

Title: A critical analysis of the South African consumer protection regulatory architecture in the retail banking sector with a focus on fair customer outcomes in the context of its developing economy

By Alexandria Motshwanetsi Mathole

PVL6700W

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law

UNIVERSITY OF CAPE TOWN

Date of Submission: 13 June 2025

Supervisor: Professor Tjakie Naudé

Department: Private Law

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

COPYRIGHT

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be used or published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I, Alexandria Motshwanetsi Mathole, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University of Cape Town to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

Signature:

Signed by candidate

.....Date:

ACKNOWLEDGEMENTS

I am grateful for the amazing support, love, patience, and care from my family during this journey. Acknowledgement and special appreciation to my daughters and business partners at Justings Advisory (Banthata and Reabetswe) for their amazing dedication, love, faith and resolve to carry the weight of the business as I focused on the research, to my husband Jerry and son Lehlogonolo for believing in me and for the motivating words. Ba ga-Mathole ke ya leboga.

I am truly grateful for the invaluable guidance by my Supervisor Prof. Tjatie Naudé who saw the potential, asked the deep probing questions, and challenged me to dig deeper. Thank you also to my friends for the support.

Indeed, can see further because I have stood on the shoulders of giants – Isaac Newton

I praise and thank the Lord Most High for His Abiding Presence, His Grace, and Guiding Hand.

DEDICATION

‘But let justice roll on like a river, righteousness like a never-failing stream!’ Amos 5:24 (NIV)

In service to humanity towards a more just, fair and equitable society that is enabled by responsible, responsive and sustainable business practices

In honour of the loving memories of great women - Sophie Madja and Blossom Madja and a special dedication to my mother Thati Banthata Chuene – morwedi wa ga Madja for her unwavering confidence in my ability to achieve this.

To my children and our future generations – It is possible!

ABSTRACT

Fair market conduct in a banker-customer relationship is crucial to maintaining trust and confidence in the financial system. Therefore, adopting appropriate fairness control mechanisms in conduct regulation for retail banking is vital, considering the complex and long-lasting nature of financial transactions and associated legal risks. A holistic systems thinking approach analysing the interconnectedness of the regulatory framework, supervisory architecture and fairness control mechanisms will enhance delivery of fair customer outcomes.

In a Twin Peaks model with multiple regulators having overlapping mandates that influence retail consumer protection, entrenching effective supervisor cooperation, coordination, and accountability measures requires that information-sharing and coordination processes and ways of working be built into the operating procedures and measurement frameworks of regulatory agencies. Formal coordination structures must be supplemented with effective information sharing on an 'unsolicited basis', especially at an operational level. Clarity is key on how power is exercised, rights are defined and protected, and how various interests are represented and balanced. The structure, capabilities and capacity of the conduct regulator must be strengthened.

A systematic assessment must be conducted of the consumer protections under the COFI Bill and the Conduct Standard against the fundamental consumer rights afforded under the CPA. To guide financial institutions and customers alike, COFI as the primary conduct legislation must establish an overarching regime prohibiting unfair terms. A principles-based regulatory approach should be complemented by risk-based and proportional rules, which should include an indicative, non-exhaustive grey list of terms that may be considered unfair. A simplified and understandable composite criterion must be introduced to determine fairness of conduct, practices or outcomes (not just contractual terms).

Given financial literacy deficiencies and vulnerability of a large part of the retail customer base in South Africa, an overriding duty of good faith should serve as an anchoring principle of the principles-based approach.

KAKARETŠO

Maitshwaro a mabotse magareng ga ditirelo tša pankka le modiriši a bohlokwa kudu gore go be le tshepo le boitshepo tshepedišong ya ditšhelete. Ka fao, go bohlokwa gore go be le mekgwa ya maleba yeo e lokilego, go laola maitshwaro a dipanka mabapi le badiriši. Gomme go lebeletšwe ditlhotlo tšeo di ba go gona, go tirišano ya ditšhelete ya go amana le mathata ao a ka hlolwago ke molao. Go swanetše gore go be le mokgwa wa go sekaseka ka botlalo melao ye e beilwego ya go laola tshepetšo ye botse ya maleba, ya go hlokomela le go laola gore go be le dipoelo tša go kgotsfatša tša badiriši.

Mmotlolo wa *Twin Peaks* o laetša balaodi ba go fapafapana ba go ba le ditaolo tša go swana tše di huetšago tšhireletšo ya badiriši. O hloka go maatlafatša tirišano ye botse ya bolaodi, maikarabelo le magato ao a dirago gore go be le poledišano ye botse ya go abelana tshedimošo, le gore go be le mekgwa ya go šoma le ditshepetšo tšeo di laolwago ke ditheo tša taolo. Ditheo tša taolo, tšeo di le go molaong di swanetše go abelana tshedimošo ya maleba ka mehla, kudu maemong ao mošomo o dirwago tšatši ka tšatši. Se bohlokwa ke gore go swanetše go bonagale gabotse gore go laola mang, ditokelo di šireletšwe le go hlalošwa, le gore dikgahlego tša go fapafapana di fiwe šedi ka go lekana. Molaodi wa boitshwaro o swanetše go ba le methopo, maatla le bokgoni bja go dira mošomo gabotse.

Ditšhireletšo tša badiriši tšeo di laolwago ke Molaokakanywa wa COFI le Maemo a Boitshwaro di swanetšwe go lekolwa kgahlanong le ditokelo tša motheo tša badiriši tša go laolwa ke CPA. Go hlahla dihlongwa tša ditšhelete le badiriši ka go swana, COFI bjalo ka molao wa motheo wa boitshwaro, e swanetše go hlama melao ya taolo yeo e thibelago maitshwaro a go se loke. Mokgwa wa taolo o swanetše go thekgwa ke melawana ya go laola kgonagalo ya kotsi le tekatekano, yeo e akaretšago melao ya go hlahla yeo e bontšhago melawana yeo e sa lokago. Go swanetše go ba le tsela ya go hlopha yeo e beekantšwego ebile e kwešišegago gabonolo go bontšha maitshwaro a go loka, ditlwaelo goba dipoelo (e sego fela dikontraka le mabaka).

Ka ge badiriši ba bantši ba hloka tsebo, thuto le bohlole bja tšhomišo ye botse ka ga ditšhelete mo Afrika Borwa, seo se hlokegago ke toka, botshephegi le nnete, gore e be tšona motheo wa melawana ya taolo.

ABBREVIATIONS AND ACRONYMS

ACL	Australian Consumer Law
AFCA	The Australian Financial Complaints Authority
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulatory Authority
ASIC	Australian Securities and Investment Commission
BASA	Banking Association South Africa
BIS	Bank of International Settlements
BN	Board Notice
CAG	Council of Australian Governments
CCA	Competition and Consumer Act of 2010
CCA 1974	Consumer Credit Act 1974
CMA	Competition and Markets Authority
COBS	Conduct of Business Source Book
COFI	Conduct of Financial Institutions Bill
CPA	Consumer Protection Act 68 of 2008
CRA	Consumer Rights Act 2015
DMCCA	Digital Markets, Competition and Consumer Act 2024
FAIS	Financial Advisory and Intermediary Services Act 37 of 2002
FCA	Financial Conduct Authority
FIC	Financial Intelligence Centre
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSMA	Financial Services and Markets Act 2000
FSRA	Financial Sector Regulation Act No. 9 of 2017
GDP	Gross Domestic Product
GFC	Global Financial Crisis
G20	Group of Twenty
IMF	International Monetary Fund
MoU	Memorandum of Understanding
NCA	National Credit Act 34 of 2005
NCR	National Credit Regulator
NPS	National Payment System
NPSA	National Payment System Act
OECD	Organization for Economic Cooperation and Development
PA	Prudential Authority
POPIA	Protection Of Personal Information Act 4 of 2013
PPI	Payment Protection Insurance
PRA	Prudential Regulation Authority
SARB	South African Reserve Bank
SCA	Supreme Court of Appeal
TCF	Treating Customers Fairly
UK	United Kingdom
UN	United Nations
UTCCR	Unfair Terms in Consumer Contracts Regulations

Table of Contents

CHAPTER 1: INTRODUCTION AND OVERVIEW.....	1
1.1 BACKGROUND AND RESEARCH QUESTION	1
1.2 RESEARCH HYPOTHESES	5
1.3 RESEARCH METHODOLOGY AND STRUCTURE	6
1.4 KEY TERMS	8
CHAPTER 2: HISTORICAL AND CURRENT CONTEXT FOR RETAIL FINANCIAL CONSUMER PROTECTION.....	11
2.1 INTRODUCTION.....	11
2.2 THE GLOBAL REGULATORY CONTEXT	11
2.2.1 Global financial crisis and subsequent international conduct failures.....	11
2.2.2 Responses by international standard setting bodies and foreign law makers.....	15
2.3 SOUTH AFRICA’S BACKGROUND TO REGULATORY REFORM	17
2.3.1 Synopsis of the financial services sector and retail consumer activity	17
2.3.2 Context for South Africa’s regulatory reform	19
2.3.3 Response by South African policy and law makers to misconduct	20
2.4 THE RETAIL BANKING DIAGNOSTIC REPORT – A CASE STUDY ILLUSTRATING EXISTING RETAIL CONSUMER PROTECTION GAPS IN SOUTH AFRICA.....	23
2.4.1 Retail Banking Diagnostic Report focus on unfair fees and changes to fees charged.....	23
2.4.2 Observations and recommendations from the Retail Banking Diagnostic Report.....	27
2.5 SUMMARY	29
CHAPTER 3: OVERARCHING REGULATORY FRAMEWORK AND OVERSIGHT MANDATES IN SOUTH AFRICA	31
3.1 THE TWIN PEAKS REGULATORY MODEL AND PROMOTION OF FAIR CUSTOMER OUTCOMES IN BANKS.....	31
3.1.1 The FSRA as the overarching Twin Peaks supervisory framework	33
3.1.2 The role of the South Africa Reserve Bank (SARB)	33
3.1.3 The role of the PA.....	36
3.1.4 The role of the FSCA.....	37
3.1.5 Multidimensional interconnected peaks	40
3.1.6 ‘First mover’ responsibility where misconduct has a prudential flavour	42
3.2 THE FSCA AND APPROACH TO CONCURRENCE WITH THE PA	43
3.3 RISK OF OVERLAPPING MANDATES IN OVERSIGHT RESPONSIBILITIES OF THE FSCA AND THE NCR REGARDING THE PROVISION OF CREDIT	45
3.4 MANAGING OPERATIONAL COMPLEXITY DURING THE TRANSITIONAL PERIOD OF THE REGULATORY REFORM JOURNEY.....	56
3.4.1. Transitional operational complexity related to FAIS	57
3.5 CONCLUSION.....	61
CHAPTER 4: LESSONS FROM THE CONSUMER PROTECTION ACT ON THE APPROACH TO FAIRNESS AND CERTAIN OTHER CONSUMER RIGHTS	64
4.1 INTRODUCTION.....	64
4.2 DOES THE CPA APPLY TO FINANCIAL PRODUCTS AND FINANCIAL SERVICES?.....	65
4.3 THE COFI BILL’S FAIRNESS CONTROLS COMPARED WITH CONSUMER RIGHTS UNDER CHAPTER 2 OF THE CPA.....	68
4.3.1 Realisation of consumer rights.....	69
4.3.2 Right to equality and not to be unfairly discriminated against.....	70
4.3.3 Right to privacy	70
4.3.4 Right to choose the supplier, goods and services	71
4.3.5 Right to disclosure and information.....	72

4.3.6	Right to fair and responsible marketing.....	73
4.3.7	Right to fair and honest dealing.....	74
4.3.8	Right to fair just and reasonable terms and conditions.....	76
4.3.9	Right to fair value, good quality and safety.....	79
4.3.10	Right to accountability of suppliers to customers.....	80
4.3.11	Right to be heard and obtain redress.....	81
4.4	FAIRNESS CONTROL MECHANISMS UNDER THE CONDUCT STANDARD COMPARED WITH FAIRNESS CONTROLS UNDER THE CPA.....	83
4.4.1	Incorporation Controls in the Conduct Standard and CPA.....	84
4.4.2	Content Controls.....	92
4.4.3	Conduct Controls.....	102
4.4.4	Interpretation Controls under the CPA and Conduct Standard.....	110
4.5	CONCLUSION.....	112

