industry has always been highly regulated. As this dissertation focuses more on the market conduct aspects of regulation, the current chapter will discuss those two legislative instruments that mainly regulate market conduct in life insurance, namely FAIS and the PPRs. It deserves to be mentioned that common law principles pertaining to agency and representation still apply to the pre-contractual stage, when parties negotiate their contract. Furthermore, since insurance is a nominate contract, the common law principles that pertain to a wide array of contractual principles, still apply to insurance contracts. For instance, principles pertaining to consensus and interpretation of insurance contract are common law based. This means that parties to insurance contracts enjoy a vast array of protection measures.

2.2 FAIS

2.2.1 Background and conceptual framework

FAIS was promulgated into law in 2002. Its main purpose was to ensure that the “advice”³¹ or “intermediary services”³² relating to a “financial product”³³, which FSPs³⁴ provided to clients, were done in a professional manner, which would protect the interests of clients. As life insurance policies are financial products, these are also regulated by FAIS.³⁵ FAIS regulates a number of aspects

³¹ S 1 of FAIS, sv “advice”. Advice means any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients (a) in respect of the purchase of any financial product; or (b) in respect of the investment in any financial product; or (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected.

³² S 1 of FAIS, sv “intermediary service”. Intermediary service means any act, other than the furnishing of advice, that is performed by a person for or on behalf of a client or product supplier (a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or (b) with a view to (i) buying, selling or otherwise dealing in ... a financial product purchased by a client from a product supplier ...; (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or (iii) receiving, submitting or processing the claims of a client against a product supplier.

³³ S 1 of FAIS, sv “financial product”. A financial product includes a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively.

³⁴ S 1 of FAIS, sv “financial service provider”. A financial services provider is any person ... who as a regular feature of the business of such person (a) furnishes advice; or (b) furnishes advice or renders any intermediary service; or (c) renders any intermediary service.

³⁵ S 1 of FAIS, sv “financial product”. A financial product includes a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively.

pertaining to the licensing of FSPs³⁶ and many of these provisions provide “indirect” protection due to the fact that the statute aims to ensure that providers are of a certain calibre. These regulations placed onerous and excessive responsibilities on FSP’s.³⁷

It is, in fact, the GCC that contains detailed rules that stipulate what is expected of FSPs. These rules pertain mostly to advice and intermediary services and have an impact on the contract that eventually comes into existence between an insurer and a policyholder.

2.2.2 Obligations in terms of the GCC

The GCC places the following general duty on an FSP “to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.”³⁸ The specific duties of an FSP include that:

“when a provider renders a financial service– (a) representations made and information provided to a client by the provider– (i) must be factually correct; (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading; (iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client ...”³⁹

The GCC also sets out requirements regarding the information on product suppliers⁴⁰ and providers,⁴¹ the contacting of clients;⁴² information about financial service;⁴³ furnishing of advice;⁴⁴ advertising and direct marketing,⁴⁵ dealing with complaints⁴⁶ and the termination of agreements.⁴⁷ For life insurance, this means that over and above the protection measures in the PPRs, the GCC regulates market conduct in considerable detail.

³⁶ Ss 7-12 of FAIS.

³⁷ Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 381.

³⁸ S 2 of the GCC.

³⁹ S 3 of the GCC.

⁴⁰ Part III of the GCC.

⁴¹ Part IV of the GCC.

⁴² Part V of the GCC.

⁴³ Part VI of the GCC.

⁴⁴ Part VII of the GCC.

⁴⁵ Part X of the GCC.

⁴⁶ Part XI of the GCC.

⁴⁷ Part XII of the GCC.

2.2.3 The impact of FAIS and the GCC

It appears that the GCC's underlying rationale was to address consumer vulnerability by compelling FSP's to communicate sufficiently and honestly during the pre-contractual phase.⁴⁸ The GCC places a duty on FSP's to assist prospective policyholders during the pre-contractual phase in disclosing all risk-related information to the FSP.⁴⁹ Insurers and their representatives were no longer able to sell policies in an heavy-handed manner and then later repudiate claims due to misrepresentation.⁵⁰ This amounted to a relieving of the burdensome weight of the policyholder's duty of disclosure, by placing a duty of enquiry on the insurer.

Accordingly, the effect of the GCC was that it introduced a new era in insurance, in which statutory measures aimed at adjusting the power balance between the insurer and the policyholder.⁵¹

2.3 The PPRs in terms of the Long-term Insurance Act

2.3.1 Background

The notion of fairness, with regards to the entering into, execution and enforcement of policies with policyholders, was introduced by the first version of the PPRs, which were published in 2004 in terms of the LTIA.⁵² The objective of these rules was to require that insurers and their intermediaries apply "sound insurance principles and practice" in order to protect the interests of policyholders.⁵³ The rules have since then evolved in order to provide for enhanced policyholder protection.⁵⁴

As a result of the unsatisfactory decision of the Constitutional Court⁵⁵ regarding the fairness of time-bar clauses, the 2004 PPRs were amended in 2010 to provide for more reasonable time frames regarding time limitation provisions for the institution of legal action against insurers.⁵⁶ The current version of the PPRs came into effect on 1 January 2018.⁵⁷ Although many provisions of the LTIA were repealed when the Insurance Act⁵⁸ was promulgated, section 62 which allows for the

⁴⁸ Millard D and Huneberg S 'Utmost good faith is dead, long live utmost good faith? A historical overview of marine insurance in England and South Africa' published in Vrancken, P. and Hugo, C. (2021) African perspectives on selected marine, maritime and international trade law topics. Stellenbosch: African Sun Media.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Rule 2 of the 2004 PPRs.

⁵⁴ Millard D and Huneberg S 'Utmost good faith is dead, long live utmost good faith? A historical overview of marine insurance in England and South Africa' published in Vrancken, P. and Hugo, C. (2021) African perspectives on selected marine, maritime and international trade law topics. Stellenbosch: African Sun Media.

⁵⁵ *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

⁵⁶ Millard D and Huneberg S 'Utmost good faith is dead, long live utmost good faith? A historical overview of marine insurance in England and South Africa' published in Vrancken, P. and Hugo, C. (2021) African perspectives on selected marine, maritime and international trade law topics. Stellenbosch: African Sun Media.

⁵⁷ BN 1407 of 2017 in GG 41321 of 15 December 2017.

⁵⁸ The Insurance Act 18 of 2017.

promulgation of these rules is still in force, which is why the PPRs remain an important source of market conduct regulation.

On 30 July 2021 the FSCA published proposed amendments⁵⁹ to the PPRs which have to date not yet come into operation. The amendments deal with the governance of product development, the distribution of insurance products, bundled products and loyalty benefits. Comments on the proposed amendments could be submitted until 10 September 2021.

2.3.2 Salient features of the PPRs

2.3.2.1 The six TCF principles

The aim of the PPRs is to ensure that insurers' conduct towards its policyholders is improved, that the insurers treat their policyholders fairly, that the insurers provide "less complex" and "good-value" policies, thereby ensuring better outcomes for policyholders.⁶⁰ The unequivocal inclusion of the six TCF principles in the PPRs is part of Government's bold reform initiative to ensure that the fair treatment of customers acts as the foundational principle which should guide insurers' market conduct.⁶¹ National Treasury defines TCF as:

"an activities-based, cross-cutting and outcomes-driven approach to regulation and supervision, designed to ensure that regulated financial institutions apply specific standards of fairness to all financial customers."⁶²

The novel aspect that TCF introduces is that insurers now have a duty to deliver the TCF outcomes to their policyholders throughout the product life cycle from design and marketing, to advice and information given at point-of-sale and thereafter, through to complaints and claims handling.⁶³

Rule 1.4 of the PPRs explicitly requires an insurer to "have appropriate policies and procedures in place to achieve the fair treatment of policyholders" and specifies the following six TCF outcomes:

⁵⁹ Notice regarding the publication of draft amendments to the Policyholder Protection Rules prescribed under Section 62 of the Long-term Insurance Act, 1998 available at https://www.masthead.co.za/wp-content/uploads/2021/08/Notice-of-amendments-to-LTIA-PPRs_30-July-2021.pdf, accessed on 19 November 2021.

⁶⁰ National Treasury Media Statement: Release of final insurance conduct regulations and policyholder protection rules (2017), available at http://www.treasury.gov.za/comm_media/press/2017/2017121501%20Media%20statement%20release%20of%20final%20insurance%20conduct%20regulations%20and%20policy.pdf, accessed on 19 November 2021.

⁶¹ Millard D 'CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry' 2018 (81) THRHR 383.

⁶² National Treasury 2014 Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy for South Africa - Discussion Document <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> 50, accessed 19 November 2021.

⁶³ *Ibid.*

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

2.3.2.2 Residual principles

In conjunction with the inclusion of fairness into the six outcomes of TCF, fairness has been incorporated as the foundational requirement of market conduct regulations throughout the PPRs.⁶⁴ The embodiment of fairness is evident in the provisions on cooling-off rights (rule 4), time-bar clauses (rule 7), advertising (rule 10), disclosure of product information (rule 11), data management (rule 13), ongoing review of product line performance (rule 14), conflict of interest, time-bar clauses, complaints and claims management (rules 18 and 19).⁶⁵

2.3.3 The impact of the PPRs

Millard noted:

“The prominence of the FAIS Act and the imperative for all financial services providers to pass an exam based on the FAIS Act had the effect of placing a disproportionate responsibility on intermediaries and advisors while failing to address product issues such as exclusions, fair claims procedure and other onerous clauses in insurance contracts itself.”⁶⁶

Fortunately, the PPRs were introduced to attend to the vulnerability of policyholders due to the asymmetry of information between policyholders and insurers⁶⁷ by expecting more from insurers

⁶⁴ Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 383.

⁶⁵ *Ibid.*

⁶⁶ *Idem* 381.

⁶⁷ Financial Services Board 2011 Treating Customers Fairly: The Roadmap, <https://www.fsb.co.za/feedback/Documents/Treating%20Customers%20Fairly%20->

during the pre-contractual phase⁶⁸ and to move the ultimate responsibility to the insurer.⁶⁹ The implication of the infusion of the fairness obligation into all the phases of the product-life cycle is that the policy document is not the sole source of the insurer's duties towards the policyholder, and that the insurer also has the duty to act fairly towards the (prospective) policyholder during each one of the phases of the product life cycle.⁷⁰

It is therefore evident that the legislature regulated market conduct issues by setting out detailed rules in the PPRs and the GCC.⁷¹ The next chapter sets out the current market conduct regulation for each phase of the product life-cycle as stipulated in FAIS, the GCC and the PPRs and examines whether COFI will bring about any change to the current market conduct regulation in the life insurance industry.

2.4 Evaluation

This chapter highlighted the general principles of the FAIS Act (and GCC) and the PPRs in terms of the LTIA as key legislative instruments that regulate market conduct. The next chapter will provide a more in-depth look into the application of these two instruments to the stages in the product life cycle.

[https://www.fsb.co.za/feedback/Documents/Treating Customers Fairly - The Roadmap 2011.pdf](https://www.fsb.co.za/feedback/Documents/Treating%20Customers%20Fairly%20-%20The%20Roadmap%202011.pdf) 6, accessed 12 December 2020.

⁶⁸ Millard D and Huneberg S 'Utmost good faith is dead, long live utmost good faith? A historical overview of marine insurance in England and South Africa' published in Vrancken, P. and Hugo, C. (2021) African perspectives on selected marine, maritime and international trade law topics. Stellenbosch: African Sun Media.

⁶⁹ Rule 1.3 of the PPRs.

⁷⁰ Millard D 'The Impact of the Twin Peaks Model on the Insurance Industry' 2016 (19) Potchefstroom Electronic Law Journal 27.

⁷¹ Millard D and Maholo J 'Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks' (2020) Legal Certainty and Fundamental Rights, Charl Hugo, Thomas M. J. Möllers (Hrsg.) 414.

CHAPTER 3

THE PRODUCT LIFE CYCLE, CURRENT MARKET CONDUCT RULES AND COFI

3.1 Introduction

The previous chapter provided an overview of the most important provisions on market conduct for life insurance. The rules are very detailed. Apparently, the idea under the new Twin Peaks system is to move away from a rules-based approach to one that is values-based.⁷² The purpose of this chapter is to explore, stage by stage, how exactly each stage in the product life cycle is regulated at present and whether COFI will change that in the context of life insurance. The idea is for TCF to be embedded in every stage of the product life cycle.⁷³ These stages include product and service design, promotion and marketing, advice, point-of-sale, information after point-of-sale, and complaints and claims handling.⁷⁴ This chapter proceeds by identifying the stages, explaining the existing rules of each stage and then showing whether or not COFI will change the *status quo*.

3.2 PRODUCT AND SERVICE DESIGN

3.2.1 General

During this phase, services providers (including insurers) design products to be sold to consumers. The Insurance Act states the following specific types of life insurance products which may be sold: risk-only (individual or group health, death or disability), fund risk (death or disability), credit life, funeral (individual or group), life annuities (guaranteed, market-related or with discretionary participation features), individual investment, fund investment, income drawdown⁷⁵ and reinsurance policies.⁷⁶

The process of rendering proper advice to a consumer entails more than just the “actual advice” (as regulated by FAIS) that the FSP gives.⁷⁷ The giving of appropriate advice is also dependent on the

⁷² Millard D ‘The Impact of the Twin Peaks Model on the Insurance Industry’ 2016 (19) Potchefstroom Electronic Law Journal 5.

⁷³ National Treasury Media Statement issued on 29 September 2020: Second draft of the Conduct of Financial Institutions Bill published for public comment (September 2020 Media Statement), available at http://www.treasury.gov.za/comm_media/press/2020/2020092901%20MEDIA%20STATEMENT%20ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf, accessed on 19 November 2021 (p1) states that COFI aims to streamline “the legal landscape for conduct regulation in the financial services sector, and to give legislative effect to the market conduct policy approach, including implementation of the Treating Customers Fairly (TCF) principles.”

⁷⁴ Millard D and Maholo J ‘Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks’ (2020) Legal Certainty and Fundamental Rights, Charl Hugo, Thomas M. J. Möllers (Hrsg.) 406.

⁷⁵ Where each of the individual investment, fund investment and income drawdown policies have guaranteed, market-related, linked or with discretionary participation features.

⁷⁶ Table 1 of the IA.

⁷⁷ Millard D ‘Of agency, representation, and insurance advice: One step forward or two steps back?’ in J Barnard et al (eds) De Serie Legenda – Developments in Commercial Law, Volume II Law of Specific Contracts and Banking Law (2019) 124.

quality of the design of the product by the product supplier.⁷⁸ It is possible that in some cases where a consumer purchased an inappropriate product the blame could actually be laid at the door of the product supplier.⁷⁹ Product design was one of the areas in insurance law that was severely neglected prior to the promulgation of the 2018 PPRs.⁸⁰ Many of the FAIS Ombud's determinations dealt with so-called burdensome clauses which were part and parcel of the design in many policies.⁸¹ These included the interpretation of "out and about" clauses, the fitting of tracking devices to cars and exclusion clauses.⁸² The Retail Distribution Review (RDR) informed the drafting of the current TCF outcome 2: "products should be designed to meet the needs of identified customer groups and (be) targeted accordingly."⁸³ A product's design could be fatally flawed in that it is not suitable for the target market or that the product is unreasonably complex.⁸⁴ In that case, the marketing of the product, the provision of suitable advice (outcome 4) and the provision of clear information (outcome 3) would also be affected.⁸⁵ For example, it would not be possible for an intermediary to provide clear information regarding the product features if the product is unreasonably complex.⁸⁶

Other than the protection of policyholders, the purpose of requiring that products be properly designed, is that a badly designed product would lead to more complaints, which will in turn require more human resources (e.g. complaints adjudicators), which will have an effect on the profitability of the insurance company as well as the confidence that consumers have in insurance products.⁸⁷

3.2.2 FAIS and the GCC

At the time when FAIS was promulgated, the focus was on advice and intermediary services and not on product design. FAIS therefore does not contain regulations on product design.