CHAPTER 5: CONSIDERATION OF CASE LAW AND ACADEMIC WRITING WHICH IS BROADLY RELEVANT TO NOTIONS OF FAIRNESS..... 115

5.1	INTRODUCTION.....	115
5.2	THE RISK OF SUBJECTIVE DETERMINATION OF FAIRNESS WITHIN A PRINCIPLE-BASED AND OUTCOMES FOCUSED REGULATORY APPROACH.....	115
5.3	APPLICATION OF THE CONCEPT OF FAIRNESS IN CASE LAW.....	117
5.3.1	Exercise of discretion by financial institutions in determining fairness.....	118
5.3.2	Exercise of judicial control in determining what is fair.....	119
5.3.3	Considerations of public policy and good faith under the common law of contract.....	120
5.3.4	Lessons from the determination of fairness in insurance and retirement contracts.....	125
5.3.5	Legislative incorporation of the values of fairness and good faith as free standing principles.....	127
5.4	PROPOSED ASSESSMENT CRITERIA TO DETERMINE FAIRNESS OF CONDUCT AND OUTCOMES.....	128
5.5	CONCLUSION.....	130

CHAPTER 6: TREATING RETAIL FINANCIAL CUSTOMERS FAIRLY UNDER THE UK REGULATORY FRAMEWORK..... 132

6.1	INTRODUCTION.....	132
6.2	OVERARCHING REGULATORY FRAMEWORK IN THE UK FOR FAIR TREATMENT OF RETAIL FINANCIAL CUSTOMERS.....	132
6.2.1	Financial consumer protection and the Financial Services and Markets Act, 2000.....	132
6.2.2	Financial consumer protection and the Consumer Rights Act 2015.....	135
6.2.3	Comparison of the UK and South African supervisory and regulatory oversight structure.....	137
6.3	UK COMMON LAW AND PRINCIPLES OF FAIRNESS.....	145
6.4	SPECIFIC LEGISLATIVE PROVISIONS DEALING WITH UNFAIR CONTRACT TERMS AND NOTICES.....	147
6.4.1	Contrary to good faith.....	150
6.4.2	Relationship between good faith and transparency.....	152
6.4.3	Relationship between good faith and fair dealing.....	155
6.4.4	Significant imbalance in the rights and obligations of the parties.....	156
6.4.5	Consumer detriment.....	159
6.4.6	Indicative and non-exhaustive list of unfair terms.....	160
6.4.7	Interpretation of unfair contract terms.....	162
6.4.8	Consequences of unfair contract terms.....	162
6.4.9	The doctrine of unconscionability.....	163
6.5	THE FCA'S APPROACH TO TREATING CUSTOMER'S FAIRLY (TCF) PRINCIPLES.....	165
6.5.1	FCA's Principles for Businesses.....	165
6.5.2	TCF Outcomes.....	167
6.5.3	Is TCF as a doctrine of equity capable of giving rise to a cause of action on its own?.....	170
6.5.4	Regulatory lessons from previous lapses in proper regulation and supervision.....	172
6.6	A NEW CONSUMER DUTY.....	174

6.7	CONCLUSION.....	177
CHAPTER 7: TREATING RETAIL FINANCIAL CUSTOMERS FAIRLY UNDER THE AUSTRALIAN REGULATORY FRAMEWORK 180		
7.1	INTRODUCTION.....	180
7.2	LAWS AND REGULATIONS IN AUSTRALIA FOR THE PROTECTION OF RETAIL FINANCIAL CUSTOMERS 181	
7.2.1	The role of the twin peaks model of supervision in promoting fair treatment of customers.....	181
7.2.2	Relevant retail consumer protection laws and obligation to ‘trading fairly’.....	188
7.2.3	Applicability of the Australian Consumer Law and ASIC Act to financial products and financial services.....	193
7.3	FAIRNES CONTROL MECHANISMS UNDER AUSTRALIAN LAW	197
7.3.1	Control of unfair terms.....	197
7.3.2	Terms excluded from assessment for fairness.....	202
7.3.3	The doctrine of unconscionability.....	203
7.3.4	Role of good faith in the determination of unconscionable conduct	207
7.3.5	Proposal to introduce concept of ‘unfair trading’	209
7.4	APPLICABILITY OF THE TCF PRINCIPLES IN AUSTRALIA	210
7.5	CONCLUSION.....	213
CHAPTER 8: SUMMARY OF EVALUATION, RECOMMENDATIONS AND CONCLUSION 217		
8.1	INTRODUCTION.....	217
8.2	ADOPTING SYSTEMS THINKING TO REGULATION, SUPERVISION, OVERSIGHT, MANAGEMENT, MONITORING, AND APPLICATION OF TCF	217
8.3	COMPARISON OF THE UK, AUSTRALIAN, AND SOUTH AFRICAN REGULATORY AND SUPERVISORY OVERSIGHT STRUCTURE FOR RETAIL FINANCIAL CONSUMER PROTECTION	219
8.3.1	Multiple peaks, the risk of overlapping mandates and operational complexity.....	219
8.3.2	Challenges with cooperation and coordination mechanisms	222
8.3.3	Regulatory arbitrage and blind spots	224
8.3.4	‘First mover’ responsibility and coordination in instances of systemic risk	225
8.4	APPLICABILITY OF GENERAL CONSUMER PROTECTION LAWS AND REGULATIONS TO RETAIL FINANCIAL CONSUMERS	227
8.5	FAIRNESS CONTROL MECHANISMS.....	230
8.5.1	Incorporation controls	230
8.5.2	Content controls	233
8.5.3	Conduct controls.....	239
8.5.4	Interpretation controls.....	247
8.6	SUMMARY OF RECOMMENDATIONS.....	248
8.6.1	Enhance supervisor cooperation, coordination, and accountability measures	248
8.6.2	Strengthen capabilities and capacity of the FSCA to exercise effective oversight around TCF and retail financial consumer protection	249
8.6.3	Ensuring assessment of retail financial consumer protections against fundamental consumer protections available under the CPA.....	249
8.6.4	Definition of unfair terms and conduct.....	250
8.6.6	An objective criterion to determine the fairness of conduct or outcomes.....	253
8.6.7	Simplify the regulatory architecture and reduce ambiguity in the wording of COFI and the Conduct Standard.....	253
8.7	CONCLUDING REMARKS	254
BIBLIOGRAPHY..... 257		

CHAPTER 1: INTRODUCTION AND OVERVIEW

1.1 BACKGROUND AND RESEARCH QUESTION

The regulatory landscape for the financial sector both in South Africa and internationally has been characterised by on-going fundamental regulatory reform, which is influenced by economic, social, and political dynamics.¹ Globally, financial consumer protection is also evolving rapidly. Factors that impact the operating environment include the demand for more inclusive economies; rising consumer activism; a focus on customer centricity; the rise of class actions; exceptionally high levels of transparency in a highly connected digitised world where barriers to accessibility of information are lowered; digitalisation of product offerings and distribution channels; and an increase in competition.

In the South African context, the four large banks are experiencing competitive pressures from new challenger banks like Discovery Bank, Thyme Digital and Bank Zero.² New market entrants like fintech firms and other non-traditional market players are also putting pressure on traditional banks.³ Currency providers, retailers and telecommunication companies are all seeking a share of the market.⁴ Although the Banks Act⁵ limits non-banks such as fintech money mobile operators from taking deposits, and the National Payment Systems Act⁶ (NPSA) limits their access to the payment system, different models are now applied under section 52 of the Banks Act enabling these non-bank entities to be sponsored onto the platform by banks as National Payment

¹ The World Bank 'Global Financial Development Report 2019 / 2020: Bank Regulation and Supervision a Decade after the Global Financial Crisis' available at <http://www.worldbank.org/financialdevelopment>, accessed on 24 February 2022.

² Fintech Futures 'Challenger banks in South Africa: who's who and what's their tech' 31 July 2019 available at <https://www.fintechfutures.com/2019/07/challenger-banks-in-south-africa-whos-who-and-whats-their-tech/> accessed on 02 October 2024.

³ Deloitte '2018 Banking Outlook: Accelerating the transformation' available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-fsi-dcfs-2018-banking-outlook.pdf> accessed on 18 August 2019.

⁴ Jorge Camarate & Simon Brinckmann 'A marketplace without boundaries: The future of banking: A South African perspective' *PWC Strategy & 2017* at 4–9 available at <https://www.pwc.co.za/en/assets/pdf/strategyand-future-of-banking.pdf>, accessed on 18 August 2019.

⁵ Banks Act 94 of 1990 at s 11.

⁶ National Payment System Act 78 of 1998 (NPSA).

Systems (NPS) participants.⁷ Mobile money operators are also able to provide customers with services on the back of partnerships, and joint venture agreements or with agents of registered banks or in terms of outsourced service arrangements.⁸

As banks explore new product offerings, distribution channels and partnerships to extend market access and to respond to the competitive landscape, different types of customer risks emerge, particularly for customers who are not familiar or conversant with the risks associated with these novel channels and relationships.⁹ These changing dynamics require financial institutions, their boards and senior management to focus on Treating Customers Fairly (TCF) by placing ethics, culture, proper governance and fair customer outcomes at the heart of organisational strategy, product development, distribution, and customer interactions. In the future, sustainable banks will be those that are able to position fair customer outcomes as a competitive differentiator.¹⁰

The evolving regulatory landscape must also be understood within a context where banks have now assumed a ubiquitous role in society with respect to facilitation of commercial transactions because banking permeates all facets of economic activity. Therefore, TCF and fair market conduct practices in a banker–customer relationship are crucial to maintain trust and confidence in the financial system.¹¹ This is particularly important considering that financial transactions and their associated legal issues are often complex and long-lasting in nature and their

⁷ Luck Mavhuru *A comparative analysis of the regulations governing mobile money services in South Africa and Zimbabwe and their impact on sustainable financial inclusion of the poor and vulnerable people* (unpublished PhD thesis, University of Cape Town, 2022) at 81–82.

⁸ Sonja Kelly, Dennis Ferenzy & Allyse McGrath ‘How Financial Institutions and Fintechs Are Partnering for Inclusion: Lessons from the Frontlines’ Institute of International Finance July 2017 available at https://www.iif.com/portals/0/files/private/partnerships_report_0.pdf accessed 02 October 2024. See also Kabelo Khumalo ‘S&P: SA banks on par with developed markets fintech’ *Business Day* 24 January 2024 available at https://www.businesslive.co.za/bd/companies/financial-services/2024-01-24-sp-sa-banks-on-par-with-developed-markets-fintech/#google_vignette accessed 02 October 2024.

⁹ Kelly, Ferenzy & McGrath (note 8) at 5–6.

¹⁰ Group of Thirty (G30) ‘Banking conduct and culture: A permanent mindset change’ available at https://watson.brown.edu/rhodes/files/rhodes/imce/events/2019/G30_Culture2018.pdf, accessed on 18 August 2019.

¹¹ James O’Donovan ‘Lender liability for investment or financial advice’ (1999)11 *Corporate & Business Law Journal* 1 at 50. See also Avishkaar Ramdhin ‘The Bank – customer relationship’ in Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 116–118 on bank-customer relationship.

consequences are often delayed to an unforeseeable time in the future.¹² The United Nations (UN) Guidelines for Consumer Protection¹³ and a General Assembly resolution specifically acknowledge that consumer confidence and trust in a well-functioning financial services market is crucial to promote ‘financial stability, growth, efficiency and innovation over the long term ...’.¹⁴

Therefore, the research question, posed within the context of South Africa as a developing economy, is whether the South African consumer protection regulatory framework and supervisory architecture in the retail banking sector is adequate and appropriate to deliver fair customer outcomes for retail financial customers.¹⁵ The core research themes relate to the centrality of the regulatory framework and supervisory architecture in the delivery of fair customer outcomes, fairness control mechanisms to ensure fairness of contracts and conduct, and the role of an overriding duty of good faith to support a principles-based approach towards delivery of fair customer outcomes. For purposes of this thesis, retail financial customers refers to natural persons and does not include juristic entities which are protected under the Consumer Protection Act (CPA).¹⁶

The research also focuses on whether the fairness control mechanisms introduced are adequate and sufficient to ensure the effective protection of retail financial consumers and to promote certainty in commercial dealings. The thesis considers the TCF principles and the adequacy of fairness controls in the Conduct Standard for Banks¹⁷ (Conduct Standard) and the draft Conduct of Financial Institutions Bill¹⁸ (COFI) in this respect.