3.2.3 The PPRs

In summary, rule 2.2 of the PPRs stipulates that an insurer must, during the development of a product, utilise suitable information regarding the needs of its target market in order to make an assessment of the "main characteristics of a new product" for purposes of ensuring that the product

⁷⁸ *Ibid.*

⁷⁹ Millard D and Hattingh W *The FAIS ACT Explained* (2016) LexisNexis, Butterworths 90.

⁸⁰ Millard D 'CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry' 2018 (81) THRHR 386.

⁸¹ *Ibid.*

⁸² *Idem* 387.

⁸³ Financial Services Board Retail Distribution Review (2014) available from <https://www.masthead.co.za/wp-content/uploads/2015/05/FSB-Retail-Distribution-Review-2014.pdf> 11, accessed on 19 November 2021.

⁸⁴ *Idem* 10.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Millard D and Maholo J 'Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks' (2020) *Legal Certainty and Fundamental Rights*, Charl Hugo, Thomas M. J. Möllers (Hrsg.) 419.

takes into account the “fair treatment of customers”. Millard remarked that although FAIS “made great strides towards professionalizing financial advice”,⁸⁸ the responsibility for selling inappropriate financial products to customers lay only partly at the door of the product supplier.⁸⁹ It is submitted that, fortunately, the 2018 PPRs implemented the required transformation by placing the ultimate responsibility of the fair treatment of the customer on the insurer.⁹⁰

Although the FSCA published proposed amendments to the PPRs on 30 July 2021⁹¹ dealing with product design and the governance and oversight of product development, these amendments have not yet been approved and therefore fall outside the ambit of this dissertation.

3.2.4 COFI

COFI requires that, during the designing phase, an insurer must make an assessment of the “main characteristics” of the policy to ensure that the policy:

“(ii) targets the retail financial customers for whose needs the product or service is likely to be appropriate and (iii) is appropriate, taking into account the fair treatment of retail financial customers.”⁹²

3.2.5 Evaluation

It is submitted that the requirement that the insurer must take the “fair treatment of customers” into account as early as at the product development phase had already been adequately regulated by the PPRs. The similar requirement in COFI would not provide an improvement regarding the fair treatment of customers and the promulgation of COFI would, in this instance therefore make no difference to market conduct regulation for life insurance products. As soon as COFI is promulgated, there will be an overlap in regulation regarding product design due to the fact that the PPRs also regulate this aspect.

3.3 PROMOTION AND MARKETING

3.3.1 General

For most consumers the purchase of an insurance product is not an absolute necessity but a grudge purchase which requires that consumers have to be educated via advertising as to the existence

⁸⁸ Millard D 'Of agency, representation, and insurance advice: One step forward or two steps back?' in J Barnard et al (eds) *De Serie Legenda – Developments in Commercial Law, Volume II Law of Specific Contracts and Banking Law* (2019) 124.

⁸⁹ *Idem* 125.

⁹⁰ Rule 1.3 of the PPRs.

⁹¹ Notice regarding the publication of draft amendments to the Policyholder Protection Rules prescribed under Section 62 of the Long-term Insurance Act, 1998 available at https://www.masthead.co.za/wp-content/uploads/2021/08/Notice-of-amendments-to-LTIA-PPRs_30-July-2021.pdf, accessed on 19 November 2021.

⁹² S 27(2)(b) of COFI.

and advantages of insurance products.⁹³ Accordingly, it is crucial that customers be protected from unfair treatment during the promotion and marketing phase. The general theme that runs through the legislation is that marketing should be factually correct, balanced and not misleading. There are many other ancillary aspects regarding marketing and promotion that could have an effect on the fair treatment of the consumer during this phase, e.g., the advertisements should be in the public interest, should identify the insurer, display information prominently and not use negative option marketing or unwanted direct advertising.

3.3.2 FAIS and the GCC

FAIS prohibits the making of any advertisement relating to a policy which is “misleading, false, deceptive, contrary to the public interest or contains an incorrect statement of fact.”⁹⁴ Section 14(3) of the GCC requires that advertisements must “(i) be factually correct ... (ii) provide a balanced presentation of key information; and (iii) ... not be misleading.”⁹⁵

The GCC regulates the ancillary aspects of marketing and promotion as it requires that advertisements should clearly be in public interest, identify the insurer, use appropriate language and medium, keep record of advertisements, not use negative option marketing, not use unwanted direct advertising, adhere to rules regarding comparative marketing and the use of puffery, endorsements, loyalty benefits or bonuses and display information prominently.⁹⁶

3.3.3 The PPRs

Rule 10 of the PPRs is a reiteration of section 14(3) of the GCC. The PPRs set out in detail what it entails for an advertisement to be factually correct. The PPRs place the responsibility on the insurer to ensure that the “information provided in the advertisement” adheres to all the requirements set out in rule 10.⁹⁷

The PPRs mirror the GCC in that they regulate the ancillary aspects of marketing and promotion in detail. They require that advertisements should clearly be in the public interest,⁹⁸ identify the

⁹³ National Treasury 2014 Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy for South Africa - Discussion Document, available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> 67, accessed 19 November 2021.

⁹⁴ S 8(9)(c)(ii) of FAIS.

⁹⁵ S 14(3)(a) of the GCC.

⁹⁶ S 14(4)-(14) of the GCC.

⁹⁷ Rule 10.3.2 of the PPRs.

⁹⁸ Rule 10.5 of the PPRs.

insurer,⁹⁹ use appropriate language and medium,¹⁰⁰ keep record of advertisements,¹⁰¹ not use negative option marketing,¹⁰² not use unwanted direct advertising,¹⁰³ adhere to rules regarding comparative marketing¹⁰⁴ and the use of puffery.¹⁰⁵ In addition, it contains rules on endorsements,¹⁰⁶ loyalty benefits or bonuses¹⁰⁷ and the display information prominently.¹⁰⁸

3.3.4 COFI

Similarly, COFI requires that the promotion and marketing of policies should be done in a manner that is “clear, fair, unambiguous and not misleading or fraudulent.”¹⁰⁹ One aspect that is missing in this regard is that COFI does not require that advertisements must provide a balanced presentation of key information in that it must not exaggerate benefits and omit mentioning the limitations. COFI also places the ultimate responsibility for ensuring that the “information provided in the advertising material” adheres to the requirements as set out in COFI, on the insurer.¹¹⁰

COFI does not regulate the ancillary aspects of marketing and promotion as it does not have any regulations requiring that the insurer should ensure that advertisements should clearly be in the public interest, that a record of advertisements should be kept or that the insurer may not use negative option marketing or unwanted direct advertising. Neither does it have any rules regarding comparative marketing, the use of puffery, endorsements, loyalty benefits or bonuses or requiring that relevant information be displayed prominently. Furthermore, aspects regarding the requirement to identify the insurer and to use appropriate language and medium are not dealt with adequately in COFI, as is the case in the PPRs and the GCC.

3.3.5 Evaluation

It is submitted that whereas the GCC only briefly regulates the prohibition of false and misleading advertising in the insurance industry, the PPRs do so in meticulous detail and the post-COFI situation would therefore not provide more protection to policyholders.

⁹⁹ Rule 10.6 of the PPRs.

¹⁰⁰ Rule 10.7 of the PPRs.

¹⁰¹ Rule 10.8 of the PPRs.

¹⁰² Rule 10.9 of the PPRs.

¹⁰³ Rule 10.10 of the PPRs.

¹⁰⁴ Rule 10.11 of the PPRs.

¹⁰⁵ Rule 10.12 of the PPRs.

¹⁰⁶ Rule 10.13 of the PPRs.

¹⁰⁷ Rule 10.14 of the PPRs.

¹⁰⁸ Rule 10.15 of the PPRs.

¹⁰⁹ S 29(1) of COFI.

¹¹⁰ S 30 of COFI.

Furthermore, whereas the GCC and the PPRs mirror each other regarding the regulation of the ancillary aspects of marketing and promotion, COFI does not deal with those issues. Therefore, COFI will not bring about any changes to the regulation of the ancillary aspects of marketing and promotion of life insurance products.

3.4 ADVICE

3.4.1 General

The provision of advice can occur during the advice phase, the point-of-sale phase and the information after point-of-sale phase, as the definition of “advice” in FAIS includes:

“... any recommendation, guidance or proposal of a financial nature furnished ... in respect of the purchase of any financial product; ... or (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product ...”.¹¹¹

The provision of advice by an FSP can be divided into the following stages: (1) obtain information from the customer regarding his needs and his financial situation; (2) conduct a suitability analysis; (3) identify the appropriate product; (4) disclose the required details about the product and ensure that the customer understands the product, and (5) maintain a record of advice.¹¹² What complicates the provision of advice regarding insurance products further is that this aspect is dealt with by FAIS, the GCC, the PPRs as well as our common law. Millard observed that although it was not legislature’s intention to replace the law of agency and mandate in common law, it appears that the GCC “introduced certain minimum standards and in a sense replaced the values-based law of agency and mandate with a more detailed rules-based approach.”¹¹³

3.4.2 FAIS and the GCC

One of the main features of FAIS is to ensure that advice is rendered by FSP’s in such a way that consumers can make informed decisions.¹¹⁴ In terms of FAIS “advice” means “any recommendation, guidance or proposal of a financial nature” provided to a client regarding the purchase or potential purchase of a financial product. It includes advice given regarding the replacement of a product, the termination of any purchase and the amendment of any terms regarding a financial product.

¹¹¹ Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 390.

¹¹² Millard D and Hattingh W The FAIS ACT Explained (2016) LexisNexis, Butterworths 128 and 129.

¹¹³ Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 377.

¹¹⁴ FAIS Sec 16(1) states that: “A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions ...”

The definition of “financial service” in the GCC includes the furnishing of advice and/or the rendering of any intermediary service. The specific duties of an FSP include that:

“when a provider renders a financial service– (a) representations made and information provided to a client by the provider– (i) must be factually correct; (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading; (iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client ... (iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction... (d) the service must be rendered in accordance with the contractual relationship and reasonable requests or instructions of the client, which must be executed as soon as reasonably possible and with due regard to the interests of the client which must be accorded appropriate priority over any interests of the provider ...”¹¹⁵

The GCC has extensive requirements regarding an FSP’s duty to ensure that it provides appropriate advice to clients.¹¹⁶ This is the crux of the FAIS Act.

3.4.3 The PPRs

The PPRs have ensured that product suppliers’ responsibilities for customer outcomes are more balanced in that the insurer now also has strict responsibilities regarding the provision of advice, and that the blame regarding mis-selling and mis-buying cannot be laid solely at the door of the intermediaries.¹¹⁷ This has been a welcome change. The PPRs have extensive disclosure requirements to which an insurer and its representatives must adhere. It requires that any communication by an insurer be, amongst others, in plain language¹¹⁸ and not misleading.¹¹⁹ Furthermore, an insurer must:

“take reasonable steps to ensure that a policyholder is given appropriate information about a policy in good time so that the policyholder can make an informed decision about the policy prior to inception and throughout the duration of the policy.”¹²⁰

¹¹⁵ S 3(1)(a) and (d) of the GCC.

¹¹⁶ S 8(1)(a) of the GCC.

¹¹⁷ Millard D 'Of agency, representation, and insurance advice: One step forward or two steps back?' in J Barnard et al (eds) *De Serie Legenda – Developments in Commercial Law, Volume II Law of Specific Contracts and Banking Law* (2019) 125.

¹¹⁸ Rule 11.3.1(a) of the PPRs.

¹¹⁹ Rule 11.3.1(b) of the PPRs.

¹²⁰ Rule 11.3.2 of the PPRs.

The PPRs state that in the event that the advice is provided by the insurer's intermediary, the insurer remains ultimately responsible and that it has to "take reasonable steps to mitigate the risks to policyholders of the independent intermediary failing to meet its disclosure obligations ..."¹²¹

One of the TCF outcomes is that an insurer must see to it that the advice that policyholders receive is "... suitable and takes account of their circumstances."¹²² It is submitted that the 2018 PPRs have fortunately brought about a welcome shift in responsibility by placing the ultimate responsibility to ensure that policyholders receive suitable advice on the insurer. In fact, the PPRs require that the insurer has the ultimate responsibility to ensure that the policyholders receive suitable advice in that an insurer has the duty to "take reasonable steps to mitigate the risk of unsuitable advice" in the event that the advice is provided by the insurer's intermediary.¹²³

3.4.4 COFI

COFI applies to a financial institution¹²⁴ that provides a financial product or a financial service,¹²⁵ where the "provision of advice" is incorporated in the definition of "financial service".¹²⁶ As part of an insurer's disclosure requirements, an insurer or its representatives¹²⁷ must ensure that "before, during and after the conclusion of a contract" the customer is made "aware of all relevant facts that could reasonably be expected to influence" his decisions regarding the product. This would include the benefits, risks, costs, contractual obligations, consequences of breach and dispute resolution options.¹²⁸ As part of the giving of advice, an insurer or its representatives¹²⁹ must make disclosures that:

"use language that is clear, plain and unambiguous, and is appropriate for the target market;¹³⁰
(b) are adequate, appropriate, timely, relevant and complete;¹³¹ (c) are factually correct and not misleading or deceptive;¹³² (d) promote understanding of the financial product or financial

¹²¹ Rule 11.3.7(c) of the PPRs.

¹²² Rule 1.4(d) of the PPRs.

¹²³ Rule 1.9 of the PPRs.

¹²⁴ S 4 of COFI defines "financial institution" with reference to the FSRA. The FSRA defines a "financial institution" as including a financial product provider and a financial service provider. The FSRA defines a "financial service provider" as "a person that, as a business or as part of a business, provides a financial service". The FSRA defines a "financial product provider" as "a person that, as a business or as part of a business, provides a financial product."

¹²⁵ S 4 of COFI.

¹²⁶ COFI defines "financial service" with reference to section 3 of the FSRA, which in turn, includes the provision of advice in its definition of "financial service".

¹²⁷ S 31(3) of COFI.

¹²⁸ S 31(1) of COFI.

¹²⁹ S 31(3) of COFI.

¹³⁰ S 31(2)(a) of COFI.

¹³¹ S 31(2)(b) of COFI.

¹³² S 31(2)(c) of COFI.

service being provided;¹³³ (e) promote comparison across similar financial products or financial services; and (f) takes into account— (i) the nature and complexity of the financial product or financial service concerned;¹³⁴ and (ii) the reasonably assumed level of knowledge, understanding and experience of financial customers at whom the disclosure is targeted.”¹³⁵

COFI requires that when providing a financial service (which would include providing advice), a financial institution must “ensure that the products and services are (a) appropriate for targeted or impacted financial customers.”¹³⁶ It furthermore requires that an insurer must make disclosures that enhance the customer’s understanding of the product¹³⁷ and enhance comparison with similar financial products.¹³⁸ In making such disclosures, the financial institution must be cognisant of the complexity of the product¹³⁹ and the “reasonably assumed level of knowledge, understanding and experience” of the customer.¹⁴⁰

3.4.5 Evaluation

Whilst the GCC, the PPRs and COFI overlap regarding issues relating to the use of clear and plain language, the GCC and the PPRs regulate these issues in the most detail as they contain comprehensive insurance specific regulations. The promulgation of COFI would not bring about any change in this respect.

Regarding the regulation of an FSP’s duty to provide suitable advice to customers: although the PPRs, the GCC and COFI overlap, the GCC regulates this matter in the most detail. The post-COFI dispensation in life insurance would therefore not be altered in this regard.