¹² Stephen Grenville ‘Banks misbehaving everywhere’ *Lowy Institute* 8 May 2018 available at <https://www.lowyinstitute.org/the-interpretor/banks-misbehaving-everywhere>, accessed on 18 August 2019. For instance, retail consumers may enter into a contract with a financial institution for transactional banking facilities but only fully appreciate the consequences of high penalty fees and other opaque charges when a trigger event occurs.

¹³ UN Conference on Trade and Development (UNCTAD) ‘United Nations Guidelines for Consumer Protection’ available at https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf, accessed 04 December 2024. See also Iris Benöhr ‘The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers’ (2020) 43 *Journal of Consumer Policy* 104 at 105–106.

¹⁴ UN General Assembly ‘Resolution adopted by the General Assembly on 22 December 2015 – 70/186 Consumer protection’ available at https://unctad.org/system/files/official-document/ares70d186_en.pdf, accessed 15 February 2022.

¹⁵ The terms customer and consumer are used interchangeably for purposes of this thesis.

¹⁶ Consumer Protection Act 68 of 2008 at ss 5(2)(b) and 6(1). See also s 1 of the Second Draft of Conduct of Financial Institutions Bill in GN 519 GG 43741 of 29 September 2020, referred to as COFI Bill or COFI.

¹⁷ Conduct Standard 3 of 2020 (Banks).

¹⁸ COFI Bill (n 16).

The study explores whether the current regulatory architecture can create opportunities for regulatory arbitrage,¹⁹ which is a practice where institutions exploit regulatory loopholes, structure their activities, and adjust their behaviours in such a manner as to skirt, evade or reduce the impact of regulation without the corresponding reduction in risk.²⁰ The thesis also analyses operational complexity during the regulatory reform journey and explores the unintended adverse consequences of the current regulatory architecture on the delivery of fair customer outcomes.

An evaluation is conducted of the sufficiency and level of complexity of the regulatory framework and supervisory architecture around retail financial consumer protection and fairness controls through a comparative analysis of the approaches in South Africa, the United Kingdom (UK) and Australia (as twin peaks jurisdictions). The UK was chosen for purposes of the comparative analysis because the South African TCF framework mirrors the UK's framework in many, but not all respects. Australia as the first country to adopt the Twin Peaks model of regulation was selected as the second jurisdiction for the comparative study. Therefore, both countries offer a prime opportunity to reflect on lessons learnt although it does not mean that South Africa ought to transplant their approaches without considering the unique context and dynamics of the country.²¹

The strengths, opportunities, weaknesses, and vulnerabilities across jurisdictions are evaluated, and recommendations are made to close identified gaps necessary to support adequate and effective retail financial consumer protection and the delivery of fair customer outcomes without unduly impeding or slowing down the pace of economic activity.

¹⁹ Organization for Economic Cooperation and Development (OECD) 'Financial consumer protection risk drivers: A framework for identification and mitigation in line with the High-Level Principles' available at [https://one.oecd.org/document/DAF/CMF/FCP/RD\(2017\)3/FINAL/en/pdf](https://one.oecd.org/document/DAF/CMF/FCP/RD(2017)3/FINAL/en/pdf), accessed 08 February 2022.

²⁰ Elizabeth Pollman 'Tech, Regulatory Arbitrage, and Limits' 2019 (20) *EBOR* 567 at 571.

²¹ Pierre Legrand 'Comparative legal studies and commitment to theory' (1995) 58 *Modern LR* 262; Pierre Legrand 'Against a European Civil Code' (1997) 60 *Modern LR* 44; Pierre Legrand 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Gunther Teubner 'Legal irritants: Good faith in British law or how unifying law ends up in new differences' (1998) 61 *Modern LR* 11 at 14.

1.2 RESEARCH HYPOTHESES

Considering the multifaceted context outlined above, it is clear that there is a compelling case for effective regulation of financial products and services to deliver fair customer outcomes. The key issue relates to the nature, manner, scale, and application of such regulation. The hypotheses of this research are that:

- a. A complex and uncertain regulatory landscape characterised by intense, intrusive, and judgement-based supervision will introduce opportunities for uncertainty and confusion amongst customers if there is ineffective coordination and cooperation between responsible authorities. This will hamper effective implementation of retail financial consumer protection measures and Treating Customers Fairly (TCF) principles in South Africa.
- b. In determining whether market conduct outcomes are fair, an objective test should be applied, as opposed to adopting a purely subjective determination of fairness.²² Failure to establish and apply an objective test and assessment criterion of fairness could introduce the risk of arbitrary and subjective decision making which may increase uncertainty for both financial institutions and customers.
- c. In a principles-based and outcomes-focused regulatory approach, principles play a primary role but should co-exist alongside risk-based rules to guide institutions in applying the principles.
- d. The lack of a common understanding or assessment criterion to determine fairness of customer treatment or outcomes will create more ambiguity and introduce more uncertainty and inconsistency in the treatment of products, solutions, financial institutions, and customers. The criterion adopted to assess fairness should factor in public policy considerations and a duty of good faith. Such an approach will enable a migration from a legalistic tick box approach to a principled assessment of the real underlying risk. A clear and consistent definition of good faith in financial sector legislation can also serve as a baseline standard to assess whether the fair treatment

²² Luanda Hawthorne ‘*Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA’ (2010) 43 *De Jure* 395 at 398.

of customers is central to the culture of financial institutions. Reducing uncertainty will contribute towards positive and proactive market conduct risk management.

- e. Whilst it is good practice to have specific legal provisions addressing financial consumer issues due to the nature and risks associated with financial products and services, the fundamental legal consumer protection mechanisms available to financial customers should not be less than those available to consumers in general. Consequently, regulatory instruments introduced to protect financial consumers must consider the fairness control mechanisms incorporated in the CPA and adapt these mechanisms to the context of financial products and services.

1.3 RESEARCH METHODOLOGY AND STRUCTURE

In order to comprehensibly address the research topic, this thesis applies both legal theory and pragmatism, considering both the letter and purpose of regulation as well as practical application of TCF considerations in financial service institutions, particularly retail banks. A qualitative documentary comparative legal analysis was conducted around implementation of consumer protection and TCF principles in the South African retail banking sector, using the UK and Australia as comparative case studies.

This thesis considers the system in which fair treatment of retail financial consumers is embedded and adopts a more holistic approach which considers the regulatory framework and supervisory architecture, together with fairness controls which operate in an interconnected manner to influence delivery of fair customer outcomes.

The research process was conducted through a desktop review and analysis of literature to critique the adequacy and appropriateness of the regulatory and supervisory framework to deliver fair customer outcomes. Widespread global market conduct failures have contributed to academic literature (including books, articles, journals, and some case law) on consumer protection and TCF in the retail banking sector. Notwithstanding this emerging body of literature internationally, there are still limited scholarly articles, journals, books, and case law in South Africa on this specific subject.

The structure of the thesis and key themes are organised in eight chapters indicated in the table below.

Chapter	Description
Chapter 1 – Introduction and Overview	Provides the background for the research question, the research proposition, and the research methodology and structure of the thesis.
Chapter 2 – Historical and current context for retail financial consumer protection	Outlines the global and local regulatory context that has influenced the need to enhance retail financial consumer protection.
Chapter 3 – Overarching Regulatory Framework and Oversight Mandates in South Africa	Covers the micro-operating environment of banks and retail financial consumers, the twin peaks regulatory model of supervision, the respective roles of financial sector regulators in relation to conduct risk and consumer protection, risk of overlapping mandates and managing operational complexities.
Chapter 4 – Lessons from the Consumer Protection Act on the approach to fairness and certain consumer rights	Analyses fairness control mechanisms under the CPA compared with fairness controls under the Conduct Standard for Banks and the COFI Bill, and remedies for unfair contract terms and conditions.
Chapter 5 – Consideration of case law and academic writing which is broadly relevant to notions of fairness	Analyses the meaning of fairness and the application of the concept in case law, covering the exercise of discretion in determining what is fair, considerations of good faith, public policy, and doctrine of unconscionability. An assessment criterion is proposed to determine the fairness of conduct and outcomes.
Chapter 6 – Treating retail financial customers fairly under the UK regulatory framework	Outlines the overarching regulatory framework and supervisory architecture in the UK for fair treatment of retail financial customers and compares it with the position in South Africa. Assesses and compares specific regulatory provisions dealing with unfair contract terms and notices.

Chapter 7 – Treating retail financial customers fairly under the Australian regulatory framework	Outlines the overarching regulatory architecture and framework in Australia for fair treatment of retail financial customers and compares it with the position in South Africa. Assesses and compares specific regulatory provisions dealing with unfair contract terms and notices.
Chapter 8 –Summary of evaluation, recommendations and conclusion	Evaluates strengths, shortcomings, threats and vulnerabilities in current retail consumer protection mechanisms across South Africa, the UK, and Australia. Evaluates opportunities to enhance retail consumer protection and makes targeted recommendations.

1.4 KEY TERMS

The following key terminology will be used often in the thesis and for the sake of convenience are briefly explained below:

- a. Fairness control in the context of this thesis refers to tools introduced in legislation to respond to unfair standard terms or individually negotiated terms.²³ Whilst the exact origins of the concept of fairness control is unclear, it can be traced to a long tradition in the German legal system and it was adopted in Europe through the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC in 1993.²⁴ A number of countries in Europe, Australasia, Latin America and Africa have also adopted a legislative system

²³ Tjatie Naudé ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ (2006) 17 *Stell LR* 361 at 361. See Marcus Moore ‘Controlling fairness in standard form contracts: What can courts do, and what should they do’ (2022) 55 *University of British Columbia Law Review* 447 at 556–557. See also Jacques Du Plessis ‘Fairness in the Law of Contract: Reflections of Beadica’ (2022) 12 *Constitutional Law Review* 197 where Du Plessis uses the terminology of fairness control – but not in relation to retail financial consumer protection– but more generally in relation to the common law of contract.

²⁴ Hans-W. Micklitz & Norbert Reich ‘The court and sleeping beauty: the revival of the Unfair Contract Terms Directive’ (2014) 51 *Common Market Law Review* 771 at 772 and 778. German Standard Contract Terms Act 1976. See also Ewoud H. Hondius ‘Unfair Contract Terms: New Control Systems’ (1978) 26 *American Journal of Comparative Law* 524 at 252–527.

of controls to regulate unfair contract terms.²⁵ Fairness control does not necessarily mean that the standard of ‘unfairness’ is the only means available to check terms but other standards such as the standards of public policy, good faith, reasonableness, or unconscionability can be used.²⁶

- b. Fairness control mechanisms refer to the types of steps introduced to control fairness of contracts, and these may include incorporation controls, interpretation controls and content controls.²⁷ This thesis proposes conduct controls as a fourth type of control.
- c. Incorporation control is the translation of the word ‘Einbeziehungskontrolle’ which is widely used in Germany to describe the rules in the German Civil Code²⁸ that set baseline prerequisites or requirements of terms to be incorporated into contracts.²⁹ It relates to requirements around form and includes disclosure and other formalities.
- d. Content control is derived from the word ‘Inhaltskontrolle’ from the German Civil Code³⁰ and refers to the test of fairness and reasonableness of the contents of contracts.
- e. Interpretation control refers to provisions in legislation that guide the interpretation of contracts to ensure fairness of contractual terms and conditions.³¹
- f. Conduct control is the fourth type of control proposed in the thesis and refers to the requirements around culture, organisational practices, behaviours, governance, oversight, and operational execution related to products and services. For purposes of this thesis, the principles and mechanisms related to the conduct, behaviour and practices of financial institutions (other than provisions dealing with contractual terms

²⁵ Geraint Howells et al *Consumer Protection in Asia* (2022) chapters 23–28. Marcus Moore ‘Controlling fairness in standard form contracts: What can courts do, and what should they do’ (2022) 55 *University of British Columbia Law Review* 447 at 556–557. See also Finmark Trust ‘Consumer protection in SADC’ February 2016 at 4–5 available at https://finmark.org.za/system/documents/files/000/000/476/original/ConsumerProtectionSADC_2016.pdf?1615197048, accessed 06 June 2025.

²⁶ See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 170 and 174.

²⁷ Naudé (n 23) at 346–365. See also Tjakie Naudé ‘The consumer’s right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective’ (2009) 126 *SALJ* 505 at 506.

²⁸ German Civil Code BGB Federal Law Gazette (*Bundesgesetzblatt*) 2909 of 2 January 2002 para 305 available at https://www.gesetze-im-internet.de/englisch_bgb/index.html, accessed 11 June 2025.

²⁹ Naudé (n 27) at 506. See also Stefan Grundmann ‘A modern standard contract terms law from reasonable assent to enhanced fairness control’ (2019) 15 *De Gruyter* 148 at 149.

³⁰ German Civil Code (n 28) section 307.

³¹ Naudé (n 27) at 506.

and conditions) are grouped together under conduct controls. The proposed assessment criterion to determine fairness of conduct is also considered as a conduct control.

- g. Good faith is a standard of behaviour that requires a party in a reciprocal relationship of trust to act honestly and not only consider their own interest, but to also consider the interests of the other contracting party.³² It dictates that a contracting party must not exploit vulnerabilities of the other party to the latter's detriment.³³ Good faith encapsulates ideas of justice, reasonableness and fairness³⁴ and underlies all contracts.³⁵
- h. The courts have judicial discretion to determine the fairness of contracts – although not as a free standing principle under common law³⁶ – and to strike down terms that are so unfair as to be considered contrary to public policy.³⁷ Legislation can also set out the criteria to determine the fairness of contracts and provide that terms that are unfair can be struck down by the court or tribunal and be rendered unenforceable.
- i. Twin Peaks refers to a regulatory model which is theoretically premised on the establishment of two peak regulators for the financial services sector. At a high level, its objective is to ensure that the safety and stability of the entire financial system is protected (prudential mandate) whilst simultaneously protecting consumers (consumer protection mandate).³⁸ The prudential regulator focuses on safety, soundness and stability whilst the market conduct regulator is intended to address market abuse, malpractice and financial consumer protection.

The above concepts will be discussed in greater detail in the relevant Chapters.

³² *Beadica 23 CC v Trustees for the time being of the Oregon Trust* 202 (5) SA 247 (CC) paras 193 and 194.

³³ *Ibid* paras 125–127.

³⁴ *Beadica* (n 32) para 176.

³⁵ *Botha v Rich NO* 2014 (4) SA 124 (CC) para 46.

³⁶ *Beadica* (n 32) para 80. Leo Boonzaier 'Contractual Fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 1 at 21–22.

³⁷ *Beadica* (n 32) paras 87 and 88.

³⁸ Gerda Van Niekerk & Corlia Van Heerden 'The importance of a legislative framework for co-operation and collaboration in the Twin Peaks model of financial regulation' (2020) 137 *SALJ* at 108 at 109.

CHAPTER 2: HISTORICAL AND CURRENT CONTEXT FOR RETAIL FINANCIAL CONSUMER PROTECTION

2.1 INTRODUCTION

This chapter sets out the global and local context and operating environment that have influenced the need for structural reforms to promote better retail financial consumer protection. Reflecting on the history offers valuable lessons on the relationship between the build-up of market conduct risk, inadequate or ineffective regulation, and inefficient supervisory frameworks.³⁹ Lessons learnt from previous market conduct failures present an opportunity to enhance the regulatory architecture and supervisory framework as well as fairness controls necessary to support the delivery of better outcomes for retail financial customers whilst allowing a climate of entrepreneurship.⁴⁰

2.2 THE GLOBAL REGULATORY CONTEXT

2.2.1 Global financial crisis and subsequent international conduct failures

The current institutional structure of international financial regulation was influenced to a large extent by the 2008 Global Financial Crisis ‘GFC’,⁴¹ which served as the catalyst to the fast pace of structural regulatory reform worldwide.⁴² The crisis started towards the latter part of 2007 when certain financial institutions, mainly in the United States, started experiencing consequential liquidity challenges due to the risky extension of loan books and subsequent re-securitisation of

³⁹ See Jon Danielsson, Marcela Valenzuela and Ilknur Zer ‘Learning from History: Volatility and Financial Crises’ 2018 (31) *The Review of Financial Studies* 2774 at 2794 and 2803. The article considered recent history to determine whether prolonged low volatility leads to excessive leverage which increases the risk of a financial crisis.

⁴⁰ See Sam Burdyl ‘On Startups and Regulatory Entrepreneurship’ *The Regulatory Review* 10 December 2023 available at <https://www.theregview.org/2023/12/10/sunday-spotlight-on-startups-and-regulatory-entrepreneurship/>, accessed 02 October 2024.

⁴¹ UN Office on Drugs and Crime ‘G20 Cannes Summit Communique 3–4 November 2011 para 12 – 16 available at https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Leaders-Communiqués/2011_G20_Leaderss_Communique_Cannes_Summit.pdf accessed 08 February 2022.

⁴² Department of Planning, Monitoring and Evaluation Republic of South Africa ‘Initial impact assessment template (Phase 1) on the Conduct of Financial Institutions Bill’ at 2, available at <http://www.treasury.gov.za/twinpeaks/SEIA%20COFI%20Bill.pdf>, accessed on 18 August 2019.

sub-prime mortgages.⁴³ Core underlying triggers for the GFC were high house prices and over-indebtedness arising from rapid growth in credit advancement to consumers who had limited employment and credit history and were particularly vulnerable to economic downturns.⁴⁴ These ‘ethically dubious practices’ ultimately harmed consumers and introduced systemic risk through the ‘originate-to-distribute’ model and associated opaque and complex financial instruments which saw under-capitalised banks requiring government bailouts when these loans defaulted.⁴⁵

Similarly, in the UK, personal debt levels were inordinately high, fuelled by growth in reckless lending practices and when the credit crunch hit, banks which raised funds through money markets instead of personal deposits found themselves unable to trade due to insufficient funds.⁴⁶ The regulatory model and traditional theories had failed, prompting the head of the Financial Conduct Authority (‘FCA’, previously referred to as the ‘FSA’) in the UK to state that

‘...standard orthodoxy was that...people make rational decisions when given sufficient information: that markets are self-correcting and...that if you oversee the distribution channels—the right products get to the right people. All three orthodoxies failed.’⁴⁷

It is reported that in addition to the massive destruction of wealth, subsequent bailout of financial institutions in the United States required an estimated US\$ 9.7 trillion of taxpayer funds whilst £1.2 trillion was absorbed in the UK.⁴⁸

Many reasons have been advanced as the root cause for the crisis, including misconduct, greed amongst bankers, excessive deregulation in the 1980s under the UK and United States neo-

⁴³ Erik Denters ‘Regulation and supervision of the global financial system - A proposal for institutional reform’ (2009) 1 *Amsterdam Law Forum* 63 at 63.

⁴⁴ Stijn Claessens et al ‘Lessons and Policy Implications from the Global Financial Crisis’ *International Monetary Fund* February 2010 available at <https://www.imf.org/external/pubs/ft/wp/2010/wp1044.pdf>, accessed 08 February 2022.

⁴⁵ David Knights & Darren McCabe ‘Masters of the universe: Demystifying leadership in the context of the 2008 global financial crisis’ (2015) 26 *British Journal of Management* 197 at 198. See also Claessens et al (n 44) at 7.

⁴⁶ Knights & McCabe (n 45) at 199.

⁴⁷ Lorna O’Mahony, Christian Twigg-Flesner & Folarin Akinbami ‘Conceptualizing the consumer of financial services: A new approach?’ (2015) 38 *Journal of Consumer Policy* 111 at 112.

⁴⁸ Knights & McCabe (n 45) at 199.

liberal political dispensations⁴⁹ and inadequate supervision and regulation.⁵⁰ Other key contributory factors were the power imbalances that enabled the transfer of risk to consumers, supply driven innovation and product design that resulted in complex products and ‘unprofessional judgement on product suitability’.⁵¹

Hot on the heels of the GFC was the pervasive mis-selling of mortgage Payment Protection Insurance (PPI),⁵² the manipulation of the London Interbank Offered Rate (Libor) scandal in 2012,⁵³ and subsequently the Wells Fargo bank account mis-selling practices reported during 2016 in the United States.⁵⁴ In Australia, Sir Kenneth Hayne was appointed in November 2017 to chair a Royal Commission to determine the nature and extent of misconduct in financial services in that jurisdiction and to assess amongst other things whether the culture, governance and remuneration structures in financial services entities were driving misconduct.⁵⁵ The final report published in February 2019 reported widespread misconduct. Root causes pointed, amongst others, to the role of perverse incentives and financial gains that drove wrong behaviours⁵⁶ and industry practices that promoted compromise and good enough outcomes instead of best interests of customers.⁵⁷ The report also flagged an indulgent regulatory approach that indicated reluctance to impose

⁴⁹ Ibid at 198.

⁵⁰ Ouarda Merrouche & Erlend Nier ‘What caused the global financial crisis - Evidence on the drivers of financial imbalances 1999-2007’ 10 *IMF Working Paper* 1 at 18, available at <https://www.imf.org/external/pubs/ft/wp/2010/wp10265.pdf>, accessed on 18 August 2019. See also Gerard Caprio, Asli Demirguc-Kunt & Edward Kane ‘The 2007 meltdown in structured securitization: Searching for lessons, not scapegoats’ 1 *World Bank* 125 at 127, available at <https://documents1.worldbank.org/curated/en/759851468327562018/pdf/767980JRN0WBRO00Box374387B00PUBLIC0.pdf>, accessed 17 October 2023.

⁵¹ Martin Melecky & Sue Rutledge ‘Financial Consumer Protection and the Global Financial Crisis’ *World Bank* 20 January 2011 at 7, available at <https://econpapers.repec.org/paper/pramprapa/28201.htm>, accessed on 12 October 2023.

⁵² Alan Wells ‘Mis-selling Payment Protection Insurance’ (2011) 32 *Business Law Review* 188 at 188.

⁵³ Roy J Girasa & Richard J Kraus ‘The LIBOR scandal: A need for revised national and international reforms and regulations’ (2014) 32 *North East Journal of Legal Studies* 89 at 89.

⁵⁴ Raymond J Elson & Patrice Ingram ‘Wells Fargo and the unauthorized customer accounts: A Case Study’ 2018 (2) *Global Journal of Business Pedagogy* 124 at 124. See also Francesco De Pascalis ‘Sales Culture and Misconduct in the Financial Services Industry: An Analysis of Cross-Selling Practices’ 2018 (39) *Business Law Review* 150 at 150–159.

⁵⁵ Australia Royal Commission *Misconduct in the Banking, Superannuation and Financial Services Industry* Final Report Volume 1 (2019) available at <https://www.royalcommission.gov.au/banking>, accessed 15 May 2023, commonly referred to as the Hayne Commission’.

⁵⁶ Hayne (n 55) at 68.

⁵⁷ Ibid at 74.

meaningful financial penalties and legal consequences but emphasised ‘negotiating outcomes rather than insisting upon public denunciation of and punishment for wrongdoing’.⁵⁸

A number of interventions (addressed in detail under section 2.2.2 below) were introduced by international standard setting bodies and several jurisdictions including the UK after the GFC to strengthen consumer protection in financial services due to increased exposure of retail financial consumers to financial risk.⁵⁹ However, subsequent high profile conduct failures referred to above,⁶⁰ point to underlying legacy risk and the enormous challenge to break the cycle of poor customer outcomes.⁶¹ At the same time, the failures have peaked academic interest in the topic.⁶² In assessing the root cause for the recurring cycle of product mis-selling, widespread customer detriment and complaints that have led to massive administrative sanctions and large-scale customer redress, Ferran noted that:⁶³

...A strategy that relies heavily on non-binding guidance is always up against the formidable obstacle that firms naturally focus on commercial interests rather than customer needs and the two do not necessarily coincide. Guidance has some value (and will still be used) but experience suggests that it needs to be reinforced.⁶⁴

These major global market conduct failures resulted in the questioning of the credibility of the banking and financial services regulatory architecture. It was argued that regulatory reform and effective financial consumer protection will yield better product and service transparency, efficiency in financial intermediation, empowered consumers that stimulate consumer-centric innovation that is demand-driven, and better service delivery and product design that delivers suitable products as well as deeper market penetration on the back of growing consumer awareness and trust.⁶⁵

⁵⁸ Ibid at 425.