3.5 POINT-OF-SALE

3.5.1 General

Although the advice phase in theory precedes the point-of-sale phase, they often overlap to a lesser or greater degree.¹⁴¹ In fact, it is even possible that the two phases overlap completely and that the FSP provides all the advice at the same stage as concluding the sale of the policy. In addition to the requirements set out in the advice phase, an insurer and FSP must also abide by the obligations as set out in this section. At the time of purchasing the policy, it is crucial for the policyholder to

¹³³ S 31(2)(d) of COFI.

¹³⁴ S 31(2)(f)(i) of COFI.

¹³⁵ S 31(2)(f)(ii) of COFI.

¹³⁶ S 26(1)(a) of COFI.

¹³⁷ S 31(2)(d) of COFI.

¹³⁸ S 31(2)(e) of COFI.

¹³⁹ S 31(2)(f)(i) of COFI.

¹⁴⁰ S 31(2)(f)(ii) of COFI.

¹⁴¹ Millard D ‘The Impact of the Twin Peaks Model on the Insurance Industry’ 2016 (19) Potchefstroom Electronic Law Journal 31.

understand and know exactly what the policy will cover. Therefore, the insurer and FSP have additional duties to ensure that the policyholder is treated fairly regarding outcome 3 in that the prospective policyholder is given clear information at the time of entering into a policy¹⁴², so as to ensure that the policyholder may make an informed decision about the proposed transaction.¹⁴³

In terms of common law, the policyholder's duty to disclose the information relevant to the risk enabled an insurer to repudiate a claim if the misrepresentation was material.¹⁴⁴ Furthermore, in the event that the policyholder warranted that all information disclosed was correct, the insurer could repudiate the claim and cancel the contract based on the breach of warranty. Due to the fact that this issue is the topic of many insurance disputes between insurers and policyholders, the PPRs set out to regulate this matter.

3.5.2 FAIS and the GCC

The GCC requires that an FSP must:

“... provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract ... and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision ...”¹⁴⁵

The GCC furthermore requires that an FSP must “...provide ... any material contractual information¹⁴⁶ ... in particular, at the earliest reasonable opportunity, provide ... full and appropriate information ...” regarding the financial product,¹⁴⁷ the benefits,¹⁴⁸ payment of premiums to the insurer,¹⁴⁹ any incentives and fees payable to the FSP,¹⁵⁰ any special terms or “exclusions of liability, waiting periods, loadings, penalties, excesses”,¹⁵¹ any cooling off rights¹⁵² and any other risks associated with the product.¹⁵³

The GCC also requires that an FSP must disclose any conflict of interest “in writing, at the earliest reasonable opportunity”¹⁵⁴ and to disclose the details of the relevant ombud “at all relevant stages

¹⁴² Rule 1.4(c) of the PPRs.

¹⁴³ S 3(1)(a) and (d) of the GCC.

¹⁴⁴ JQR 2019(1) Par 2.1.3 (the third sentence, just before footnote 28).

¹⁴⁵ S 7(1)(a) of the GCC.

¹⁴⁶ S 7(1)(b) of the GCC.

¹⁴⁷ S 7(1)(c)(i) of the GCC.

¹⁴⁸ S 7(1)(c)(ii) of the GCC.

¹⁴⁹ S 7(1)(c)(iv) of the GCC.

¹⁵⁰ S 7(1)(c)(vi) of the GCC.

¹⁵¹ S 7(1)(c)(vii) of the GCC.

¹⁵² S 7(1)(c)(xii) of the GCC.

¹⁵³ S 7(1)(c)(xiii) of the GCC.

¹⁵⁴ S 3(1)(c) of the GCC.

of the relationship with a client, including at the start of the relationship ...”¹⁵⁵ Furthermore, the GCC requires that an FSP must inform a client, that “all material facts must be accurately and properly disclosed”¹⁵⁶ and also of the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information.¹⁵⁷

The GCC prohibits an FSP from requesting a client to “waive any right or benefit conferred on the client by or in terms of any provision of this Code ...”¹⁵⁸

The GCC prohibits an FSP from requesting a client to “sign any written or printed form or document unless all details required to be inserted thereon by the client or on behalf of the client have already been inserted.”¹⁵⁹

The GCC does not deal with the consequences of misrepresentation at all. It only requires that the FSP informs the client of “the possible consequences of the misrepresentation or non-disclosure of a material fact or the inclusion of incorrect information.”¹⁶⁰

3.5.3 The PPRs

Outcome 3 in rule 1.4 of the PPRs explicitly requires an insurer to ensure that “policyholders are given clear information and are kept appropriately informed before, during and after the time of entering into a policy.”

The PPRs list specific information in rule 11.4.2 that an insurer must include in a quotation or before a policy resulting from direct marketing is entered into. It includes the details of insurer;¹⁶¹ the type and general explanation of the relevant policy;¹⁶² the policy benefits;¹⁶³ any charges or fees;¹⁶⁴ any commission;¹⁶⁵ any material tax considerations;¹⁶⁶ details relating to the payment of the premium;¹⁶⁷ details regarding cooling-off rights;¹⁶⁸ “concise details of any significant exclusions or limitations, which information must be provided prominently as contemplated in rule 10.15”;¹⁶⁹ any conflict of

¹⁵⁵ S 18(1)(a)(ii) of the GCC.

¹⁵⁶ S 7(1)(d)(i) of the GCC.

¹⁵⁷ S 7(1)(d)(iii) of the GCC.

¹⁵⁸ S 21 of the GCC.

¹⁵⁹ S 7(2) of the GCC.

¹⁶⁰ S 7(1)(d) of the GCC.

¹⁶¹ Rule 11.4.2(a) of the PPRs.

¹⁶² Rule 11.4.2(b) of the PPRs.

¹⁶³ Rule 11.4.2(c) of the PPRs.

¹⁶⁴ Rule 11.4.2(d)(i) of the PPRs.

¹⁶⁵ Rule 11.4.2(d)(ii) of the PPRs.

¹⁶⁶ Rule 11.4.2(d)(iii) of the PPRs.

¹⁶⁷ Rule 11.4.2(e) of the PPRs.

¹⁶⁸ Rule 11.4.2(f) of the PPRs.

¹⁶⁹ Rule 11.4.2(g) of the PPRs.

interest;¹⁷⁰ whether the policyholder has any obligation to “disclose any material facts, including information to ensure that a policyholder knows what must be disclosed as well as the consequences of non-compliance with the obligations”¹⁷¹ and details of the relevant ombud.¹⁷² The PPRs do not specifically require that a broker or agent disclose whether he or she is entitled to any incentives in connection with the sale of the policy.

The PPRs prohibit an insurer from requesting a policyholder to waive any right or benefit that it would have otherwise had¹⁷³ or to allow a policyholder to sign any blank or uncompleted document.¹⁷⁴

Section 59 of the LTIA stated that in the event that a policyholder failed to disclose information or made a misrepresentation to the insurer (even if the policyholder warranted that all disclosures were true), a policy may only be nullified¹⁷⁵ or claim repudiated¹⁷⁶ if that non-disclosure or misrepresentation “is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any variation thereof.” Section 59 of the LTIA was repealed by the Insurance Act 18 of 2017 with effect from 1 October 2018. Rule 21 of the PPRs was inserted with effect from 1 October 2018. Rule 21 similarly states that a policy may only be cancelled¹⁷⁷ or claim repudiated¹⁷⁸ if a “reasonable, prudent person would consider that representation or non-disclosure as being likely to have materially affected the insurer’s ability to assess the risk under the policy ...”¹⁷⁹

3.5.4 COFI

COFI does not require that the financial institution and the broker or agent must disclose to the customer details regarding cooling-off rights, exclusions or limitations, any incentive payable to the broker or agent, any conflict of interest, the details of the relevant ombud or that the customer has an obligation to disclose any material facts.

COFI does not deal with the waiver of rights, the signing of uncompleted documents or with a misrepresentation made to the insurer.

¹⁷⁰ Rule 11.4.2(j) of the PPRs.

¹⁷¹ Rule 11.4.2(k) of the PPRs.

¹⁷² Rule 11.4.2(m) of the PPRs.

¹⁷³ Rule 8 of the PPRs.

¹⁷⁴ Rule 9 of the PPRs.

¹⁷⁵ S 59(1)(a)(i) of the LTIA (Repealed).

¹⁷⁶ S 59(1)(a)(ii) of the LTIA (Repealed).

¹⁷⁷ Rule 21.1(a) of the PPRs.

¹⁷⁸ Rule 21.1(b) of the PPRs.

¹⁷⁹ Rule 21.1 of the PPRs.

3.5.5 Evaluation

Whilst the GCC requires that a broker or agent disclose whether he/she is entitled to any incentives in connection with the sale of the policy, the PPRs do not. COFI does not require that the financial institution and the broker or agent must disclose to the customer details regarding cooling-off rights, exclusions or limitations, any incentive payable to the broker or agent, any conflict of interest, the details of the relevant ombud or that the customer has an obligation to disclose any material facts. The post-COFI dispensation will not bring about any change to the market conduct regulation regarding point-of-sale disclosures.

Whilst the GCC and the PPRs overlap, COFI does not deal with the regulation regarding the waiver of rights nor with the signing of uncompleted documents in life insurance.

The GCC does not deal with the consequences of misrepresentation at all. Presently, rule 21 of the Long-term PPRs ensure that insurers cannot reject a claim in the event of a misrepresentation which the policyholder warranted to be true if the non-disclosure was not likely to have materially affected the risk under the policy. It is submitted that rule 21 results in the fairer treatment of policyholders and it is submitted that it is crucial that this rule be retained after the enactment of COFI as COFI does not deal with misrepresentation at all.

3.6 INFORMATION AFTER POINT-OF-SALE

3.6.1 General

Once again, the provision of advice can occur during the after point-of-sale phase. The purpose of regulating insurer's behaviour after the point-of-sale phase is to ensure that customers continue receiving good service and are not sent from one department to the next in an attempt to obtain after-sales service.

Accordingly, the PPRs require that in ascertaining whether the insurer has treated its customers fairly, one of the end results/"outcomes" that should follow is that the customer does not have to deal with unreasonable post-sale barriers.¹⁸⁰ Similarly, COFI also deals with the post-sale phase of an insurance product. It requires that there should not be any post-sale hindrances for a customer that keeps him/her from holding the insurer accountable for "(a) its contractual obligations; (b) expectations created that are not being met; or (c) unfair treatment pertaining to a financial product ..."¹⁸¹

¹⁸⁰ Rule 1.4(f) of the PPRs.

¹⁸¹ S 31(1)(a)-(c) of COFI.

Millard noted that “an unintended consequence of the FAIS Act has been an emphasis on "advice", which resulted in a disproportionate burden on advisors and intermediaries to explain onerous clauses.”¹⁸² She noted that if an insurer has the duty to review a product’s performance, then it is possible that the insurer might discover that some of these onerous clauses that have been so part and parcel of the policy contracts carry relatively less importance when factoring into account the cost to administer the related complaints and claims derived from those clauses.¹⁸³

It is only fair that a policyholder is protected against the lapse of his/her policy due to the non-payment of a premium as the non-payment could have been due to an administrative or systems fault or delay by the bank. Fairness also demands that a policyholder should be informed of any change in premiums and the reasons therefore, so as to enable the policyholder to make an informed decision as to whether or not he/she should obtain alternative insurance.

The keeping of records by an FSP will result in enhanced consumer protection as an FSP will most likely be more cognisant of all its duties as it has to put all the interactions on record. The keeping of records also enables the policyholder to access the records in future so as to ascertain the precise detail of the contract.

A policyholder should be protected against the unfair cancellation of its policy by the insurer, as well as dealing with unreasonable hindrances if the policyholder wishes to terminate a policy.

3.6.2 FAIS and the GCC

The disclosure after the point-of-sale phase is regulated by section 7(3A) of the GCC which requires that an FSP:

“must at the earliest reasonable opportunity after conclusion of a transaction provide the client with all information referred to in subsections (1), (2) and (3) in writing, to the extent that any such information has not already been provided to the client in writing.”¹⁸⁴

Subsection 7(1), which was dealt with at the “Point-of-sale: Disclosures: FAIS and the GCC” section as set out before, requires that an FSP must “at the earliest reasonable opportunity, provide, where

¹⁸² Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 387.

¹⁸³ *Ibid.*

¹⁸⁴ S 7(3A) of the GCC.

applicable, full and appropriate information ...” of the product,¹⁸⁵ benefits,¹⁸⁶ payment of premiums,¹⁸⁷ any incentives and fees payable to the FSP,¹⁸⁸ any special terms or exclusions of liability,¹⁸⁹ any cooling off rights¹⁹⁰ and any other risks associated with the product.¹⁹¹

The GCC requires that an FSP who “has provided advice to a client or is rendering ongoing financial services to the client ... must on a regular basis ...” provide ... current details ...” of the clients monetary obligations,¹⁹² the main benefits,¹⁹³ any ongoing payments like incentives or fees payable to the FSP in respect of the policy,¹⁹⁴ and, if applicable, the value of the investment portion thereof.¹⁹⁵ The GCC furthermore requires that in the event of material or significant changes to the policy occurring, the FSP must notify the client without delay.¹⁹⁶

Other than section 17 of the GCC which requires that an FSP keeps a complaints management framework, neither FAIS nor the GCC requires that an insurer keep a data management framework.

Due to the fact that FAIS does not regulate the insurers’ conduct, it does not therefore have any regulations regarding the review of the performance of products.

The GCC requires that in the event of material or significant changes to the policy occurring, that the FSP must notify the client without delay.¹⁹⁷ The GCC does not deal with the non-payment of premiums.

FAIS requires that an FSP must maintain records regarding premature cancellations, complaints and keep continued compliance records.¹⁹⁸ The GCC requires that an FSP’s record of advice must:

¹⁸⁵ S 7(1)(c)(i) of the GCC.

¹⁸⁶ S 7(1)(c)(ii) of the GCC.

¹⁸⁷ S 7(1)(c)(iv) of the GCC.

¹⁸⁸ S 7(1)(c)(vi) of the GCC.

¹⁸⁹ S 7(1)(c)(vii) of the GCC.

¹⁹⁰ S 7(1)(c)(xii) of the GCC.

¹⁹¹ S 7(1)(c)(xiii) of the GCC.

¹⁹² S 7(4)(a) of the GCC.

¹⁹³ S 7(4)(b) of the GCC.

¹⁹⁴ S 7(4)(d) of the GCC.

¹⁹⁵ S 7(4)(c) of the GCC.

¹⁹⁶ S 3(1)(a)(viii) of the GCC.

¹⁹⁷ S 3(1)(a)(viii) of the GCC.

¹⁹⁸ S 18 of FAIS.

“reflect the basis on which the advice was given, and in particular- (a) a brief summary of the information and material on which the advice was based; (b) the financial product which were considered; (c) the financial product or products recommended with an explanation ...”¹⁹⁹

The GCC requires that an FSP must “give immediate effect to a request of a client who voluntarily seeks to terminate” a policy.²⁰⁰ Under certain circumstances the FSP must “take reasonable steps to ensure” that the policyholder comprehends the consequences of the termination,²⁰¹ “notify all affected clients”, and “ensure that any outstanding business is completed promptly.”²⁰²

3.6.3 The PPRs

Regarding the disclosure after point-of-sale, the PPRs require that:

“An insurer must at the earliest reasonable opportunity after inception of the policy ... provide the policyholder with ... the following information (a) evidence of cover;²⁰³ the timing and manner in which the policy benefits will or may be made available to the policyholder or a beneficiary;²⁰⁴ ... details of any restrictions on access to policy benefits ...;²⁰⁵ ... any charges or fees ...;²⁰⁶ any commission ...;²⁰⁷ and any material tax consideration²⁰⁸ ... all exclusions or limitations ...;²⁰⁹ (f) any obligation to monitor cover ...;²¹⁰ any right to cancel ...;²¹¹ the right to claim benefits ...;²¹² and the representations made by or on behalf of the policyholder to the insurer which were regarded by that insurer as material to its assessment of the risks under the policy”.²¹³

The PPRs require that an insurer must “on an ongoing basis, disclose to the policyholder relevant information depending on the type of policy.”²¹⁴ The PPRs have very useful and detailed provisions regarding the information that must be disclosed in the event that the premium or any of the terms and conditions of the policy changes.²¹⁵ The insurer has to provide reasons for such changes,²¹⁶

¹⁹⁹ S (3)(2)(a) of the GCC.

²⁰⁰ S 20(a)(i) of the GCC.

²⁰¹ S 20(a)(ii) of the GCC.

²⁰² S 20(b) of the GCC.

²⁰³ Rule 11.5.1(a) of the PPRs.

²⁰⁴ Rule 11.5.1(b) of the PPRs.

²⁰⁵ Rule 11.5.1(c) of the PPRs.

²⁰⁶ Rule 11.5.1(d)(i) of the PPRs.

²⁰⁷ Rule 11.5.1(d)(ii) of the PPRs.

²⁰⁸ Rule 11.5.1(d)(iii) of the PPRs.

²⁰⁹ Rule 11.5.1(e) of the PPRs.

²¹⁰ Rule 11.5.1(f) of the PPRs.

²¹¹ Rule 11.5.1(g) of the PPRs.

²¹² Rule 11.5.1(h) of the PPRs.

²¹³ Rule 11.5.1(j) of the PPRs.

²¹⁴ Rule 11.6.1 of the PPRs.

²¹⁵ Rule 11.6.4 of the PPRs.

²¹⁶ Rule 11.6.4(b) and (c) of the PPRs.

“an explanation of the implications of that change;²¹⁷... and an explanation of the policyholder’s rights and obligations regarding such changes, including what cooling-off rights are offered and procedures for the exercise thereof.”²¹⁸ With regard to investment policies the PPRs specify that additional information such as the up-to-date value of the investment²¹⁹ and the total premiums paid to date²²⁰ must be provided to the policyholder at least on an annual basis.

The PPRs have extensive requirements regarding an insurer’s duty to have an “effective data management framework” which enables the insurer to have access to up-to-date and accurate data;²²¹ properly identify business risks;²²² comply with legislation²²³ and regulatory reporting requirements;²²⁴ assess its liability under each of its policies²²⁵ and report on complaints.²²⁶

The PPRs require that an insurer must review a product’s performance on an ongoing basis to evaluate whether the product continues to deliver fair outcomes to policyholders.²²⁷ In the event that any shortcomings have been identified, it should implement suitable remedial action.²²⁸

The PPRs have extensive rules regarding premium reviews.²²⁹ An insurer is prohibited from increasing a premium unless it does so in accordance with the conditions as specified in the policy.²³⁰ Furthermore, rule 15.4 requires that a review must, inter alia, “reasonably balance the interests of the insurer and the reasonable benefit expectations of policyholders or members ...”²³¹ In order to determine the latter, the PPRs specify six circumstances under which the requirements of rule 15.4 will not be met, which include that the insurer may not recover any historical losses on the policy²³² or “unfairly target a particular group of policyholders ...”²³³

It is only in the PPRs that one can find any regulations regarding the non-payment of the premium. Rule 15.1 states that an insurer must give the policyholder a period of grace for the payment of

²¹⁷ Rule 11.6.4(c) of the PPRs.

²¹⁸ Rule 11.6.4(e) of the PPRs.

²¹⁹ Rule 11.6.3(a) of the PPRs.

²²⁰ Rule 11.6.3(b) of the PPRs.

²²¹ Rule 13.2(a) of the PPRs.

²²² Rule 13.2(b) of the PPRs.

²²³ Rule 13.2(c) of the PPRs.

²²⁴ Rule 13.2(d) of the PPRs.

²²⁵ Rule 13.2(e) of the PPRs.

²²⁶ Rule 13.2(f) of the PPRs.

²²⁷ Rule 14.1(a) of the PPRs.

²²⁸ Rule 14.2 of the PPRs.

²²⁹ Rule 15 of the PPRs.

²³⁰ Rule 15.2 of the PPRs.

²³¹ Rule 15.4(a) of the PPRs.

²³² Rule 15.5(a) of the PPRs.

²³³ Rule 15.5(c) of the PPRs.

premiums of not less than 15 days after the due date, during which period the policy remains in force.

The PPRs require that a provider should record “all policy related communications” and store all “transaction documentation” and “and all other material documentation relating to the policy and the policyholder.”²³⁴

The PPRs require that an insurer must, generally, give written notice of its intention to terminate an individual policy.²³⁵ Furthermore, the insurer remains liable under the policy for specified periods in the event that the insurer failed to provide the required notice.²³⁶ The PPRs regulate the situation where an insurer terminates a group scheme policy²³⁷, as well as where a policyholder wishes to terminate a group scheme policy.²³⁸

3.6.4 COFI

The disclosure after point-of-sale is regulated by COFI in that it requires that an insurer must ensure that policyholders “have access to, and are provided with, relevant information regarding the financial products ... on an ongoing basis.”²³⁹

COFI requires that an insurer must ensure that policyholders “have access to, and are provided with, relevant information regarding the financial products ... on an ongoing basis.”²⁴⁰

COFI does not have any requirements regarding the keeping of a data management framework.

COFI requires that an insurer must ensure that the products perform as the insurer has led its customers to expect, through the disclosures and advertising provided by the insurer and its representatives.²⁴¹ Furthermore, in the event that the insurer is of the opinion that a material risk had developed that the product might be unsuitable or not performing as the customers were led to expect, “or any other unfair outcomes to its financial customers, it must take remedial action to reasonably mitigate the risk.”²⁴²

²³⁴ Rule 16.2 of the PPRs.

²³⁵ Rule 20.2.1 of the PPRs.

²³⁶ Rule 20.2.2 of the PPRs.

²³⁷ Rule 20.2.4(a) of the PPRs.

²³⁸ Rule 20.3 of the PPRs.

²³⁹ S 33(2)(a) of COFI.

²⁴⁰ S 33(2)(a) of COFI.

²⁴¹ S 26(2) of COFI.

²⁴² S 26(3) of COFI.

COFI requires that the “remuneration, compensation or consideration for the rendering of any authorised activity”, which would include the provision of a life policy,²⁴³ must be reasonable and determined in a manner that is commensurate with the “fair treatment” of a policyholder.²⁴⁴ COFI does not deal with the non-payment of premiums.

COFI requires that an insurer must keep records as “prescribed in conduct standards and other applicable legislation.”²⁴⁵

COFI requires that an insurance company must continue to enhance the fair treatment of policyholders regarding the manner in which a policy is terminated and the relationship between the parties after the termination of the policy.²⁴⁶ Furthermore, COFI requires that policyholders should not have to deal with unreasonable hindrances if they want to terminate a policy,²⁴⁷ they should have access to “efficient and fair termination processes”²⁴⁸ and an insurer may only terminate a policy in a “fair manner”.²⁴⁹

3.6.5 Evaluation

Whereas the GCC, PPRs and COFI do overlap substantially regarding disclosure after point-of-sale and on an on-going basis, the GCC regulates this aspect in more detail and the PPRs are the most comprehensive of the three as they have been designed specifically for the insurance industry.

Other than section 17 of the GCC which requires that an FSP keeps a complaints management framework, neither FAIS/GCC nor COFI requires that an insurer has a data management framework. However, such a framework is set out in detail in the PPRs.

Whereas COFI and the PPRs do overlap with regard to the ongoing review of a product’s performance, the GCC does not deal with it at all.

Whilst the GCC, the PPRs and COFI do overlap to a small degree with regard to the regulation of premiums, the GCC and COFI do not deal with the non-payment of premiums. The extensive rules in the PPRs regarding premium reviews and the non-payment of premiums are essential for the fair

²⁴³ Schedule 1 of COFI.

²⁴⁴ S 20(2) of COFI.

²⁴⁵ S 55 of COFI.

²⁴⁶ S 32(2) of COFI.

²⁴⁷ S 33(2)(g) of COFI.

²⁴⁸ S 33(2)(g) of COFI.

²⁴⁹ S 34(1) of COFI.

treatment of policyholders and it is submitted that these regulations should remain in force after the enactment of COFI, as COFI does not regulate it.

Whereas the GCC, the PPRs and COFI do overlap with regard to maintaining records and the termination of policies, it is only the PPRs that regulate the duty to maintain records and the termination of policies in detail.

3.7 COMPLAINTS AND CLAIMS HANDLING

3.7.1 General

One of the main issues that bring the insurance industry into disrepute, is insurance companies' inability to fairly and efficiently deal with complaints and claims. It is of paramount importance that insurers treat their customers fairly during this phase of the product life cycle and that the concept of fairness be applied by setting out practical and detailed rules. The 2018 PPRs introduced detailed complaints and claims management regulations.

The meticulous stipulations in the PPRs and the GCC regarding complaints management are evidence that the unfair treatment of policyholders is out-of-bounds. Millard noted regarding the complaints management regulations in the PPRs that “[t]he detail contained in rule 18 is quite staggering.”²⁵⁰

The final and, perhaps most important, application of fairness is found in the enforcing of procedural fairness regarding the interaction between insurers and complainants.²⁵¹

3.7.2 The GCC and the PPRs

Numerous amendments were made to sections 17-19 of the GCC so as to mirror the provisions in the PPRs in great detail. The first batch of the amendments to the GCC was made with effect from 26 December 2020 and the second batch with effect from 26 June 2021. As a result the PPRs and the GCC's extensive rules dealing with complaints management are now the same. The regulations in the PPRs and GCC deal with the establishment²⁵² and requirements of a complaints management framework,²⁵³ rules regarding the allocation of the responsibility to ensure the former,²⁵⁴

²⁵⁰ Millard D and Maholo J 'Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks' (2020) *Legal Certainty and Fundamental Rights*, Charl Hugo, Thomas M. J. Möllers (Hrsg.) 414.

²⁵¹ Millard D 'CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry' 2018 (81) *THRHR* 389.

²⁵² Rule 18.2 of the PPRs S 17(1) of the GCC.

²⁵³ Rule 18.3 of the PPRs and S 17(2) of the GCC.

²⁵⁴ Rule 18.4 of the PPRs and S 17(3) of the GCC.

categorisation of complaints,²⁵⁵ how complaints should be escalated and reviewed,²⁵⁶ how decisions relating to complaints should be made,²⁵⁷ the record-keeping of complaints,²⁵⁸ communication with complainants,²⁵⁹ engaging with the ombud²⁶⁰ and the reporting of complaints information.²⁶¹

The GCC, however, does not deal with claims management at all.

The PPRs contain extensive rules dealing with claims management. Millard noted that the fact that “every single aspect of the claims procedure is now subject to rules” does not “constitute an overkill ... as unfairness has always been particularly evident from the way in which insurance companies handled claims.”²⁶² Rule 17 regulates the establishment²⁶³ and requirements of a claims management framework,²⁶⁴ the allocation of the responsibility to ensure the former,²⁶⁵ how claims should be escalated and reviewed,²⁶⁶ how decisions relating to claims should be made,²⁶⁷ the time limitations applicable to initiating litigation,²⁶⁸ the record-keeping of claims,²⁶⁹ communication with claimants,²⁷⁰ reporting claims information,²⁷¹ prohibited claims practices²⁷² and how to deal with claims received during periods of grace.²⁷³

3.7.3 COFI

Part of the post-sale phase of market conduct regulation of COFI ensures that policyholders can resort to “efficient and effective complaints management” that addresses their issues regarding policies in a “fair and expeditious” manner.²⁷⁴ COFI requires that an insurer monitors complaints and should “pro-actively manage conduct risks, effect improved financial customer outcomes, and prevent recurrences of poor outcomes and errors.”²⁷⁵ COFI requires that an insurer must ensure

²⁵⁵ Rule 18.5 of the PPRs and S 17(4) of the GCC.

²⁵⁶ Rule 18.6 of the PPRs and S 17(5) of the GCC.

²⁵⁷ Rule 18.7 of the PPRs and S 17(6) of the GCC.

²⁵⁸ Rule 18.8 of the PPRs and S 17(7) of the GCC.

²⁵⁹ Rule 18.9 of the PPRs and S 17(8) of the GCC.

²⁶⁰ Rule 18.10 of the PPRs and S 18 of the GCC.

²⁶¹ Rule 18.11 of the PPRs and S 19 of the GCC.

²⁶² Millard D and Maholo J ‘Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks’ (2020) *Legal Certainty and Fundamental Rights*, Charl Hugo, Thomas M. J. Möllers (Hrsg.) 413.

²⁶³ Rule 17.2 of the PPRs.

²⁶⁴ Rule 17.3 of the PPRs.

²⁶⁵ Rule 17.4 of the PPRs.

²⁶⁶ Rule 17.5 of the PPRs.

²⁶⁷ Rule 17.6 of the PPRs.

²⁶⁸ Rule 17.6 of the PPRs.

²⁶⁹ Rule 17.7 of the PPRs.

²⁷⁰ Rule 17.8 of the PPRs.

²⁷¹ Rule 17.9 of the PPRs.

²⁷² Rule 17.10 of the PPRs.

²⁷³ Rule 17.11 of the PPRs.

²⁷⁴ S 33(2)(c) of COFI.

²⁷⁵ S 33(2)(d) of COFI.

that there are no post-sale barriers that would unreasonably prevent policyholders from making a complaint.²⁷⁶

In addition, COFI requires that an insurer must ensure that there are no post-sale barriers that would “unreasonably prevent” policyholders from submitting a claim.²⁷⁷ Furthermore, an insurer must see to it that it has “claims management processes” in place that promote “claims being handled in a fair, transparent, and expeditious manner.”²⁷⁸

3.7.4 Evaluation

The GCC mirrors the meticulously detailed provisions of the PPRs with regard to complaints management. COFI, on the other hand, only briefly deals with this topic. Since complaints management is one of the headaches for policyholders, it is crucial that the regulations in the PPRs or the GCC remain effective upon the enactment of COFI.

Whereas COFI only briefly deals with claims management and the GCC does not deal with claims management at all, the regulations in rule 17 of the PPRs are superbly detailed. Due to the fact that rule 17 deals with insurance specific issues which absolutely necessitate being regulated, these rules in the PPRs should be retained in a later version of the PPRs upon the enactment of COFI.

Chapter four investigates the prevalent market conduct issues in the life insurance industry as is evidenced by the cases/actions heard by the five fora that deal with insurance law matters in South Africa.

²⁷⁶ S 33(1)(d) of COFI.

²⁷⁷ S 33(1) of COFI.

²⁷⁸ S 33(2) of COFI.

CHAPTER 4

DECISIONS BY JUDICIAL FORA

4.1 General

This chapter will investigate the determinations, enforcement actions and cases heard by the five fora that deal with insurance law matters in South Africa, in order to ascertain what the current market conduct issues in life insurance are, how prevalent those issues are, how successfully the current legislation and fora dealt with those issues, and then finally, whether COFI will be able to remedy any of those market conduct issues.

This extensive review entailed an examination of the FAIS Ombud determinations,²⁷⁹ the FSCA enforcement actions,²⁸⁰ final determinations by the Ombudsman for Long-term Insurance,²⁸¹ decisions by the Financial Services Tribunal²⁸² and a number of court cases.²⁸³ All these determinations, enforcement actions and cases were summarised and the relevant data was incorporated and analysed on an Excel spreadsheet.²⁸⁴ The table below indicates the number of determinations, enforcement actions and cases that pertain to life insurance in the market conduct context and then from all these determinations, enforcement actions and cases that came before the different fora, the number that are relevant to this dissertation:

²⁷⁹ 'AnnexB_JudicialForums.FAISOmbud2022.02.26' attached hereto as Annexure B.