⁵⁹ Claessens et al (n 44) at 29. See also Melecky & Rutledge (n 51) at 2.

⁶⁰ At (n 52); (n 53); (n 54) and (n 55).

⁶¹ Shakeel Ahmed, Kenbata Bangassa & Saeed Akbar ‘A study on trust restoration efforts in the UK retail banking industry’ 2020 (52) *The British Accounting Review* 1 at 1. See also Carmela D’Avino and Maria Tselika ‘Unveiling the drivers of banks’ misconduct: Sanctions, signals, and the extent of unethical behaviour’ 2024 (96) *International Review of Financial Analysis* 1 at 1. Mark Carney is quoted as saying ‘Repeated episodes of misconduct – such as the Libor and FX scandals – called into question the social licence that markets need to innovate and grow’.

⁶² See D’Avino & Tselika (n 61) at 13.

⁶³ Eilis Ferran ‘Regulatory lessons from the Payment Protection Insurance mis-selling scandal in the UK’ (2012) 13 *EBOR* 247.

⁶⁴ Ferran (n 63) at 259.

⁶⁵ Melecky & Rutledge (n 51) at 3.

2.2.2 Responses by international standard setting bodies and foreign law makers

In response to the GFC, the G20 at its November 2011 meeting in Cannes, acknowledged that integration of financial consumer protection into regulatory and supervisory frameworks is integral to financial stability.⁶⁶ The G20 further endorsed the voluntary and non-binding high-level principles on financial consumer protection formulated by the Financial Stability Board with the OECD.⁶⁷ The high level principles were intended to serve as global best practice for financial consumer protection and to guide member, and non-member governments and regulators across jurisdictions.⁶⁸

Although the revised high-level principles were subsequently revised in 2022,⁶⁹ and are said to be forward-looking and reflecting global best practice,⁷⁰ it remains to be seen whether these financial protection mechanisms are effective on the ground to deliver overall positive outcomes for financial customers. For instance, the COVID pandemic between 2020 – 2021 also revealed instances of exploitation of situational vulnerability brought on by the pandemic.⁷¹

⁶⁶ G20-G8 France ‘Cannes Summit Final Declaration – Building our common future: renewed collective action for the benefit of all’ *Group of 20* November 2011 at 7, available at https://g7g20-documents.org/fileadmin/G7G20_documents/2011/G20/France/Leaders/1%20Leaders%27%20Language/Cannes%20Summit%20Final%20Declaration%20-%20Building%20Our%20Common%20Future%2C%20Renewed%20Collective%20Action%20for%20the%20Benefit%20of%20All_04112011.pdf, accessed 08 February 2022.

⁶⁷ G20-G8 France 2011 (n 50). See also Gabriela I Ramos ‘The OECD in the G20: A natural partner in global governance’ (2011) 43 *The George Washington International Law Review* 325 at 338. Also incorporated in the Financial Stability Board ‘G20/OECD high-level principles on financial consumer protection’ available at https://www.fsb.org/2011/11/cos_111104a/, accessed 08 February 2022. See also OECD ‘Report on the implementation of the recommendation of the council on high-level principles on financial consumer protection’ available at [https://one.oecd.org/document/C\(2022\)7/en/pdf](https://one.oecd.org/document/C(2022)7/en/pdf), accessed 10 February 2022.

⁶⁸ South Africa is not a member of the OECD but is considered a key partner. See OECD ‘Partnerships in OECD Bodies’ available at <https://www.oecd.org/en/about/legal/partnerships-in-oecd-bodies.html#:~:text=Key%20Partners,Participant%20without%20prior%20Council%20approval> accessed 03 October 2024. Notwithstanding, the principles were endorsed by the G20 leaders at the Cannes Summit on 3-4 November 2011 and by the members of the Financial Stability Board, which have included the Principles in their Compendium of Standards (Recommendation 22). This makes South Africa, the UK and Australia adherents to the principles. See also World Bank ‘2017 Good Practices for Financial Consumer Protection’ 2017 available at <https://www.worldbank.org/en/topic/financialinclusion/brief/2017-good-practices-for-financial-consumer-protection>, accessed 10 February 2022. Furthermore, section 2(2) of COFI (2020) provides that in interpreting, applying or complying with the Act, the court, FSCA or any other person may consider international standards relating to the objectives of the Act.

⁶⁹ OECD Legal Instruments ‘Recommendation of the council on high level principles on financial consumer protection’ 2022 revision available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>, accessed 21 December 2023.

⁷⁰ OECD (n 69) at 5.

⁷¹ Richard Alderman et al ‘Consumer law and policy relating to change of circumstances due to the COVID-19 pandemic’ (2020) 43 *Journal of Consumer Policy* 437 at 442.

The report by the G20/OECD Task Force⁷² acknowledged that financial products and services have unique risk features which warrant the specific protection of consumers because they are ‘technically complex, difficult for consumers to inspect, compare or evaluate, infrequently purchased, long term in nature and have a significant risk of consumer detriment if things go wrong.’⁷³

Recently the FCA in the UK observed increasing innovation to meet customer needs and that poor practices have been addressed over time. However, there are still too many firms that have not adequately, consistently, and sufficiently considered customer needs and prioritised fair customer outcomes.⁷⁴

Nevertheless, under resourced policy makers have historically lagged behind rapid financial innovation and therefore, the risk of regulatory arbitrage remains for private sector actors to exploit regulatory loopholes and blind spot areas.⁷⁵ The customer impact of regulatory blind spots associated with innovation was evident in the November 2022 collapse of the FTX cryptocurrency exchange which left many consumers without meaningful legal protection because crypto assets were initially not catered for in the definition of a financial product.⁷⁶

⁷² OECD (n 69).

⁷³ OECD (n 69) at 10.

⁷⁴ FCA ‘A new Consumer Duty: Feedback to CP21/13 and further consultation 2021’ May 2021 available at <https://www.fca.org.uk/publication/consultation/cp21-13.pdf>, accessed 20 November 2021.

⁷⁵ Hilary J Allen ‘Experimental strategies for regulating Fintech’ (2020) 3 *Journal of Law & Innovation* 1 at 3.

⁷⁶ Lawrence J Trautman & Larry D Foster ‘The FTX crypto debacle: Largest fraud since Madoff’ (2022) 54 *University of Memphis LR* 289. See Marina Brogi & Valentina Lagasio ‘New but naughty. The evolution of misconduct in FinTech’ 2024 (95) *International Review of Financial Analysis* 1 at 2. See also Allison Morrow ‘Customers who trusted crypto giant FTX may be left with nothing’ *CNN Business* 15 November 2022, available at <https://edition.cnn.com/2022/11/14/business/ftx-customer-money-bankruptcy/index.html> accessed 15 October 2023. In October 2020 the FSCA published the declaration of crypto assets as a financial product in terms of the Financial Advisory and Intermediary Services Act 37 of 2002, finally bringing the provision of financial services related to crypto assets within the purview of the FSCA.

2.3 SOUTH AFRICA'S BACKGROUND TO REGULATORY REFORM

Notably, South Africa is a member state of the United Nations 'UN', a member of the G20,⁷⁷ the Bank of International Settlements 'BIS',⁷⁸ and the Financial Stability Board.⁷⁹ Therefore, it has a responsibility to implement agreed upon global standards⁸⁰ and support global safety, soundness, and stability of the global financial system.⁸¹

2.3.1 Synopsis of the financial services sector and retail consumer activity

The current economic structure in South Africa is such that commerce is highly dependent on the effective functioning of the rails provided by the financial system, in which banks perform the role of a necessary utility. According to the International Monetary Fund 'IMF' country report on South Africa, the percentage of total financial sector assets in South Africa relative to gross domestic product (GDP), as at December 2020 was sitting at three hundred percent (300%).⁸² The banking sector assets were one hundred and thirty two percent (132%) of GDP and accounted for forty four percent (44%) of total financial sector assets.⁸³ Indeed, the financial sector in South Africa is substantial, sophisticated, concentrated, and interconnected, with an asset to GDP ratio that is higher than emerging market peers.⁸⁴ It is reported that a significant portion of the assets are

⁷⁷ G20 'About the G20' available at <https://www.g20.org/en/about-the-g20> accessed 02 October 2024.

⁷⁸ Bank of International Settlements 'BIS member central banks' available at https://www.bis.org/about/member_cb.htm accessed 02 October 2024. BIS is referred to as the bank for central banks and promotes international cooperation to ensure monetary and financial stability. The SARB is a member of Bank of International Settlements.

⁷⁹ Financial Stability Board 'Members of the FSB' available at <https://www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board/> accessed 02 October 2024. The FSB is an international body coordinating financial regulators and supervisors as well as international standard setting bodies to develop regulatory, supervisory and financial sector policies necessary to promote international financial stability.

⁸⁰ Stavros Gadinis 'The Financial Stability Board: The New Politics of International Financial Regulation' (2012) 48 *Texas International Law Journal* 157 at 169. See Financial Sector Regulation Act 9 of 2017 'FSRA' ss 12(c); 34(4)(b) and 58(5)(c).

⁸¹ Erika Botha & Daniel Makina 'Financial regulation and supervision: theory and practice in South Africa' (2011) 10 *IBER Journal* 27 at 31. See also FSRA (n 80) s 12.

⁸² IMF 'South Africa financial sector assessment program technical note on banking regulation and supervision' *IMF* 17 June 2022 para 6, available at <https://www.imf.org/en/Publications/CR/Issues/2022/06/16/South-Africa-Financial-Sector-Assessment-Program-Technical-Note-on-Banking-Regulation-and-519725>, accessed 20 June 2022.

⁸³ IMF (n 82) para 6.

⁸⁴ *Ibid* paras 6; 7 and 11.

located in the banking industry and eighty five percent (85%) of that is held by five (5) of the large banks.⁸⁵

Therefore, the financial services industry – particularly the banking sector – plays a pivotal role in society as an enabler and facilitator of economic activity and growth through its systematic mobilization of deposits and savings, allocation and facilitation of access to capital, and managing financial risk.⁸⁶ The relationships in the financial system are dynamic, multidimensional, complex and non-linear and therefore require the adoption of a holistic systems thinking approach that takes into consideration the interconnectedness.⁸⁷ Therefore when looking at retail financial consumer protection and delivery of fair customer outcomes, it is necessary to consider the system in which it is embedded, its component parts, their interactions, causality (cause and effect feedback loops to understand what actions or behaviours causes what outcomes) and to address the root causes of poor customer outcomes, not just symptoms.⁸⁸

The 2022 Financial Sector Outlook Study⁸⁹ noted that ninety one percent (91%) of South Africans participate in the formal financial system characterised by a highly developed credit market in which more than fifty percent (50%) of the country’s credit-active consumers are regarded as over-indebted.⁹⁰ Notably, customers as retail investors through their savings, provide a significant portion of the liquidity in the financial system. They also play a pivotal role as a source on the demand side of financial services through borrowings, payment transactions and related economic activities.⁹¹

⁸⁵ FSCA ‘Financial Sector Outlook Study’ FSCA 5 April 2022 at 10, available at <https://www.fsca.co.za/Documents/FSCA%20Financial%20Sector%20Outlook%20Study%202022.pdf>, accessed on 21 June 2023.

⁸⁶ Mmiselo Freedom Qumba ‘A comparative analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom’ (2022) 139 *SALJ* 78 at 78.