²⁸⁰ 'AnnexD_JudicialForumsFSCA.EnforcementActions2020.02.26' attached hereto as Annexure D.

²⁸¹ 'AnnexC_JudicialForums.OmbudsmanLT12022.02.26' attached hereto as Annexure C.

²⁸² 'AnnexE_JudicialForums.FinancialServTribunal2022.02.26' attached hereto as Annexure E.

²⁸³ 'AnnexF_JudicialForumsCasesJQRAll2022.02.26' attached hereto as Annexure F.

²⁸⁴ 'AnnexA_JudicialForumsFSCA.FAISOmbud.LTOmbud.FinServTrib.Courts2022.02.26' attached hereto as Annexure A.

	Date span	Total amount of determinations considered	Determinations on life insurance (excl. funeral insurance)	Determinations relevant to this dissertation
FAIS OMBUD determinations	2005-2021 ²⁸⁵	18 ²⁸⁶	13 ²⁸⁷	8 ²⁸⁸
Final determinations by the Ombudsman for Long-term Insurance	2016-2021 ²⁸⁹	23	13	13
FSCA enforcement actions	2016-2021 ²⁹⁰	88		7
Financial Services Tribunal decisions	Only 2021 ²⁹¹	60		0
Court cases	2017-March 2021 ²⁹²	39		3

The information in the table above already provides a basis for a preliminary conclusion: i.e. from the multitude of determinations and cases heard, only a relatively small percentage pertain to life insurance (excluding funeral insurance). This indicates that there is reason to believe that the current market conduct framework is successful in providing fair outcomes to consumers.

²⁸⁵ The FAIS Ombud published the 517 determinations that it made since 2005 until 19 November 2021 on its website (<https://www.faisombud.co.za/determinations>, accessed on 19 November 2021). In order to obtain a wholistic perspective on the market conduct issues in life insurance and because only 2.1% of those determinations dealt with long-term insurance, this dissertation intended to consider all the FAIS Ombud's determinations for the last sixteen years.

²⁸⁶ *Ibid.*

²⁸⁷ The FAIS Ombud divides the determinations in the following categories: long-term insurance, short term insurance, investments, forex, property syndication, retirement, medical aid and non-FAIS/FSOS. Only eighteen of the 517 determinations published were long-term insurance determinations (excluding funeral insurance).

²⁸⁸ After perusing the eighteen long-term insurance cases, only eight of those cases are relevant to this dissertation and were accordingly considered for purposes of this dissertation.

²⁸⁹ The Ombudsman for Long-term Insurance published the 23 determinations that it made since 2016 until 2020 on its website (<https://www.ombud.co.za/publications/final-determinations>, accessed on 19 November 2021). In order to obtain a wholistic perspective on the market conduct issues in life insurance this dissertation intended to consider all the Ombudsman's determinations for the last six years. Ten of those determinations dealt with funeral insurance and therefore only thirteen were relevant to this dissertation.

²⁹⁰ The FSCA published the 88 enforcement actions that it made since 2016 until 2020 on its website (<https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>, accessed on 19 November 2021). In order to obtain a wholistic perspective on the market conduct issues in life insurance this dissertation intended to consider all the FSCA's enforcement actions for the last six years.

²⁹¹ The Financial Services Tribunal publishes a multitude of decisions every year on the FSCA's website (<https://www.fsca.co.za/Enforcement-Matters/Pages/Financial-Service-Tribunal-Decisions.aspx>, accessed on 19 November 2021). Due to the fact that there are so many decisions, only the last 60 decisions were examined.

²⁹² The 39 most recent cases that were discussed in the JQR (from the 2017(1) to the 2021(1) publications) were perused to ascertain which of them dealt with life insurance cases.

4.2 FAIS Ombud Determinations

4.2.1 Statutory framework

The mission of the FAIS Ombud (the Ombud) is “to promote consumer protection and contribute to the integrity of the financial services industry by resolving complaints in a manner that is impartial, expeditious, economic, accessible and at all times, equitable.”²⁹³ The mandate of the FAIS Ombud is to resolve complaints in terms of the FAIS Act and the GCC in an independent, impartial and expeditious manner.²⁹⁴ The FAIS Ombud endeavours to primarily resolve complaints through mediation or conciliation.²⁹⁵ In the event that the Ombud’s attempts at mediation or conciliation fail, it will issue a determination.²⁹⁶ The FAIS Ombud’s determinations are binding and are enforceable in the same way as is a judgment of a civil court..²⁹⁷ In cases where the parties do not accept the Ombud’s recommendation or the parties cannot settle the matter, the Ombud would make a final determination.²⁹⁸ In the event that a party is aggrieved by a determination issued by the Ombud, it may approach the Financial Services Tribunal for a reconsideration of the determination.²⁹⁹

4.2.2 FAIS Ombud determinations

4.2.2.1 General

Only eight of the 517 final determinations as listed on the FAIS Ombud’s website³⁰⁰ are relevant to this dissertation and are accordingly discussed below.³⁰¹

a) *CE du Plessis / SA Home Loans (Pty) Ltd*³⁰²

This determination dealt with whether an appropriate explanation of the material terms (an exclusion clause) was given to joint life insureds in terms of section 7(1)(a) of the 2003 GCC.³⁰³ The complainant, Mrs du Plessis, and her late husband obtained credit life insurance over both spouses’ lives. The Ombud dismissed the complaint as it found that voice recording indicated that the deceased was “clearly informed of the fact that he would not be covered for twenty-four months for

²⁹³ FAIS Ombud Annual Report: 2019/2020, available at [https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-\(fais-ombud\)-annual-report.pdf](https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-(fais-ombud)-annual-report.pdf) 2, accessed on 19 November 2021.

²⁹⁴ <https://www.faisombud.co.za/about-us/mandate/>, accessed on 19 November 2021.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ <https://www.faisombud.co.za/determinations/>, accessed on 19 November 2021.

²⁹⁹ FAIS Ombud Annual Report: 2019/2020, available at [https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-\(fais-ombud\)-annual-report.pdf](https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-(fais-ombud)-annual-report.pdf) 8, accessed on 19 November 2021.

³⁰⁰ <https://www.faisombud.co.za/determinations/>, accessed on 19 November 2021.

³⁰¹ Annexure B.

³⁰² Case number FOC 2079/07-08/LP (2).

³⁰³ The General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003, published in Board Notice No. 80 of 2003 (the 2003 GCC) was in effect prior to the amendment by GN 706/2020 w.e.f. 26 June 2020.

death due to a heart attack”³⁰⁴ and that there had therefore been proper disclosure. The Ombud made a passing comment: “However, Respondent would be well advised to change its stance on this point and ensure that it’s consultants make proper disclosure to both spouses.”³⁰⁵ The Ombud noted that the latter should be the case irrespective of the marital regime of the spouses. In terms of section 7(1)(a) of the GCC an FSP has to provide an appropriate explanation of the material terms so as to enable the client to make an informed decision. It is submitted, in line with the *Naidoo / SA Home Loans*³⁰⁶ case, that such an exclusion clause is a material term of a policy, and that where there are joint life assureds, there are two clients who have to be clearly informed of the exclusion clause. It is therefore submitted that the Ombud’s decision in this case was incorrect as both the joint life assureds had to be clearly informed of the exclusion clause as both of them were the clients to whom full disclosure had to be made. It is accordingly submitted that it appears that this is one of the areas in the life insurance industry where clarity needs to be provided by introducing specific regulation.

b) *S Naidoo / SA Home Loans (Pty) Ltd*³⁰⁷

SA Home Loans (SAHL) rejected a claim made by the complainant, Mrs Naidoo, in terms of a bond protection policy (a type of credit life policy) in which her life and that of the deceased were joint life assureds.³⁰⁸ Evidence showed that the pre-existing medical conditions of the deceased were only discussed with Mrs Naidoo. It was common cause that there were no discussions with or disclosures made to the deceased. The Ombud noted:

“Logic would demand that any discussion relating to the pre-existing conditions of the deceased ought to have been discussed with the deceased himself and not with his surviving spouse. In any event there is no record on the available evidence that there was even a reference to the deceased in relation to pre-existing conditions... In terms of the FAIS Act, material disclosures must be ... made to the client to whom the financial service is rendered. In this case, we have two clients, the Complainant and the deceased. The responsibility to disclose those terms ... entails appropriate communication to both parties to the contract.”³⁰⁹

The Ombud found that SAHL breached (1) Sections 3(1)(a)(ii)-(iii) as “disclosures relating to the exclusion was not properly communicated ... not provided in plain language, created uncertainty ...

³⁰⁴ Par 10.

³⁰⁵ Par 14.

³⁰⁶ Case number FOC 035 / 06 / KZN / 2, par 28 and 29.

³⁰⁷ Case number FOC 035 / 06 / KZN / 2.

³⁰⁸ Par 1.

³⁰⁹ Par 28 and 29.

and was .. certainly not comprehensive enough. Additionally, it was confusing and misleading.”³¹⁰ (2) Section 44(1) of the LTIA (SAHL failed to inform Mrs Naidoo of her rights pertaining to free choice),³¹¹ (3) Section 15(3)(f) of the GCC (the commission was not disclosed)³¹²; (4) Section 15(2)(a) of the GCC (the direct marketer must make enquiries to ensure that product is suitable)³¹³, and (5) Section 15(b)(iii)(bb) of the GCC (SAHL did not disclose to the clients that they have decreasing life cover.)³¹⁴

c) *Babalwa Molate / Discovery Life Limited*³¹⁵

In casu, the complainant, Mrs Molate, entered into a life insurance contract with the respondent, Discovery Life, on 23 March 2015. In terms of the contract both her and her husband’s lives were insured for R2 000 000 and the inception date was stated as 1 May 2015.³¹⁶ However, Mrs Molate’s husband was killed in a motor vehicle accident just weeks prior to the inception date. Discovery rejected her claim. Mrs Molate claimed that she was not properly advised during the pre-contractual phase and that she was not made aware of the fact that the policy only took effect at a later date.³¹⁷ The FAIS Ombud found that Discovery contravened, amongst others, section 15(3)(j) of the 2003 GCC as the direct marketer did not provide the complainant with concise details of any special terms and conditions, etc. The Ombud noted with disapproval that when one listens to Discovery’s recording:

“all that can be heard is the representative’s rush to complete the script and close the transaction. Yet it was evident from the complainant’s answers that she could not fully comprehend the full risk that she was facing. She relied solely on the guidance provided by respondent.”³¹⁸

The Ombud further indicated its disapproval when it stated:

“It further appears from respondent’s letters to this office that notwithstanding the obvious violations of the Code, there was simply no willingness to do the right thing. It is one thing to

³¹⁰ Par 32.2.

³¹¹ Par 33.

³¹² Par 35.1.

³¹³ Par 35.4.

³¹⁴ *Ibid.*

³¹⁵ Case number FAIS 04862/15-16/GP 2.

³¹⁶ Par 3.

³¹⁷ *Ibid.*

³¹⁸ Par 45.

escape liability for one claim and totally another to expose yourself to conduct that could be construed as avoiding a claim at all costs.”³¹⁹

This is an example of an instance where the Ombud acted in the best interest of the policyholder.

d) *Hylton Forge / Old Mutual Life Assurance Company South Africa Limited (OMLACSA)*³²⁰

The complainant, Mr Forge, claimed that the respondent, OMLACSA, had misrepresented the law to him as OMLACSA incorrectly advised him to only withdraw a third of his fund value instead of the full amount. Upon discovery of this mistake, Mr Forge lodged a complaint with OMLACSA and required a reversal of the transaction.³²¹ Mr Forge averred that the service he received since the lodging of his complaint was of an unacceptably deficient standard and that OMLACSA only provided various explanations and disregarded his petitions. The Ombud found that OMLACSA contravened, amongst others, section 3(1)(a)(iii) of the 2003 GCC in that the insurer failed to properly advise the complainant and treated the complainant poorly after the submission of the complainant's claim. The Ombud indicated its disapproval by stating:

“What makes respondent's conduct particularly objectionable is that it knew it had misled complainant. Instead of doing what is right, respondent blamed complainant for its mistake. Respondent's conduct toward complainant is manifestly unfair... Respondent's conduct is an affront to the Act and the TCF Principles... One cannot help but express dismay at respondent's lack of interest in making things right by complainant... Respondent's conduct breached the provisions of the Act and Code and is anathema to the TCF principles.”³²²

Again, this is a clear example of where the Ombud protected the interests of the policyholder.

e) *SA Grobler / Direct Axis (Pty) Ltd*³²³

The respondent, Direct Axis, rejected a death claim made by the Complainant, Mrs Grobler, in terms of a credit life policy to secure the outstanding amount of the R250 000 debt that the deceased had with Wesbank. The insurers rejected the claim due to the fact that the deceased had not disclosed that the deceased had a pre-existing heart condition which caused his death. The Ombud found that the respondent breached section 3(1)(a)(iii) of the 2003 GCC in that it did not make adequate representations which took the assumed level of knowledge of the client into account. The Ombud

³¹⁹ Par 53.

³²⁰ Case number FAIS 03558/16-17 KZN 4.

³²¹ Par 6.

³²² Par 41-44.

³²³ Case number FOC 1434/05 NP 2.

noted that “(t)his type of customer is certainly one who can be subject to abuse ...”³²⁴ In addition, the respondent breached section 3(1)(a)(iv) of the 2003 GCC in that the necessary disclosure regarding the exclusion regarding a pre-existing medical condition was not made “timeously so as to afford the client reasonably sufficient time to make an informed decision.”³²⁵ The Ombud indicated its disapproval in the following:

“In this case, the impression created is that the transaction relating to the sale of the policy was already in place. Simply informing an unsophisticated consumer, as the deceased was, that an optional protection plan is in place is not seeking his participation in a transaction that is contemplated. Rather, it is simply telling him that one is in place. ... It has been found that the actual rendering of the financial service in this matter took no more than 2 minutes and 2 seconds. It is an indication that direct marketers endeavour to maintain quick turnaround times to meet commission targets. It is evident that in an effort to maintain these turnaround times the unsuspecting consumer will be the victim, as is apparent in this case.”³²⁶

f) *G and J Le Vatte / RS Spendley & Another*³²⁷

In this case, the 1st respondent gave advice to the complainants, Mr and Mrs le Vatte, and recommended that Mr le Vatte replace his existing life policies with another life policy (the replacement policy).³²⁸ One of the conditions of the replacement policy was that Mr le Vatte undergo certain medical examinations. Mr le Vatte failed to do so and instead obtained another replacement life policy via the intermediation of their long-standing broker. When the 1st respondent learned that Mr le Vatte had obtained a replacement policy via the intermediation of his own broker, the 1st respondent claimed payment of services rendered and advice given. The complainants lodged a complaint with the respondents, who did not attend to the complaint within a reasonable time. The complainants then lodged a complaint with the Ombud. The Ombud found that the respondent breached, amongst others, section 8(1)(d)(ii) of the 2003 GCC in that the respondents failed to disclose special terms and exclusions regarding a replacement policy. The respondents were negligent in their rendering of the financial service and treated the complainants unfairly. The Ombud noted its disapproval in the following:

“Instead, the Respondents were hell-bent on selling policies to the Complainants whether a need for such policies existed or not... As is evident from just some of the aspects of 1st

³²⁴ Par 23.

³²⁵ Par 27.

³²⁶ Par 27 and 28.

³²⁷ Case number FOC/600/05/EC.

³²⁸ Par 8.

Respondent's conduct detailed above, his was nothing more than a cavalier approach to rendering a financial service with the focus on selling financial products without exhibiting any skill in financial planning and without any concern for the interests of the client."³²⁹

This is yet another example of how the FAIS Ombud ensured a fair outcome for the policyholder.

g) *Dawid Martinus Adlen / Herman Coertzen Brokers CC & Herman Bernardus Coertzen*³³⁰

In this case, the complainant, Mr Alden, was advised by the respondent to replace his existing Old Mutual policy with the lives insured being himself and his spouse, with a Sanlam life policy. The respondent accordingly facilitated cancelling the Old Mutual policy on 6 December 2012 with immediate effect. However, Mr Alden's wife passed away on 21 December 2012. Mr Alden's claim to Sanlam was rejected as the replacement life cover had not yet incepted.³³¹ Mr Alden claimed his loss of the amount that would have been paid out to him if the respondent had not failed to discharge his duties in terms of FAIS and the GCC.

The Ombud ruled that the respondent failed to adhere to section 3(1)(a)(iii) of the 2003 GCC in that he did not ascertain the facts regarding the debit order date and failed to advise his client of the appropriate way of cancelling the policy and section 8(1)(d) of the 2003 GCC in that the respondent failed to alert his client regarding any risks that might arise and "the actual and potential financial implications, costs and consequences of such a replacement".³³² In addition, the respondent failed to adhere to section 8(2) of the 2003 GCC in that the respondent failed to ensure that his client "is in a position to make an informed decision" which requires that the client understands the "risks of cancelling the old prior to the start of the new policy"³³³ and section 9 of the 2003 GCC in that the respondent failed to keep a record of advice. Accordingly, the Ombud upheld the complaint and ordered that the respondents pay Mr Alden R800 000.

h) *Michael le Roux (executor) in his capacity as executor of estate of Late Ivan Nigel Grant Leighton / Barons Belville (Barloworld SA (Pty) Ltd)*³³⁴

The deceased, Mr Leighton, purchased a vehicle through an instalment sale agreement with Wesbank. The respondent's representative, Ms Redelinghuys, sold a personal debt protection policy to Mr Leighton which was then ceded to Wesbank as security. Mr Leighton subsequently passed

³²⁹ Par 97 and 98.

³³⁰ Case number FAIS 05054/13-14/ GP2.

³³¹ Par 5.

³³² S 8(1)(d) of the 2003 GCC.

³³³ S 8(2) of the 2003 GCC.

³³⁴ Case number FOC 4838/07-08/WC/2.

away and Mrs Leighton submitted a claim. The claim was rejected on the basis that the deceased had a pre-existing thyroid condition that caused his death.³³⁵ The complainant, Mr Michael Le Roux, in his capacity as executor of the Estate of Ivan Nigel Grant Leighton claimed the loss suffered by the estate due to the respondent's failure to properly execute its duties to provide financial services. Specifically, the complainant averred that Ms Redelinghuys had led the deceased to believe that after settling the amount owed to Wesbank, the surplus would be paid out to his estate.³³⁶ Furthermore, the complainant alleged that Ms Redelinghuys had not disclosed the exclusion clauses to the deceased.³³⁷ The Ombud concluded that Ms Redelinghuys herself was not aware of the exclusion clauses in the policy. Consequently, the Ombud found that the respondent failed to adhere to section 7(1)(a) of the 2003 GCC (disclosing material terms and exclusions) and section 2 of the 2003 GCC (rendering services with due care). In addition thereto, the Ombud found that the respondent failed to adhere to (3) Section 8 (1)(a) and (b) of the 2003 GCC (obtain information regarding the client's financial situation), and (4) Section 9 of the 2003 GCC (maintain a record of advice). Accordingly, the Ombud upheld the complaint and ordered the payment of the amount of loss sustained by the estate.

4.2.3 Evaluation of FAIS Ombud determinations

It appears that the FAIS Ombud is successful in executing that part of its mandate pertaining to resolving complaints expeditiously, when one considers that 81.76% of all complaints received by the FAIS Ombud during the 2019/2020 financial year were resolved within three months and 91.18% within six months.³³⁸

During the 2019/2020 financial year the FAIS Ombud received 8835 new complaints,³³⁹ of which 3745 were dismissed.³⁴⁰ The Ombud will dismiss a complaint if it finds that the complaint does not have a fair chance of success or that the respondent has made a fair settlement offer.³⁴¹ These dismissed complaints therefore indicate that the Ombud found that the respondents did not contravene the FAIS Act or that the respondent made a reasonable settlement offer which could

³³⁵ Par 7.

³³⁶ Par 16.

³³⁷ Par 14.

³³⁸ FAIS Ombud Annual Report: 2019/2020, available at [https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-\(fais-ombud\)-annual-report.pdf](https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-(fais-ombud)-annual-report.pdf) 9, accessed on 19 November 2021.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Office of the Ombud for Financial Services Providers Leaflet available at <https://www.faisombud.co.za/wp-content/uploads/files/publications/FAIS%20Info%20Leaflet.pdf>, accessed on 19 November 2021.

bring the matter to a fair conclusion.³⁴² 2467 of those complaints were channelled to different fora.³⁴³ The Ombud made provisional determinations or recommended settlements in favour of the complainants in the remaining 1290 cases.³⁴⁴

4.2.4 Conclusion

Seven of the eight cases discussed above dealt mainly with advice relating to life insurance.³⁴⁵ Six of those seven advice-related determinations dealt with the requirement that concise details of any special terms and exclusions be provided to the (prospective) policyholder in terms of sections 15(3)(j), 3(1)(a)(iii), 7(1)(a) and 8(1)(d)(ii) of the 2003 GCC.³⁴⁶ It therefore appears that the cases before the FAIS Ombud were satisfactorily dealt with by applying the regulations in the GCC. However, it is submitted that the one area in which it appeared that current legislation did not provide sufficient clarity is in the *CE du Plessis / SA Home Loans (Pty) Ltd*³⁴⁷, case where it was in dispute as to whether an appropriate explanation of the material terms should be given to both joint life insureds in terms of section 7(1)(a) of the 2003 GCC. The promulgation of COFI will also not provide clarity on this matter in life insurance.

4.3 The Ombudsman for Long-term Insurance

4.3.1 Statutory framework

The Ombudsman for Long-term Insurance (the Ombudsman) operates officially as a financial ombud scheme in terms of the Financial Services Ombud Schemes Act.³⁴⁸ The Ombudsman's mission is to "receive and consider complaints against subscribing members" free of charge and to bring such complaints to resolution through mediation, conciliation or recommendation.³⁴⁹ As a last resort, the Ombudsman may give a determination (also called a ruling). These rulings are legally binding on subscribing insurers, but not on complainants.³⁵⁰ 97% of registered long-term insurers are subscribing members who are subject to the Ombudsman's jurisdiction and are bound by its determinations.³⁵¹ Any policyholder, premium payer, insured life, beneficiary, cessionary or an executor who has a complaint against a subscribing insurer may lodge a complaint with the

³⁴² *Ibid.*

³⁴³ FAIS Ombud Annual Report: 2019/2020, available at [https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-\(fais-ombud\)-annual-report.pdf](https://nationalgovernment.co.za/entity_annual/2128/2020-office-of-the-ombud-for-financial-services-providers-(fais-ombud)-annual-report.pdf) 9, accessed on 19 November 2021.

³⁴⁴ *Ibid.*

³⁴⁵ Annexure A.

³⁴⁶ Annexure A.

³⁴⁷ Case number FOC 2079/07-08/LP (2).

³⁴⁸ The Financial Services Ombud Schemes Act 37 of 2004.

³⁴⁹ The Ombudsman for Long-term Insurance: Rules – English, available at <https://www.ombud.co.za/about-us/rules/rules-english>, accessed on 19 November 2019.

³⁵⁰ The Ombudsman for Long-term Insurance: English Brochure, available at <https://www.ombud.co.za/publications/brochures>, accessed on 19 November 2019.

³⁵¹ *Ibid.*

Ombudsman.³⁵² In hearing complaints, the Ombudsman must adhere to the Rules of the Ombudsman for Long-term Insurance.³⁵³ Those rules govern the interactions between the Ombudsman, each subscribing member of the long-term insurance industry and complainants.³⁵⁴ The Ombudsman should endeavour to act independently and objectively, adhere to informal and cost-effective procedures and implement considerations of equity in all its undertakings.³⁵⁵

4.3.2 The Ombudsman for Long-term Insurance's determinations

4.3.2.1 Introduction

The Ombudsman for Long-term Insurance has published a total of 23 final determinations since 2016 on its website, of which thirteen are relevant to this dissertation and will be discussed below. In seven of these determinations, the Ombudsman had to interpret the law. In the remaining six cases, the Ombudsman had to interpret the contractual terms of the relevant policy of the case and apply it to the facts at hand. Therefore, these cases did not deal with a question of interpreting the law, which could possibly require regulation via legislation.

It should be noted that, in publishing its determinations on its website, the Ombudsman identifies each determination via a case number as well as a short description of the issue in the determination.³⁵⁶ This is different from the FAIS Ombud determinations above, as these cases are not reported in the style of precedents. The names of the complainants also do not appear in these determinations.

4.3.2.2 Cases where the Ombudsman had to interpret the law

a) *Case 35 - In duplum (2019)*³⁵⁷

In this final determination the Ombudsman had to decide whether the *in duplum* rule was applicable. The complainant took a loan against one of his policies in 1999. His loan debt of R5 319,00 grew to a policy debt of R55 487,00. Prior to the promulgation of the LTIA on 1 January 1999, the Insurance Act 37 of 1943 provided that insurance companies were exempted from complying with the common law *in duplum* rule regarding the accumulation of interest on policy debt.

On the one hand the following statements or referrals from the Ombudsman appear to indicate that the *in duplum* rule is a rule of general application to insurance companies regarding the charging of

³⁵² *Ibid.*

³⁵³ The Ombudsman for Long-term Insurance: Rules – English, available at <https://www.ombud.co.za/about-us/rules/rules-english>, accessed on 19 November 2019.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ <https://www.ombud.co.za/publications/final-determinations>, accessed on 19 November 2021.

³⁵⁷ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 35.*

interest on policy debt which arose after 1 January 1999 and that would not require explicit regulation in legislation. The Ombudsman stated as follows:

- the *in duplum* rule “applies with at least equal force in today’s modern world of finance ...”;³⁵⁸
- it “was applicable to any debt which arises out of a loan or advance granted after 1 January 1999”;³⁵⁹
- the applicability and application of the *in duplum* rule “was accepted and supported by the FSCA”;³⁶⁰ and
- the rule “was accepted and applied by other members of the industry.”³⁶¹

Furthermore, the Ombudsman confirmed that it was the Legislature’s intention that the exclusion of the *in duplum* rule be omitted from insurance legislation.³⁶² But, then on the other hand, after applying the *in duplum* rule to the present case, the Ombudsman noted that:

“This final determination does not decide any principle of general application. It relates only to the complaint under consideration. We carefully considered the matter and came to the unanimous conclusion that, on the facts of this matter, fairness demands that the protection of the *in duplum* rule should be extended to the complainant.”³⁶³

Furthermore, it appears that the *in duplum* rule’s application is so contentious that Momentum refused to accept the Ombudsman’s provisional ruling regarding such an insignificant amount. Thereafter, Momentum sought a legal opinion from Dr Monica Vessio to clarify the *in duplum* rule’s application. But alas, the issue had still not been resolved and numerous legal minds had to submit to this final interpretation of the application of the *in duplum* rule in this determination from the Ombudsman. Accordingly, it is submitted that it appears that the *in duplum* rule is, in fact, an issue which should rather be explicitly regulated by insurance legislation.

b) *Case 46 - Exclusion – evidence – insurer insists that the policyholder must provide documents (2020)*³⁶⁴

In casu, the complainant bought a life policy as underwritten by Santam Structured Life (SSL). The life insured passed away and the complainant claimed in terms of the policy. The claim was rejected due to the fact that the deceased died as a result of a pre-existing medical condition which had not been disclosed to the insurer. The complainant alleged that SSL’s agent did not discuss the

³⁵⁸ Par 16.5.

³⁵⁹ Par 12.

³⁶⁰ Par 12.

³⁶¹ Par 12.

³⁶² Par 16.4.

³⁶³ Par 16.12.

³⁶⁴ *Ombudsman for Long-term Insurance: Final Determination 2020: Case 46.*

exclusion clause with her during the pre-contractual phase. SSL acknowledged that the business plan for these types of policies entailed that the policies were sold by representatives who used a pro-forma text to provide information to prospective policyholders, but that the business plan did not include the provision of advice to prospective policyholders. It is submitted that it is astonishing that SSL had the audacity to admit that it “was of the view that the onus is on the policyholders to familiarise themselves with the provisions and in doing so, be aware of the relevant exclusion.”³⁶⁵ The Ombudsman found that the contract was void as “there had not been a meeting of the minds at application stage and as such no consensus regarding the terms of the policy, had been reached.”³⁶⁶ The Ombudsman indicated its disapproval of SSL’s manner of doing upgrade calls by noting that “the call had been conducted in an underhand manner”³⁶⁷ and that “the policyholder did not appear to understand that an additional premium was to be paid.”³⁶⁸

c) *Case 31 - Poor service in claims handling (2018)*³⁶⁹

Alexander Forbes incorrectly terminated the complainant’s disability income benefit, whereafter the complainant lodged a complaint with the Ombudsman. Although Alexander Forbes then reinstated her income disability benefit, the complainant maintained that the insurer had handled the complaint poorly throughout the process. In a final determination the Ombudsman for Long-term Insurance awarded compensation to the complainant for the inconvenience and distress that she suffered as a result of Alexander Forbes’ poor service in handling the claim and complaint. The Ombudsman noted its disapproval by stating that the insurer increased the complainant’s hardships “at a time when the complainant was already struggling because of her medical condition ...”³⁷⁰ The Ombudsman commented that “The fact that Alexander Forbes still denies any wrongdoing and has not apologised reflects a worrying lack of customer care and a need for more insight on their part of how their conduct impacts on a claimant’s experience.”³⁷¹

d) *Case 45 - Compensation for poor service (2020)*³⁷²

Here, the complainant maintained that the insurer had handled her claim for income disability after two mastectomies and treatment for breast cancer in an unprofessional manner. The Ombudsman for Long-term Insurance ruled that Liberty pay R15 000 compensation to the complainant for, amongst others, not ensuring that the policyholder did not face “unreasonable post-sale barriers to

³⁶⁵ Par 10.

³⁶⁶ Par 15.

³⁶⁷ Par 14.

³⁶⁸ Par 14.

³⁶⁹ *Ombudsman for Long-term Insurance: Final Determination 2018: Case 31.*

³⁷⁰ Par 5.

³⁷¹ Par 6.

³⁷² *Ombudsman for Long-term Insurance: Final Determination 2020: Case 45.*

change or replace a policy, submit a claim or make a complaint.”³⁷³ The Ombudsman noted its disapproval in the following sentence: “The lack of reason by Liberty for its non-adherence to the provisional determination is further evidence of the perfunctory handling of this complaint.”³⁷⁴ It is submitted that it is surprising that Liberty had the audacity to ignore the Ombudsman’s provisional determination.

e) *Case 26 - Compensation Award (2017)*³⁷⁵

In this instance, the insurer only paid the majority of the claim two and a half years after the submission of the claim. The Ombudsman awarded compensation to the complainant for the material inconvenience and distress that the complainant suffered as a result of the insurer’s maladministration of the claim. The Ombudsman noted that “our office had seldom seen such a poor level of service.”³⁷⁶

f) *Case 42 - Accidental Cover Fairness (2019)*³⁷⁷

In this case, the complainant bought a disability cover policy that was marketed by AllLife telephonically to persons who were HIV positive. During such a telephonic sale to the complainant, the AllLife agent advised the complainant that if he did not complete the medical underwriting process, the policy will be limited to accidental cover only. Thereafter the complainant was hospitalised for cancer and submitted a disability claim. The insurer rejected the claim due to the fact that the complainant had not done the medical underwriting process. The Ombudsman ruled that, “in terms of fairness, the payment of a premium for full cover, when the actual cover provided is that of accidental cover only, could not be justified and as such, the difference .. was to be refunded to the complainant.”³⁷⁸

It is submitted that due to the fact that fairness has been incorporated explicitly into the 2018 PPRs, one would expect an insurer to maintain a reasonable level of fairness with its policyholders on its own accord, without the intervention of an ombud. It is surprising that AllLife/Centriq objected to the Ombudsman’s proposal, reasoning that the policy stated that in the event that the underwriting was not completed, no pricing adjustment would be done.