⁸⁷ Ayham A M Jaaron & Chris J Backhouse ‘Fostering sustainable performance in services through systems thinking’ (2019) 39 *The Service Industries Journal* 1072 at 1076.

⁸⁸ Ross D Arnold & Jon P Wade ‘A Definition of systems thinking: A systems approach’ (2015) 44 *Procedia Computer Science* 669 at 674.

⁸⁹ FSCA (n 85) at 9.

⁹⁰ *Ibid* at 8 and 9.

⁹¹ John Armour et al *Principles of Financial Regulation* (2016) 205.

However, notwithstanding the resilience and stability of the financial sector and deepening access to financial services,⁹² the level of financial literacy of general consumers in South Africa remains relatively low,⁹³ rendering the average South African consumer financially vulnerable. Furthermore, the advent of innovative digital financial products, services and new distribution channel introduces new types of risks. For instance, the South African Reserve Bank ‘SARB’ noted an increase in shadow banking activities which are not regulated to the same extent as traditional banks.⁹⁴ Shadow banks present an opportunity for regulatory arbitrage by moving risk to less regulated entities which may be subject to less consumer protections.⁹⁵

Within this context, it must be acknowledged that risk taking is an inherent characteristic of the business of a bank but excessive risk taking, and an unrestrained profit motive can introduce systemic risks, and result in negative behaviours⁹⁶ that cause customer detriment and poor outcomes. Consequently, the regulatory premise and approach must be one that acknowledges that retail financial consumers deserve specific regulatory protection ‘above and beyond other users of the financial system’.⁹⁷

2.3.2 Context for South Africa’s regulatory reform

The South African financial services sector proved to be resilient and successfully weathered and averted the direct impact of the disastrous GFC.⁹⁸ Notably, in 2009 the IMF acknowledged the effective oversight exercised by the SARB and commended South Africa for sound macroeconomic policies that provided a cushion for South Africa against the aftermath of the 2008

⁹² FSCA (n 85) at 10.

⁹³ FSCA ‘Financial Education Summit 28 August 2024 Draft South African Financial Education Commitment Charter’ at 20, available at <https://www.fsca.co.za/Documents/Draft%20SA%20FE%20Commitment%20Charter.pdf>, accessed 05 December 2024.

⁹⁴ Esti Kemp ‘Measuring shadow banking activities and exploring its interconnectedness with banks in South Africa’ *South African Reserve Bank* 15 December 2017 at 8, available at <https://www.resbank.co.za/content/dam/sarb/publications/occasional-papers/2017/8160/OP1701.pdf>, accessed 07 March 2024.

⁹⁵ Kemp (n 94) at 25.

⁹⁶ Qumba (n 86) at 79.

⁹⁷ Armour et al (n 91) at 206.

⁹⁸ National Treasury Republic of South Africa ‘Explanatory Policy Paper accompanying the first draft of the Conduct of Financial Institutions Bill’ available at <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf>, accessed on 18 August 2019. See also Roy Charles Havemann *Lessons from South African bank failures 2002-2014* (unpublished PhD thesis, Stellenbosch University, 2019) 56.

downturn and recession.⁹⁹ However, the local financial services sector has had its share of poor customer outcomes.

For instance, in the 2014 collapse of African Bank, 13 000 black investors through African Bank's Eyomhlaba and Hlumisa black equity ownership investment vehicles (which included customers) lost their initial investments and suffered cumulative losses estimated at R 2,029 billion.¹⁰⁰ This amount excluded billions of rands in value lost by other South Africans who were invested in African Bank through asset managers. The collapse was triggered by negligence, poor governance, bad accounting practices, and impairments due to increasing bad debts following rapid growth in the lending book in 2012.¹⁰¹ African Bank also failed to consider that significant loans to a related business (Ellerines) with low repayment prospects for almost R1,4 billion could potentially place customer deposits at risk.

Excessive risk taking, negligence and reckless conduct emerging from some reported failures gave momentum to the need for regulatory reform.¹⁰²

2.3.3 Response by South African policy and law makers to misconduct

In 2004, a Task Group was formed by the National Treasury (referred to as Falkena III) to study the competitiveness of the South African banking industry. The Falkena report raised red flags around high bank profits that were much higher than the average return on equity of leading global banks, pointing to market power and potential anti-competitive conduct in the sector.¹⁰³

⁹⁹ Rodney Ramcharan 'IMF Survey: Sound policies shield South Africa from worst of recession' *International Monetary Fund* 25 September 2009 available at

<https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar092509a>, accessed 20 June 2022.

¹⁰⁰ JF Myburgh 'Myburgh Report on African Bank – Executive Summary' *The South African Reserve Bank* 12 May 2016 available at <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2016/7288>, accessed 23 October 2023. See also The Finance Ghost 'Will history rhyme at African Bank?' *Financial Times* 19 October 2023 available at https://www.businesslive.co.za/fm/opinion/2023-10-19-the-finance-ghost-will-history-rhyme-at-african-bank/?utm_source=Arena+Holdings&utm_medium=email&utm_campaign=THE+FINANCE+GHOST%3A+Will+history+rhyme+at+African+Bank%3F+%7C+Kai+%21Garib%3A+Inside+a+munic, accessed 19 October 2023.

¹⁰¹ Myburgh Report (n 100) para 92–93.

¹⁰² Havemann (n 98) at 91.

¹⁰³ Hans Falkena et al 'Competition in South African banking' (2004) available at

https://www.academia.edu/2003746/Competition_in_South_African_Banking, accessed on 04 August 2024. The Competition Commission of South Africa 'Banking market enquiry' (2008) at 38 available at

The FEASibility Research Report titled ‘The National Payment System and Competition in the Banking Sector’ published in 2006 also raised similar concerns impacting negatively on customer outcomes.¹⁰⁴

Between 2006 and 2008 the Competition Commission, under its mandate to provide consumers with competitive prices and product choices, also conducted an enquiry into the banking sector. The report revealed several gaps warranting better consumer protection mechanisms in the banking sector.¹⁰⁵ Criticism was also levelled against banks which ‘tended to set their fees within a sufficiently close range of each other so that none would be likely to impinge greatly on the market share of the other’.¹⁰⁶ The Commission made several recommendations to promote competition in the sector and to achieve better customer outcomes by addressing costing, pricing, fees, charges and access to payment systems. The GFC also highlighted the need for delivery of better outcomes, even though South Africa fared better during the crises.

Excessive high risk-taking behaviour in the sector was demonstrated in the well published misconduct case of Fidentia which saw an illegal Ponzi scheme defraud an estimated 47 000 widows and orphans related to the mine workers provident.¹⁰⁷ Whilst, this case related to asset management and not banking per se, it serves as an illustration of the adverse consequences of poor culture and outcomes for customers.

<https://www.compcom.co.za/banking-enquiry/> accessed 26 September 2023. See also Vicky Robinson ‘Bank Charges under scrutiny’ *Mail & Guardian* 30 August 2004, available at <https://mg.co.za/article/2004-08-30-bank-charges-under-scrutiny/>, accessed 26 September 2023.

¹⁰⁴ Competition Commission (n 103) at 5 cited the report by Penelope Hawkins & Olu Akinboade on ‘The national payment system and competition in the banking sector’ (2006) commonly referred to as the FEASibility Research Report.

¹⁰⁵ Competition Commission (n 103) at 28–29; 132 and 495–509.

¹⁰⁶ Gian Luciano Boeddu; Ligia De Souza Neves Lopes & Douglas Randall ‘South Africa: Retail Banking Diagnostic - Treating customers fairly in relation to transactional accounts and fixed deposits’ *World Bank Group* 2018 available at <https://documents1.worldbank.org/curated/en/732111536246467778/pdf/129778-WP-South-Africa-Retail-Banking-Diagnostic-Report.pdf>, accessed on 26 September 2023. Referred to a World Bank Diagnostic. The Diagnostics Report cited 2008 findings of the Competition Commission around product complexity and lack of price competitiveness in retail banking.

¹⁰⁷ Detlev Krige ‘Fields of dreams, fields of schemes: Ponzi finance and multi-level marketing in South Africa’ (2012) 82 *Africa* 69 at 69. See South African Human Rights Commission ‘Report on the public hearing on housing, evictions and repossessions’ available at https://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf, accessed 28 March 2024. See also Ciaran Ryan ‘Calls for inquiry into home and car repossession abuses’ *Moneyweb* 11 December 2017 available at <https://www.moneyweb.co.za/news/south-africa/calls-for-inquiry-into-home-and-car-repossession-abuses/>, accessed 28 March 2024.

In 2011, the National Treasury of the Republic of South Africa published what is commonly referred to as the Red Book titled ‘A Safer Financial Sector to Serve SA better’ in response to the findings from the Competition Commission and the key challenges facing the financial sector arising from the GFC.¹⁰⁸ The document identified the need for changes in the approach to market conduct practices, the protection of consumer interests and financial inclusion. The authors of the Red Book pointed out that:

The financial services sector touches the life of each South African. It enables economic growth, job creation, the building of vital infrastructure and sustainable development for South Africa and her people. It is, therefore, crucial that the sector is well-regulated and stable. However, stability is not the only policy objective for the financial sector. The sector is characterized by high and opaque fees, and needs to be more transparent, competitive, and cost effective.

A follow up discussion document was published by the National Treasury in 2014 titled ‘Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa’.¹⁰⁹ The document espoused a multipronged strategy to improve market conduct and to ensure a simplified and strengthened market conduct framework.¹¹⁰ As part of the review into market conduct practices in South Africa, the World Bank also prepared a report in 2016, which highlighted that, although there is a consumer protection framework in South Africa, the Consumer Protection Act¹¹¹ did not specifically address financial services.¹¹² The report further noted that there was no specific framework in place for non-bank financial services including payment systems.¹¹³ The World bank recommended that the authorities adopt a consumer protection

¹⁰⁸ National Treasury Republic of South Africa ‘A Safer Financial Sector to Serve SA better’ available at <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>, accessed on 18 August 2019, commonly referred to as the Red Book.

¹⁰⁹ National Treasury Republic of South Africa ‘Treating Customers Fairly in the financial sector: A draft market conduct policy framework for South Africa’ December 2014 available at www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf, accessed on 18 August 2019.

¹¹⁰ National Treasury (n 109) at 32.

¹¹¹ CPA (n 16).

¹¹² World Bank ‘Achieving effective financial inclusion in South Africa: A payment perspective’ (2016) available at <http://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf>, accessed on 18 August 2019.

¹¹³ World Bank (n 112) para 88–89.

framework in line with the Draft Market Conduct Policy Framework.¹¹⁴ Notwithstanding the observations and recommendations made, malpractices related to excessive fees, complex charging models, inappropriate product design and mis-selling, and reckless lending have remained major sources of concern.¹¹⁵

2.4 THE RETAIL BANKING DIAGNOSTIC REPORT – A CASE STUDY ILLUSTRATING EXISTING RETAIL CONSUMER PROTECTION GAPS IN SOUTH AFRICA

In a retail banking diagnostic report requested by National Treasury and released in 2018, the World Bank considered ‘the provision of transactional accounts and fixed deposits in terms of the main phases of the product life cycle – from product design, offer, sale, operation, administration to closure’.¹¹⁶ The aim of the diagnostic exercise was to identify potential deficiencies in fair treatment to customers in the provision of transactional accounts and fixed deposits and to make recommendations to address deficiencies identified, having regard to international best practices¹¹⁷ and the unique South African market context.¹¹⁸ The diagnostic report reiterated similar concerns that were raised by the Banking enquiry a decade ago about product design complexity and pricing in a concentrated market with few players.¹¹⁹

2.4.1 Retail Banking Diagnostic Report focus on unfair fees and changes to fees charged

A key element considered by the World Bank Retail Banking Diagnostic related to potentially unfair fees as well as changes to terms, conditions and fees charged,¹²⁰ in the main because fees are so varied, often complex, and potentially opaque.

Banks have two primary income stream sources generated through products and services provided to customers. The first is interest from loans or credit, and the second is fees charged in relation to

¹¹⁴ Ibid.

¹¹⁵ Daleen Millard & Choene Jacqueline Maholo ‘Treating Customers Fairly: A new name for existing principles?’ (2016) 79 *THRHR* 594 at 595.