³⁷³ Par 6.3.

³⁷⁴ Par 6.1.

³⁷⁵ *Ombudsman for Long-term Insurance: Final Determination 2017: Case 26.*

³⁷⁶ Par 15.

³⁷⁷ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 42.*

³⁷⁸ Par 25.

g) *Case 25 - Late Submission - Equity Jurisdiction (2016)*³⁷⁹

In this case, the complainant was employed as a machine operator who had been diagnosed with 'severe peripheral neuropathy'. He ceased his normal occupation as a result thereof in July 2012, but was only advised in December 2012 by his occupational health doctor to claim medical disability benefits. He only submitted his claim six months after the prescribed period in the policy and Liberty Life accordingly rejected the claim. The Ombudsman found that on grounds of equity and after taking into account the "explanation for the delay and the degree of lateness",³⁸⁰ the late submission of the claim should "in this instance be condoned and Liberty Life should be required to assess the claim accordingly."³⁸¹

4.3.2. Cases where the Ombudsman had to interpret the law

a) *Case 30 – Dread Disease Claim (2018)*³⁸²

In this case the Ombudsman had to interpret the provisions of the group risk policy for dread disease policy and decide whether the "current insurer" could decline the complainant's claim due to the fact that stage IV breast cancer claim had already been paid out by the "previous" insurer.

b) *Case 41 - Duplicate Policies (2019)*³⁸³

In this case the complainant and her late husband had similar policies covering the same debt. Complainant accordingly required that both policies be paid out. The Ombudsman could not find any indication in the communication between the parties that holding similar policies covering the same debt might be problematic. The Ombudsman noted that the client solely relied on the advice of Nedgroup, that Nedgroup should have picked up that the couple owned duplicate policies and noted that Nedgroup must "stop making excuses as it was easy to collect the premiums let it be easy as well to settle both claims."³⁸⁴

c) *Case 44 - Income disability benefits – frequency of medical reviews (2020)*³⁸⁵

In this case Sanlam approved income protector disability benefits for 6 months based on medical reports done in October 2019, but they required up-to-date reports again in February 2020. Although the policyholder suffered from an incurable and worsening neuropathy, Sanlam was of the opinion that the policyholder had not reached her maximum medical improvement (MMI) and had not removed the possibility of her returning to work. Sanlam believed a review of the complainant's claim

³⁷⁹ *Ombudsman for Long-term Insurance: Final Determination 2016: Case 25.*

³⁸⁰ Par 9.

³⁸¹ *Ibid.*

³⁸² *Ombudsman for Long-term Insurance: Final Determination 2018: Case 30.*

³⁸³ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 41.*

³⁸⁴ Par 17.

³⁸⁵ *Ombudsman for Long-term Insurance: Final Determination 2020: Case 44.*

every six months was reasonable due to the fact that they had a contractual right to verify the validity of the complainant's claim on a regular basis. The Ombudsman found that Sanlam's right must be exercised reasonably and that requesting medical reports more frequently than annually would in all likelihood impede the complainant's recovery and have an impact on her medical state.

d) *Case 40 - Disability (2019)*³⁸⁶

The Ombudsman had to decide whether the insured, a supervisor of manual municipal workers, was, on the facts of the case at hand, entitled to disability benefits in terms of the disability policy with Sanlam. It should be noted that the insurer's decision to reject the claim appears to be manifestly unfair. The Ombudsman found that it was unreasonable to expect the insured to return to his previous occupation due to the fact that he "needs to respond to the inclination to urinate as soon as possible"³⁸⁷, that "it is unlikely that public toilets are that readily available"³⁸⁸ in that rural municipal area where the complainant worked, the complainant was 60 years old, only had a grade 12 and a certificate in waste management, had not worked since 2014 and his occupation was mostly physical. The Ombudsman also concluded that it would be unreasonable to expect him to find another reasonable occupation.

e) *Case 32 - Disability - temporary benefit (2018)*³⁸⁹

The Ombudsman had to interpret and apply the definition of "disability" and the six-month waiting period to the facts of the case at hand.

f) *Case 47 - Claim declined due to pre-existing condition (2020)*³⁹⁰

The Ombudsman had to interpret the ambit of the exclusion clause in a hospital cash plan policy. According to the policy AIG was not liable if the complainant was hospitalised as a result of, or as a direct result of diabetes.

4.3.3 Evaluation of the determinations of the Ombudsman for Long-term Insurance.

Of those seven determinations discussed above that deal with a question of law, two were equity determinations,³⁹¹ three dealt with compensation awards for poor service and, in one case, there

³⁸⁶ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 40.*

³⁸⁷ Par 2.1.

³⁸⁸ *Ibid.*

³⁸⁹ *Ombudsman for Long-term Insurance: Final Determination 2018: Case 32.*

³⁹⁰ *Ombudsman for Long-term Insurance: Final Determination 2020: Case 47.*

³⁹¹ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 42 (Accidental Cover Fairness) and Ombudsman for Long-term Insurance: Final Determination 2016: Case 25 (Late Submission - Equity Jurisdiction).*

had not been any consensus due to the insurer using a “no-advice” business model.³⁹² Only Case 35 - *In duplum* (2019)³⁹³ regarding the *in duplum* rule remains troublesome.

4.3.4 Conclusion

It appears that the cases in front of the Ombudsman for Long-term Insurance were satisfactorily dealt with by applying current legislation and common law principles. However, it is submitted that the one area in which it appeared that current legislation did not provide sufficient clarity is in Case 35³⁹⁴ where the applicability of the *in duplum* rule was the subject of a protracted dispute. It is submitted that this is an issue which should rather be explicitly regulated by insurance regulation and that the promulgation of COFI will not clarify this issue in life insurance.

4.4 The FSCA Enforcement Committee

4.4.1 Statutory framework

The FSCA was established by the FSR Act and is the market conduct regulator of all financial institutions that are licensed in terms of a financial sector law.³⁹⁵ This would include insurance companies that provide insurance products to customers.³⁹⁶ The objective of the FSCA is to:

“(a) enhance and support the efficiency and integrity of financial markets; and (b) protect financial customers by - promoting fair treatment of financial customers by financial institutions ...”³⁹⁷

In order to achieve its objective, the FSCA must “regulate and supervise, in accordance with financial sector laws, the conduct of financial institutions...”³⁹⁸ The FSCA’s mission is “to ensure a fair and stable financial market, where consumers are informed and protected, and where those that jeopardize the financial well-being of consumers are held accountable.”³⁹⁹

Therefore, for insurance-related complaints, the FSCA’s Enforcement Committee assists clients with legislative related complaints dealing with the manner in which the insurers conduct themselves.⁴⁰⁰

³⁹² *Ombudsman for Long-term Insurance: Final Determination 2020: Case 46 (Exclusion – evidence – insurer insists that the policyholder must provide documents).*

³⁹³ *Ombudsman for Long-term Insurance: Final Determination 2019: Case 35 (In duplum).*

³⁹⁴ *Ibid.*

³⁹⁵ Complaints, Enquiries & Questions, available at <https://www.fsca.co.za/Customers/Pages/Complaints-and-Questions.aspx>, accessed on 19 November 2021.

³⁹⁶ *Ibid.*

³⁹⁷ S 57 of the FSRA.

³⁹⁸ S 58 of the FSRA.

³⁹⁹ About us, available at <https://www.fsca.co.za/Pages/Vision-and-Mission.aspx>, accessed on 19 November 2021

⁴⁰⁰ Complaints, Enquiries & Questions, available at <https://www.fsca.co.za/Customers/Pages/Complaints-and-Questions.aspx>, accessed on 19 November 2021.

Insurance claim disputes and contractual disagreements, however, fall outside the jurisdiction of the Enforcement Committee and have to be attended to by the Ombudsman for Long-term Insurance or the FAIS Ombud.⁴⁰¹

4.4.2 FSCA's enforcement actions

4.4.2.1 General

The FSCA publishes its enforcement actions on its website.⁴⁰² In order to hold financial institutions who jeopardize the financial well-being of customers accountable, it imposes administrative penalties.⁴⁰³ The FSCA's administrative penalties can be enormous. In the most recent investment-related case of the *FSCA / Viceroy Research Partnership, Aiden Lau, Fraser John Perring, Gabriel Bernarde*⁴⁰⁴ the FSCA imposed an administrative penalty of fifty million Rand on the respondents for having contravened the Financial Markets Act⁴⁰⁵ in that the respondents published false and deceptive statements in respect of Capitec Bank Holdings Limited. In a funeral policy case, the FSCA imposed an administrative penalty of R17 730 465 on Vesticento CC⁴⁰⁶ for contravening, amongst others, the general duty of an FSP in terms of section 2 of the GCC and not making adequate representations in terms of section 3(1) of the GCC. The licence of Vesticento CC was also withdrawn.

The seven enforcement actions below are relevant to this dissertation and will now be discussed.

a) *FSCA / Lombard Life Limited*⁴⁰⁷

Lombard Life repudiated 114 insurance claims during a 13-month period. 86 of those notices of repudiation of claims did not adhere to rule 16(1)(ii) of the 2004 PPRs (the insurer must inform the policyholder of their right to make representations to the insurer in respect of the repudiated claim), and rule 16(1)(iii) of the 2004 PPRs (the insurer must inform the policyholder of their right to lodge a complaint at the relevant ombud). The FSCA noted that the aggravating circumstances included that the insurer's non-compliance continued for a prolonged period of 13 months and that the insurer's non-compliance "failed to demonstrate sound insurance principles and practice in the interest of the policyholders."⁴⁰⁸ The FSCA awarded a R150 000 administrative penalty.

⁴⁰¹ *Ibid.*

⁴⁰² <https://www.fsc.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>.

⁴⁰³ Millard D 'The Impact of the Twin Peaks Model on the Insurance Industry' 2016 (19) Potchefstroom Electronic Law Journal 27.

⁴⁰⁴ 2021-08-30.

⁴⁰⁵ The Financial Markets Act 19 of 2012.

⁴⁰⁶ *FSCA / Vesticento CC t/a Mutual Direct Group Funeral Benefits* (FSP No. 45161) 2021-03-16.

⁴⁰⁷ 2017-02-17.

⁴⁰⁸ Par 5.1.3.

b) *FSCA / The Smart Insurance Company Limited*⁴⁰⁹

In this case the insurer also failed to provide the required notices in terms of rule 16(1)(ii) and (iii) of the 2004 PPRs to 61 of its policyholders whose claims had been rejected.

c) *FSCA / Afrikan Financial Services (Pty) Ltd*⁴¹⁰

In this case, the two directors of Afrikan Financial Services (Pty) Ltd (the respondent), Mr Nola and Ms Khuzwayo were the sole shareholders of the respondent. They also managed the respondent's daily operations. The respondent was licenced as an FSP, but not registered as a long or short term insurer. The FSCA found that the respondent contravened, amongst others:

- Section 7 of FAIS in that it went beyond its licence by offering the public investment opportunities which promised a 15% return on capital;⁴¹¹
- Section 7(1) of the LTIA in that it sold various insurance products to the public without the necessary licence;⁴¹²
- Section 13(3) of FAIS in that it failed to maintain the representative register for its 69 employees,⁴¹³ and
- Section 2 of the GCC in that it failed to render services honestly and in the interests of clients.⁴¹⁴

The respondent's licence to act as FSP was revoked, an administrative penalty of R2 528 501.81 was awarded, Mr Nola and Ms Khuzwayo were debarred for a ten-year period and forbidden to provide financial services again.

d) *FSCA / Assupol Life Limited*⁴¹⁵

Assupol Life Limited (Assupol), a registered long-term insurer, provided consideration to some of its independent intermediaries in the form of sharing in the underwriting profits. The FSCA found that Assupol breached s 49 of the LTIA which states that an insurer is prohibited from remunerating an independent intermediary in any form other than commission. Furthermore, the FSCA found that the insurer repudiated several claims without providing the required notices to the policyholders in terms of rule 16(1)(iii) of the 2004 PPRs (the insurer must inform the policyholder of their right to lodge a complaint at the relevant ombud) and rule 16(1)(c)(v) of the 2004 PPRs (the insurer must inform the policyholder of the time limitation for the institution of legal action or the prescription period). The FSCA found that the fact that Assupol "failed to exercise proper oversight over its outsourced

⁴⁰⁹ 2017-06-15.

⁴¹⁰ 2019-11-22.

⁴¹¹ Par 6.

⁴¹² Par 7.

⁴¹³ Par 8.

⁴¹⁴ Par 10.

⁴¹⁵ 2017-04-13.

function for a period of four years”⁴¹⁶ and that Assupol’s failure to give proper notices to policyholders “had the potential of causing prejudice to the policyholders whose claims were rejected”⁴¹⁷ were aggravating circumstances. The FSCA awarded a R500 000 administrative penalty.

e) *FSCA / African Unity Life Limited*⁴¹⁸

The FSCA imposed an administrative penalty on African Unity Life on 2 December 2016 for its failure to adhere to the prescribed format of notices in terms of rules 16.1(c)(ii), (iii) and (v) of the 2004 PPRs.⁴¹⁹

f) *FSCA / African Unity Life Limited*⁴²⁰

In this second FSCA case against African Unity Life dated 28 May 2021, the FSCA found that African Unity Life breached, amongst others, rule 16.1(a) and (b) of the 2004 PPRS in that it failed to “accept, reject or dispute a claim ... within a reasonable period”⁴²¹ and thereafter inform the policyholder within ten days of its decision. The FSCA imposed an administrative penalty of R300 000 on African Unity Life.

g) *FSCA / 3Sixty Life Limited*⁴²²

In this case the FSCA imposed an administrative penalty of R110 000 on the insurer for breaching, amongst others, rule 16(1)(iii) of the 2004 PPRs.

4.4.3 Evaluation of FSCA’s enforcement actions

The Enforcement Committee published the determinations of 88 of the cases it had heard since 2016 on its website. Only eight of these determinations are relevant to this dissertation. This illustrates that the GCC is effective in enforcing the rules where the life insurers are the errant parties.

4.4.4 Conclusion

It appears that the cases heard by the FSCA were satisfactorily dealt with by the current market conduct regulations.

⁴¹⁶ Par 11.1.1.

⁴¹⁷ Par 11.1.2.

⁴¹⁸ 2016-12-02.

⁴¹⁹ Par 1.

⁴²⁰ 2021-05-28.

⁴²¹ Rule 16.1(a) of the 2004 PPRs.

⁴²² 2020-05-20.

4.5 The Financial Services Tribunal

4.5.1 Statutory framework

The Financial Services Tribunal was established in terms of section 219 of the FSR Act as an independent and impartial tribunal of record.⁴²³ The main function of the Tribunal, in the life insurance context, is to review determinations made by one of the specified decision-makers, on application by an aggrieved party.⁴²⁴ The specified decision-makers are the FSCA, an FSP (regarding decisions to debar representatives), the FAIS Ombud and the Ombudsman for Long-term Insurance.⁴²⁵ The Tribunal's orders have the effect of civil judgments and may be enforced as if they were granted by a court.

4.5.2 Decisions that are relevant to this dissertation and conclusion

The 60 most recent decisions as published on the Financial Services Tribunal's website were perused, but none were found to be relevant to this dissertation.

4.6 Court cases

Millard discusses the most relevant and interesting insurance law cases in Juta's Quarterly Review of South African Insurance Law (JQR). The 39 most recent cases that were discussed in the JQR (from the 2017(1) to the 2021(1) publications) were perused to ascertain which of them dealt with life insurance cases. The majority of cases discussed in the JQR deal with short term or funeral insurance cases. Only three of those 39 cases are relevant to this dissertation and are discussed below.

a) *Basson v Hollard Life Assurance Company Limited*⁴²⁶

In this case, the insurer rejected the applicant's claim on the grounds of the insured's misrepresentation and non-disclosure of facts relating to his health at the point-of-sale phase. The court based its decision on section 59 of the LTIA. The court concluded that:

“the insured failed to disclose, or disclosed information which he warranted to be true and correct, which was not true and correct and in circumstances where the representations and non-disclosures were likely to have materially affected the assessment of the risk by the defendant under the policy.”⁴²⁷

⁴²³ S 219 of the FSRA.

⁴²⁴ S 218 of the FSRA.

⁴²⁵ *Ibid.*

⁴²⁶ [2018] 4 All SA 77 (GJ).

⁴²⁷ Par 89.

Section 59 of the LTIA was subsequently repealed and replaced by rule 21 of the current version of the PPRs (which came into effect on 1 January 2019). Millard agreed that the court was correct in applying section 59 as it was “the law that applied at the time that this policy was entered into”.⁴²⁸ Millard submitted that the judgement would not have differed if the court applied rule 21 instead.⁴²⁹

It is important to note, as Millard pointed out, that section 59 was in fact a codification of the common law position.⁴³⁰ It is submitted that had the court not specifically referred to section 59, it would have appeared that the court based its judgement upon applying the common law principles regarding misrepresentation. One can therefore conclude that this matter was appropriately dealt with by utilising common law principles, which were, in this instance mirrored in the current market conduct regulations.

b) *Flemming v MMI Group*⁴³¹

In this case, the policyholder sought a declaratory order that his policies contained tacit terms requiring the insurer to disclose to the policyholder, amongst others, how the increase in premiums were calculated. The court found that although the policy made provision for the insurer’s right to increase the premiums, such a discretion was not an unfettered discretion. The court accordingly ordered that certain facts and information regarding the calculation of the new premiums be disclosed to the policyholder. This case was heard prior to when the 2018 PPRs were made effective. Rule 11.6.4 of the PPRs now require that an insurer must provide a policyholder with “appropriate details of the reasons for any change to the premium payable under a policy.”⁴³² It is submitted that due to the fact that this potential issue has been regulated by the PPRs, the potential for ambiguity and confusion is now minimised.

c) *Naidoo v Discovery Limited*⁴³³

In this case the deceased, without the knowledge of the appellant, requested that the appellant be removed as beneficiary and nominated other beneficiaries. The court found that where spouses are married in community of property, a risk-only life insurance policy constituted an asset in the joint estate and that the amendment of the beneficiary by the policyholder amounted to an alienation in terms of section 15(2)(c) of the Matrimonial Property Act. Millard suggested that, as a general rule, neither endowment policies nor risk-only life insurance policies should form part of the joint estate

⁴²⁸ JQR 2019(1) Par 2.1.3 (the last sentence of the discussion, after footnote 28).

⁴²⁹ *Ibid.*

⁴³⁰ JQR 2019(1) Par 2.1.3 (after footnote 24).

⁴³¹ [2017] ZAGPPHC 650 (2 October 2017).

⁴³² Rule 11.6.4 of the PPRs.

⁴³³ [2018] ZASCA 88 (31 May 2018).

of spouses married in community of property.⁴³⁴ She further submitted that the PPRs should be amended to clarify the rights and duties of policyholders and their beneficiaries who are married in community of property.⁴³⁵ It is submitted that this is another insurance law issue that is not dealt with in FAIS, the GCC, the PPRs or COFI and for which regulation is needed to provide clarity.

4.7 Conclusion

It is submitted that the cases as selected for discussion in the JQRs indicate the specific conflicts in insurance law on which the parties did not have consensus as to what law should be applied and/or how it should be applied in the specific case. The majority of these issues stem from common law principles and while fairness is not disputed or adjudicated on *per se*, the courts are empowered to adjudicate on any issue and disputes in life insurance and could be resolved by applying the law, which includes statutory provisions and common law. It could be argued that if only three out of 39 insurance law cases during the last five years dealt with life insurance, then the life insurance sector is significantly better regulated in comparison to the other product sectors in insurance.

Furthermore, of those three cases, two deal with issues which are now regulated by the PPRs.⁴³⁶ However, regarding the *Naidoo v Discovery*⁴³⁷ case: it is submitted that the regulation of the rights and duties of life insurance policyholders and beneficiaries who are married in community of property, is one of the life insurance law issues that are not dealt with in FAIS, the GCC, the PPRs or COFI and on which regulation should provide the requisite clarity.

In her discussion about the *Flemming v MMI Group*⁴³⁸ case, Millard noted that “The relief granted somehow does not demonstrate a sound legal principle (or argument).”⁴³⁹ It is submitted that even when cases appear before learned judges, the judgements do not always provide clear precedents that illuminate the equitable rights and obligations of parties. It is therefore proposed that the most efficient manner of eliminating confusion and minimising unnecessary disputes regarding the rights and obligations of parties is to regulate the issues that cause such disputes.

Chapter five provides a conclusion and answer to the research question.

⁴³⁴ JQR 2018(2) Par 2.1.3 (the fifth paragraph).

⁴³⁵ JQR 2018(2) Par 2.1.3 (the fourth paragraph).

⁴³⁶ A typical *Basson v Hollard Life Assurance Company Limited* dispute should be prevented by utilising rule 21 of the PPRs and a typical *Flemming v MMI Group* issue should be regulated by rule 11.6.4 of the PPRs.

⁴³⁷ [2018] ZASCA 88.

⁴³⁸ [2017] ZAGPPHC 650.

⁴³⁹ JQR 2017(4) Par 2.1.4 (the sixth paragraph).

4.8 Evaluation

This chapter proposes that if the bigger picture of dispute resolution in insurance is investigated, life insurance disputes (with the exception of funeral insurance) are, by far, in the minority. Furthermore, it proposes that each issue could be resolved successfully by either employing the FAIS Act and the GCC, the PPRs or common law.

CHAPTER 5

CONCLUSION AND ANSWER TO THE RESEARCH QUESTION

5.1 Pre-COFI success

5.1.1 Pre-COFI success regarding the provision of advice

As noted before, in assessing the principles pertaining to agency and representation as found in our common law of contract and delict, Millard submitted that the common law has proven its worth as a source of law that regulates by using principles.⁴⁴⁰ As was noted in the previous chapter, FAIS has also been successful in regulating the provision of advice and in that respect one would agree with Millard who postulated that “it is in fact doubted whether a higher standard is needed.”

Furthermore, it is submitted that the PPRs already brought about the required shift in responsibility towards the insurer to ensure that customers are given appropriate advice by emphasizing the duty of the insurer to treat the policyholders fairly.⁴⁴² It therefore appears that the provision of appropriate advice has been successfully regulated by the common law, FAIS, the GCC and the PPRs. Therefore, COFI would not bring about any practical change in the manner in which a life insurer should regulate its compliance regarding the provision of advice.

Therefore, although COFI can be commended for dealing with all phases of the product life cycle (and not just the advice phase) and dealing with the inequality of the parties’ unbalanced negotiation stances,⁴⁴³ this is primarily a reform for the other financial sectors as the insurance sector’s PPRs have already dealt with fairness throughout the product life cycle.

5.1.2 Pre-COFI success regarding the responsibility of the insurer throughout the product life cycle

The PPRs have already attended to ensuring that the insurer has the duty to act fairly towards the (prospective) policyholder throughout the product life cycle by e.g., requiring that an insurer:

⁴⁴⁰ Millard D 'Of agency, representation, and insurance advice: One step forward or two steps back?' in J Barnard et al (eds) *De Serie Legenda – Developments in Commercial Law, Volume II Law of Specific Contracts and Banking Law* (2019) 132.

⁴⁴¹ Millard D 'Fair play? The Conduct of Financial Institutions Bill and the new face of the financial services industry' in S du Toit and C Hugo *Annual Banking Law Update 2019: Recent Legal Developments of Special Interest to Banks* (2019) 143.

⁴⁴² Millard D 'Of agency, representation, and insurance advice: One step forward or two steps back?' in J Barnard et al (eds) *De Serie Legenda – Developments in Commercial Law, Volume II Law of Specific Contracts and Banking Law* (2019) 131.

⁴⁴³ Millard D 'Fair play? The Conduct of Financial Institutions Bill and the new face of the financial services industry' in S du Toit and C Hugo *Annual Banking Law Update 2019: Recent Legal Developments of Special Interest to Banks* (2019) 104.

- must take the fair treatment of the customer into account during the development of a product;⁴⁴⁴
- may only cancel a policy or repudiate a claim in the event of a material misrepresentation or non-disclosure;⁴⁴⁵
- must review a product's performance on an ongoing basis to ensure fair outcomes to policyholders;⁴⁴⁶
- must give the policyholder a period of grace in the event of the non-payment of a premium;⁴⁴⁷
- must give written notice of its intention to terminate an individual policy,⁴⁴⁸ and
- must ensure that fair claims management processes are implemented.⁴⁴⁹

5.2 A comparison between the current market conduct rules and COFI

5.2.1 Market conduct issues dealt with exclusively by the PPRs

It is crucial that the following sections in the PPRs be retained after the promulgation of COFI as these aspects are only regulated by the PPRs (neither the GCC nor COFI deal with these aspects), namely product and service design, point-of-sale (specifically misrepresentation), data management framework, non-payment of premiums, and claims management.

5.2.2 Market conduct issues which are best dealt with by the PPRs

The PPRs deal with the following issues in the most detail, namely: marketing (factually correct, balanced and not misleading), disclosure after point-of-sale, on-going disclosures, record keeping, and termination of a policy. The GCC and COFI are similar in their approach, but less detailed than the PPRs.

5.2.3 Market conduct issues not dealt with by COFI

The following topics are not dealt with in COFI, namely marketing (which should be in the public interest), disclosures and waivers at point-of-sale and signing of uncompleted documents at point-of-sale and complaints management (COFI only briefly deals with complaints management).

⁴⁴⁴ Rule 2.2 of the PPRs.

⁴⁴⁵ Rule 21.1 of the PPRs.

⁴⁴⁶ Rule 14.1(a) of the PPRs.

⁴⁴⁷ Rule 15.1 of the PPRs.

⁴⁴⁸ Rule 20.2.1 of the PPRs.

⁴⁴⁹ Rule 17 of the PPRs.

5.2.4 Market conduct issues where there is an overlap of regulation in the GCC, the PPRs and COFI

There is an overlap of regulation in the GCC, the PPRs and COFI regarding the following topics, namely advice, where disclosures must be made in plain language, must be factually correct, adequate and timeous (the GCC and PPRs, however, deal with this aspect in more detail than COFI), and the stipulation that advice must be appropriate and suitable.

5.2.5 Market conduct issues which are not dealt with by the GCC

Whilst the GCC does not deal with the ongoing review of the product's performance, the regulations in COFI and the PPRs overlap.

5.2.6 Conclusion

In conclusion, the promulgation of COFI will not bring about any change regarding any of the market conduct related topics discussed in this dissertation in the life insurance industry.

5.3 Decisions by judicial fora

5.3.1 Life insurance industry not the main culprits

Millard noted that the FAIS Ombud resolved complaints in a fair and expeditious manner⁴⁵⁰ where unlicensed FSP's had deceived customers.⁴⁵¹ Millard submitted that in these cases the FAIS Ombud provided a distinct benefit by sparing the complainants from attempting to claim their losses via the costly and tedious court system.⁴⁵² Millard is of the opinion that if one considers the number of complaints lodged at the FAIS Ombud in comparison to the number of daily interactions with financial services providers, there is no evident need for more legislation.⁴⁵³

If one considers that only a small percentage of all these financial services sector cases that were heard by these fora deal with life insurance cases, one could make the argument that life insurance companies are not the main culprits of unfair treatment towards financial customers.

⁴⁵⁰ Millard D 'The Impact of the Twin Peaks Model on the Insurance Industry' 2016 (19) Potchefstroom Electronic Law Journal 20.

⁴⁵¹ Millard D 'The Impact of the Twin Peaks Model on the Insurance Industry' 2016 (19) Potchefstroom Electronic Law Journal 20.

⁴⁵² *Ibid.*

⁴⁵³ Millard D 'CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry' 2018 (81) THRHR 378.

5.4 Recommendations

“Complex legal reforms” often give rise to duplications and “overlaps” which, in turn, cause a sense of bewilderment.⁴⁵⁴ Even prior to the publishing of the COFI Bill, Millard noted that there is an “overlap between 2018 PPRs, the GCC and the law of agency which affects those activities that constitute advice, the actual sale and after-sale service and this is indeed confusing.”⁴⁵⁵ It is submitted that this dissertation proves existence of the complexity that results from an overlap of market conduct regulation in life insurance.

Treasury intends that COFI will supersede the market conduct regulations contained in most of the “existing financial sector laws.”⁴⁵⁶ It is presently not certain which of the existing financial sector laws regulating life insurance will be repealed. It has been suggested that the duplications and “overlaps” will be consolidated and straightened out when the GCC is superseded with the promulgation of COFI.⁴⁵⁷ It is possible that Treasury could solve the duplication and “overlaps” by “consolidating” all market conduct regulation in the final COFI Act and by repealing the PPRs “together with the enabling legislation (the LTIA and the STIA).”⁴⁵⁸

The purpose of the dissertation was to establish whether the replacement of FAIS (and the GCC) and/or the PPRs by the COFI Act will have a marked or significant impact on market conduct regulation in the life insurance industry. After a thorough investigation, it is submitted that the repeal of FAIS would leave a significant void in the regulation regarding the provision of appropriate / suitable advice. It would be of even greater concern if the PPRs were to be repealed in totality as they contain many insurance-specific regulations which are not dealt with in COFI, and also because they are set out in exquisite detail in the PPRs.

Thus, although the promulgation of COFI *per se* will not bring about any change regarding any of the market conduct related topics discussed in this dissertation in the life insurance industry, the repeal of FAIS (and the GCC) and/or the PPRs would leave many significant vacuums.

It is submitted that the PPRs should be retained in a later version of the PPRs, after the parts that are similar to those in COFI have been removed. Hopefully, a more consolidated market conduct framework would enhance effective compliance by insurers and intermediaries and result in better

⁴⁵⁴ *Idem* 390.

⁴⁵⁵ *Idem* 391.

⁴⁵⁶ National Treasury Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill available at <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf> 20, accessed on 19 November 2021.

⁴⁵⁷ Millard D ‘CoFI and T(CF): Further along the road to Twin Peaks and a fair insurance industry’ 2018 (81) THRHR 391.

⁴⁵⁸ *Idem* 390.

outcomes for policyholders. In the final instance, it is hoped that the COFI Bill would be streamlined to ensure that there are no overlaps between it and the existing rules in life insurance. At the same time, it is hoped that persistent issues will be resolved by promulgating product-specific rules in legislation such as the Insurance Act and the PPRs.

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Electronic annexures to dissertation

Annexure A:

AnnexA_JudicialForumsFSCA.FAISOmbud.LTOmbud.FinServTrib.Courts2022.02.26.

Annexure B: AnnexB_JudicialForums.FAISOmbud2022.02.26.

Annexure C: AnnexC_JudicialForums.OmbudsmanLTI2022.02.26.

Annexure D: AnnexD_JudicialForumsFSCA.EnforcementActions2020.02.26.

Annexure E: AnnexE_JudicialForums.FinancialServTribunal2022.02.26.

Annexure F: AnnexF_JudicialForumsCasesJQRAll2022.02.26.