¹¹⁶ World Bank (n 106) at 1–10.

¹¹⁷ Financial Stability Board (n 67).

¹¹⁸ World Bank (n 106) at 1.

¹¹⁹ Ibid at 33–39.

¹²⁰ Ibid at 8–9.

accounts and services provided.¹²¹ Globally, as banks diversified revenue streams, commission and fee income increased exponentially and is now a significant contributor to non-interest revenue.¹²² Fee income ranges from fees charged for overdraft fees, late payment fees, monthly service fees, ATM withdrawal fees, card or point of sale fees, fees for wire transfer (EFT), fees for purchases and top-up (electricity, airtime, lotto), account payment fees, digital banking fees (telephone, internet, USSD, App), assisted banking fees (branch or telephone banking advisor), cash deposit fees, account payment and funds transfer fees, debit order fees (internal & external), balance enquiry fees and statement fees. Administration fees include fees for stop payments, debit order disputes, insufficient funds, dishonoured / returned payments, notice or proof of payment and notify me SMS fees.¹²³ Notably, the National Credit Act (NCA) regulates fees and interest charged in relation to credit products.

Predominantly, charging models for non-credit related fees are either based on an unbundled ‘pay-as-you transact’ practice or on bundled packages.¹²⁴ Within these models the fee structure can either be variable or fixed, based on the transaction type or volume.¹²⁵ The complexity of bank fees for transaction accounts has been a source of much contention.¹²⁶ For instance ‘pay-as-you transact’ options may still attract other monthly fees or subscription fees, whilst volume and value limits and certain transaction exclusions apply for bundled options.¹²⁷

Variable fee structure may have a minimum fee component and/or an added value related fee and/or a maximum fee cap.¹²⁸ There are fee structures that are hybrid in nature, where a product

¹²¹ Robert DeYoung & Tara Rice ‘How do banks make money? The fallacies of fee income’ (2004) 28 *Economic Perspectives* 34 at 34.

¹²² Peterson Ozili & Erick Outa ‘Bank earnings management using commission and fee income: The role of investor protection and economic fluctuation’ (2019) 20 *Journal of Applied Accounting Research* 172 at 184 –185. See also Kenneth J Robinson ‘Savings and loans crisis’ available at <https://www.federalreservehistory.org/essays/savings-and-loan-crisis>, accessed 20 September 2023.

¹²³ Also see Competition Commission (n 103). In 2008 the Competition Commission released a report covering non-credit related bank fees.

¹²⁴ *Ibid* 93.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* at 5.

¹²⁷ *Ibid* at 94.

¹²⁸ *Ibid*.

may be packaged as offering a bundled fee but certain transactions like off-us ATM transactions¹²⁹ are charged on a ‘pay-as-you transact’ basis, or a tiered flat fee structure is applied based on transaction volumes, or where a zero flat fee is charged provided a certain balance is maintained but a fee is charged for other specified types of transactions. Pricing formulas across banks differ and the complexity of the fee models and formulas associated with a myriad of diversified product offerings make it difficult for ordinary retail financial consumers to compare price and value.¹³⁰ Furthermore, behavioural research suggests that increased pricing complexity of financial products and services elevates the risk of sub-optimal choices and reduces the likelihood of consumers using the pricing information in decision making.¹³¹ The ability to compare product cost segments across banks is difficult and further limits the ability of customers to assess the fairness, desirability, or competitiveness of pricing. The OECD 2023 survey highlights this gap by pointing out that on average only 26% of adult consumers compare products across financial service providers.¹³²

Furthermore, strategies to migrate customers to electronic online platforms through charging higher fees for branch and ATM use have resulted in low-income customers, who operate in cash intensive sectors, bearing the cost of higher fees.¹³³

¹²⁹ An ‘off-us transaction’ refers to an ATM transaction that is done at an ATM that does not belong to the issuing bank.

¹³⁰ Bank Zero ‘Pricing guide 2022’ available at <https://www.bankzero.co.za/wp-content/uploads/2021/10/Bank-Zero-pricing-guide-2022-1.pdf>, accessed 20 September 2023; ABSA ‘2023 pricing guide retail bank on sale products’ available at <https://www.absa.co.za/content/dam/south-africa/absa/pdf/pricing-brochure/2023/2023-Pricing-Brochure.pdf>, accessed 20 September 2023; Capitec ‘Transaction fees’ available at <https://www.capitecbank.co.za/personal/transact/transact-fees/>, accessed 20 September 2023; FNB ‘Bank’ available at <https://www.fnb.co.za/rates/Transact-Pricing-Guide.html>, accessed 20 September 2023; Nedbank ‘Rates & fees’ available at <https://personal.nedbank.co.za/home/rates-and-fees.html>, accessed 20 September 2023; Standard Bank ‘Bank accounts’ available at <https://www.standardbank.co.za/southafrica/personal/products-and-services/bank-with-us/bank-accounts/our-accounts>, accessed 20 September 2023; Tyme Bank ‘Everyday account fees and charges’ available at <https://www.tyembank.co.za/fees/everyday-banking/>, accessed 20 September 2023.

¹³¹ Dilip Soman, Amar Cheema & Eugene Y Chan ‘Understanding consumer psychology to avoid abuse of credit cards’ in David Glen Mick et al (eds) *Transformative Consumer Research for Personal and Collective Wellbeing 1* ed (2012) 428. See also W Fred Van Raaij *Understanding Consumer Financial Behavior: Money Management in an Age of Financial Illiteracy* (2016) 8.

¹³² OECD ‘International survey of adult financial literacy’ available at <https://www.oecd-ilibrary.org/docserver/56003a32-en.pdf?expires=1705928470&id=id&accname=guest&checksum=0F00BE4EF551D928674FFCFB6D3DCE59>, accessed 22 January 2024, accessed 22 January 2024. Although neither South Africa, the UK or Australia participated in the survey, it is indicative of the average global scores.

¹³³ World Bank (n 106).

Therefore, to promote fair customer outcomes, it is necessary for financial institutions to adopt approaches that address complex fee structures, enable easier price comparison and ensure appropriate pricing information disclosure in a manner that customers can understand.¹³⁴

The Banking Commission¹³⁵ previously recommended that the Banking Association of South Africa (BASA) periodically reviews minimum disclosure standards in the Banking Association Code of Banking Practice in relation to product and price information to cover standard terminology, ‘plain language’ requirement, communication and providing customer information, minimum information for bank statements, summary and breakdown of charges and interest (both debit and credit) on every account, advance notice of new charges and altered charges, and a regular reminder of rights to customers.¹³⁶

To aid price comparison, the Banking Commission also recommended that BASA develops – through independent means – generic customer profiles to assist comparison and a centralised banking fee calculator service that is an accessible facility for consumers to input their own product requirements.¹³⁷ However, considering the unique position and data that the Financial Sector Conduct Authority (FSCA) holds and to manage competition law risks, they are probably better placed to operate such a price comparison platform to support informed choice by retail financial consumers.¹³⁸

It is commendable that the banking industry had, as far back as January 2012, initiated a self-regulation mechanism to promote fair conduct in the banking sector through implementation of the South African Code of Banking Practice.¹³⁹ The voluntary code espoused principles of fairness, transparency, accountability, and reliability. The purpose of the Code was to promote good banking practices and to set minimum standards when dealing with customers; to increase

¹³⁴ Ibid at 5–7. See COFI Bill (n 16) at s 31(2).

¹³⁵ Competition Commission (n 103) at 498.

¹³⁶ Ibid at 498.

¹³⁷ Ibid at 499.

¹³⁸ See World Bank ‘Public sector–operated price comparison websites: Case studies and good practices’ June 2013 at 5 available at <https://documents1.worldbank.org/curated/en/437261468214827213/pdf/787830REVISED00price-comparison-eng.pdf>, accessed 03 October 2024.

¹³⁹ BASA ‘Code of Banking Practice’ available at <https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf>, accessed on 19 December 2024.

transparency and understanding on what can be expected from financial products and services; to promote open and fair relationships between the bank and its customers and to foster confidence in the banking system.¹⁴⁰ However, although the principles adopted in the voluntary code are laudable, the diagnostic report recommended a review of the Code to appropriately address TCF outcomes.¹⁴¹

2.4.2 Observations and recommendations from the Retail Banking Diagnostic Report

The 2018 Retail Diagnostic Report made the following observations and recommendations regarding fairness of transactional accounts and fixed deposit terms and conditions:

- a. Terms and conditions did not appear to be effectively subjected to the general unfair terms control mechanisms.¹⁴²
- b. There was evidence of one-sided bank contract terms with material exclusion of liability provisions and terms that impose excessive and onerous responsibility on customers for certain risks.¹⁴³
- c. There were interpretation issues regarding the applicability of FAIS to transactional accounts and the CPA to transactional and deposit accounts.¹⁴⁴ Consequently the National Consumer Commission had not reviewed unfair fees in terms of Part G of the CPA.¹⁴⁵
- d. Although there was improvement in pricing and fee practices, some fees which could be considered as ‘restricted penalties’ or unfair or unreasonable fees, were still being charged. Examples provided included dishonouring fees for insufficient funds or fees for debit order disputes, especially due to the lack of correlation between the excessive fee charged and actual cost incurred, or loss suffered. These fees could be considered unfair because they were not adequately disclosed to the customer, or because the product does not meet customer expectations and failed to perform as the customer was led to believe or because it is inherently unfair.¹⁴⁶

¹⁴⁰ BASA Code (n 139) at 4.

¹⁴¹ World Bank (n 106) at 2 and 10.

¹⁴² Ibid at 8.

¹⁴³ Ibid at 6.

¹⁴⁴ Ibid at 50.

¹⁴⁵ Ibid at 91.

¹⁴⁶ Ibid at 8 and 89.

- e. In dealing with middle income transactional account offerings, the FSCA should supplement principles-based requirements with more detailed regulatory guidance.¹⁴⁷
- f. The jurisdiction of the Ombud was excluded to consider fairness of fees that are not regulated by the NCA or other applicable legislation. The Ombud also confirmed the view that there is no legal restriction on banks charging customers unfair fees.¹⁴⁸
- g. The COFI Bill and financial sector law should include ‘a regime that would prohibit unfair terms in transactional account and fixed deposit standard form contracts’ and it may also apply to pricing.¹⁴⁹
- h. The Code of Banking Practice should be reviewed and updated in light of the TCF Outcomes to ensure it reflects public and regulatory expectations.¹⁵⁰

In the final analysis, the diagnostic report recommended that South Africa introduce a hybrid model combining principles and rules-based regulation.¹⁵¹ Principles and rules-based regulation are discussed in Chapters 3. Furthermore, a key recommendation included ensuring that COFI¹⁵² or sectoral law under the Financial Sector Regulation Act (FSRA)¹⁵³ introduces a prohibition on unfair terms and conditions in contracts for transactional accounts and fixed deposits similar to part G of the CPA.¹⁵⁴ Although the Conduct Standard for Banks published in terms of the FSRA has incorporated a test for unfair terms and conditions,¹⁵⁵ the 2020 draft of COFI has not introduced an adequate unfairness control regime to prohibit unfair terms. Furthermore, the COFI Bill and FSR law have not introduced a ‘grey-list’ of terms that are presumably considered unfair or provided for an enforcement regime by the FSCA to tackle unfair terms and conditions.¹⁵⁶ Unfairness control mechanisms are discussed in greater detail in Chapters 4 and 5.

¹⁴⁷ Ibid at 5.

¹⁴⁸ Ibid at 90.

¹⁴⁹ Ibid at 6.

¹⁵⁰ Ibid at 10.

¹⁵¹ Ibid at 5.

¹⁵² COFI Bill (n 16) .

¹⁵³ FSRA (n 80). Notably, the FSRA establishes a comprehensive system to regulate the financial services sector, it establishes the Prudential Authority and the Financial Sector Conduct Authority, identifies other financial sector regulators and under Schedule 1 sets out a list of financial sector laws. COFI is intended to be an overarching financial sector law regulating the conduct of financial institutions.

¹⁵⁴ World Bank (n 106) at 6 and 56.

¹⁵⁵ Conduct Standard (n 17).

¹⁵⁶ See World Bank (n 106) at 51.

2.5 SUMMARY

Although financial institutions have addressed many issues from historic conduct failures and key recommendations from the Retail Diagnostic Report, a comprehensive fairness control regime has not been implemented as yet. A number of other recommendations also remain unaddressed. For instance, it is the media that have taken the proactive lead in price comparison for entry level accounts,¹⁵⁷ and the section 31(2)(e) of COFI requires banks to disclose information to customers in a manner that aids comparison of similar products and services. However, the same level of price comparison data is still not easily available publicly for the middle-income segment which can benefit from less complex product design and access to credible price comparison and better customer outcomes when it comes to product selection.¹⁵⁸ The Diagnostics Report provides examples of comparison tools provided by regulators in other jurisdictions. For instance, regulators in Canada, Hungary, Ireland, Malaysia, Mexico, Peru, Norway and the UK provide such price comparison websites.¹⁵⁹ Therefore, it is appropriate for the FSCA to implement such a comparison tool.

In a competitive market consumers should be able to make rational choices on the basis of appropriate price signals and value.¹⁶⁰ However, evidence suggests that complex fee structures have been applied in many instances to obscure the true price of products and services and to levy hidden fees on consumers.¹⁶¹ The analysis of fees charged on transactional accounts and the tendency to mask the full fees highlight a critical need for customers to have access to simple means and capability to search and compare banking products and price with minimum cost.¹⁶² Although it is assumed that consumers make rational decisions based on cost, benefit and preferences, behavioural science indicates behavioural biases, cognitive shortcuts or ‘situational

¹⁵⁷ Myles Illidge ‘Cheapest bank accounts in South Africa’ *My Broadband* 16 March 2023, available at <https://mybroadband.co.za/news/banking/483261-cheapest-bank-accounts-in-south-africa-3.html>, accessed 20 September 2023; Hippo ‘2023 banking fees guide’ available at <https://www.hippo.co.za/blog/money/2023-banking-fees-guide/>, accessed 20 September 2023; Staff Writer ‘South Africa’s new payment system PayShap fees compared – Nedbank vs Absa vs Standard Bank vs FNB’ *Business Tech* 14 March 2023, available at <https://businesstech.co.za/news/banking/672429/south-africas-new-payment-system-payshap-fees-compared-nedbank-vs-absa-vs-standard-bank-vs-fnb/>, accessed 20 September 2023.

¹⁵⁸ World Bank (n 106) at 33.

¹⁵⁹ World Bank (n 138) at 5.

¹⁶⁰ Competition Commission (n 103) at 91.

¹⁶¹ Natasha Sarin ‘Making consumer finance work’ (2019) 119 *Colombia Law Review* 1519 at 1519. See also World Bank (n 106) at 5.

¹⁶² Competition Commission (n 103) at 498.

and cognitive limitations’ in the decision making process.¹⁶³ For instance, research on customer behavioural biases has demonstrated that consumers predictably make mistakes when choosing financial products, resulting in lower returns without a commensurate compensating benefit.¹⁶⁴ Therefore exploiting this inherent weakness, some financial institutions may still design products that appeal to certain salient features that customers desire (such as low price), whilst adding other disadvantageous terms or features in a manner that is not readily obvious to the consumer.¹⁶⁵ Therefore, regulators and financial institution alike must contribute to improving the ability of financial customers to choose better and to ensure meaningful delivery of fair customer outcomes.¹⁶⁶ The following chapter assesses the design of the regulatory framework and supervisory architecture or oversight mandates in South Africa to support fair customer outcomes and address identified market conduct gaps.

¹⁶³ Samon, Cheema & Chen (n 131) at 423. See also W Fred Van Raaij *Understanding Consumer Financial Behavior: Money Management in an Age of Financial Illiteracy* (2016) at 4.

¹⁶⁴ Armour et al (n 91) at 208. See also FCA ‘Applying Behavioural Economics at the Financial Conduct Authority’ available at <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>, accessed 24 October 2023.

¹⁶⁵ Armour et al (n 91) at 207.

¹⁶⁶ Australian Securities & Investments Commission ‘Review into open banking in Australia’ available at https://treasury.gov.au/sites/default/files/2019-03/c2017-t224510_ASIC.pdf, accessed 20 September 2023.

CHAPTER 3: OVERARCHING REGULATORY FRAMEWORK AND OVERSIGHT MANDATES IN SOUTH AFRICA

The institutional structure of regulatory and supervisory bodies is critical in the design of regulatory systems and may impact the efficiency and manner in which scarce regulatory resources are utilised.¹⁶⁷ Therefore, in addressing consumer protection of retail financial customers within the context of South Africa as a developing economy, the current chapter addresses the impact of the Twin Peaks model on the supervision of fair customer outcomes in banks. It reviews the risk of overlapping mandates in oversight responsibilities between the FSCA and the National Credit Regulator ‘NCR’ regarding the provision of credit and the role of Ombuds and Tribunals in delivering fair customer outcomes. The chapter considers retail financial consumer protection mechanisms in the Conduct Standard¹⁶⁸ and the COFI Bill¹⁶⁹ to assess fairness and ensure the fair treatment of customers. Finally, the chapter analyses managing operational complexity during the transitional period of the regulatory reform journey.

3.1 THE TWIN PEAKS REGULATORY MODEL AND PROMOTION OF FAIR CUSTOMER OUTCOMES IN BANKS

Michael Taylor initially proposed the twin peaks regulatory architecture which anticipated the establishment of two peak regulators for financial services.¹⁷⁰ At a high level, the objective of the Twin Peaks model is to ensure that the safety and stability of the entire financial system is protected (prudential mandate) whilst simultaneously protecting consumers (consumer protection mandate).¹⁷¹ The scope of the prudential regulator is focused on safety, soundness and stability

¹⁶⁷ David T Llewellyn ‘Institutional structure of financial regulation and supervision: The basic issues’ *World Bank* 7 June 2006 at 4 and 8, available at <https://letr.org.uk/references/storage/QW6PBIDS/Llewellyn%20-%202005%20-%20Institutional%20structure%20of%20financial%20regulation%20an.pdf>, accessed on 18 October 2023. It is a well-known fact that supervisory bodies have limited resources.

¹⁶⁸ Conduct Standard (n 17).

¹⁶⁹ COFI Bill (n 16).

¹⁷⁰ Michael Taylor ‘“Twin Peaks”: A Regulatory Structure for the New Century’ (1995). Michael W Taylor ‘Twin Peaks’ Revisited...a second chance for regulatory reform (2009) 4. See also Michael W Taylor ‘Regulatory reform after the financial crisis: Twin Peaks revisited’ in Robin Hui Huang & Dirk Schoenmaker (eds) *Institutional Structure of Financial Regulation: Theories and International Experiences* (2016) 637.

¹⁷¹ Van Niekerk & Van Heerden (n 38) at 109.

and it is aimed at managing the risk of bank failure.¹⁷² Through its mandate to maintain the integrity of the financial system, the prudential regulator is also tasked with introducing mechanisms to manage systemic risk, loss absorption and risk taking.¹⁷³ The market conduct regulator is intended to address market abuse and malpractice whilst promoting confidence in the financial system.¹⁷⁴

It is argued that the prudential regulation requires the regulator to think ‘like a banker’ whilst market conduct regulation requires ‘thinking like a customer’ and consequently the mindset, cultures and approaches of both institutions may be different.¹⁷⁵ When both prudential regulation and market regulation are within the same regulatory agency, there is increased risk of the interests of customer protection being subservient to the interests of market safety and soundness.¹⁷⁶ Therefore, one of the perceived advantages of Twin Peaks is that it reduces the risk of concentration of power and of the prudential regulator dominating the landscape.¹⁷⁷

It is worth noting that Twin Peaks is not the only institutional oversight model in use globally. The Bank of International Settlements published a study in 2018¹⁷⁸ which indicated that across the 82 jurisdictions which were considered in the study, the sectoral model was the most used. Under the sectoral model, supervision is arranged on a sectoral basis – i.e. banking, insurance, market integrity and securities – and in each sector, one regulator holds the mandate for prudential and conduct supervision.¹⁷⁹ Other jurisdictions apply an integrated or partially integrated model. Twin Peaks has emerged as a ‘partially integrated’ supervisory architecture as the prudential regulator and the conduct regulator serve as ‘peak’ regulators operating separately yet collaboratively. At the time of publication of the study, only nine jurisdictions had adopted the Twin Peaks organisational model including Australia, the Netherlands, Belgium, New Zealand, the UK, Canada, Guatemala, El Salvador, and South Africa.¹⁸⁰

¹⁷² Martha Gertruida van Niekerk *A comparative analysis of the role of the central bank in promoting and maintaining financial stability in South Africa* (Unpublished PhD thesis, University of Pretoria, 2018) 16. See also Van Niekerk & Van Heerden (n 38) at 109.

¹⁷³ Johann De Jager ‘The South African Reserve Bank: Blowing winds of change (part 2)’ (2013) 25 *SA Merc LJ* 492 at 507.

¹⁷⁴ De Jager (n 173) at 508.

¹⁷⁵ National Treasury (n 108) at 29.

¹⁷⁶ Llewellyn (n 167) at 5.

¹⁷⁷ Andrew Godwin, Li Guo & Ian Ramsay ‘Is Australia’s “Twin Peaks” system of financial regulation a model for China?’ (2016) 46 *Hong Kong LJ* 621. See also Michael Taylor (n 170) at 2.

¹⁷⁸ Daniel Calvo et al ‘Financial Supervisory Architecture: What Has Changed After the Crisis?’ April 2018 *Financial Stability Institute* available at <https://www.bis.org/fsi/publ/insights8.pdf>, accessed 14 July 2022.

¹⁷⁹ Calvo et al (n 178) at 1.

¹⁸⁰ *Ibid* at 36.

3.1.1 The FSRA as the overarching Twin Peaks supervisory framework

The FSRA was promulgated in South Africa in 2017 as the overarching legislation for the regulation of financial institutions, and the provision of financial products and financial services. The Act establishes a supervisory framework in combination with financial sector laws, aimed at achieving a stable financial system designed to protect the interests of financial customers and to support balanced and sustainable economic growth.¹⁸¹ Interestingly, South Africa is the first developing economy to adopt the Twin Peaks model.¹⁸²

The Twin Peaks model is intended to make the South African financial sector safer and to promote better outcomes for customers. The stated objectives of the Act as set out in section 7(1) are to promote:

- a. 'Financial stability;
- b. The safety and soundness of financial institutions;
- c. The fair treatment and protection of financial customers;
- d. The efficiency and integrity of the financial system;
- e. The prevention of financial crime;
- f. Financial inclusion;
- g. Transformation of the financial sector; and
- h. Confidence in the financial system.'¹⁸³

3.1.2 The role of the South Africa Reserve Bank (SARB)

The FSRA outlines the overall responsibility of the SARB to maintain and enhance financial stability.¹⁸⁴ The scope of the SARB includes monitoring strengths, weaknesses, and risks to financial stability, and to take steps to mitigate such risks;¹⁸⁵ conducting financial stability reviews; and ¹⁸⁶ managing systemic risks.¹⁸⁷

¹⁸¹ Andrew Schmulow 'Retail market conduct reforms in South Africa under Twin Peaks' (2017) 11 *Law and Financial Markets Review* at 163.

¹⁸² Andrew Godwin 'Australia's trek towards Twin Peaks – Comparisons with South Africa' (2017) 11 *Law and Financial Markets Review* at 183 at 189.

¹⁸³ FSRA (n 80) at s 7(1).

¹⁸⁴ *Ibid* at s 11.

¹⁸⁵ *Ibid* at s 12.

¹⁸⁶ *Ibid* at s 13.

¹⁸⁷ *Ibid* at ss 14 and 15.

Microeconomic factors have largely contributed to banking crises, however material disruptions at any point across the economy are likely to have an impact on the banking system. The nature of the business of banking, and cyclical developments therefore exposes banks to diverse sources of stress.¹⁸⁸ Unique features of banks that expose them to different sources of distress are

above average reliance on creditors' funds (for instance deposits) and their low capital ratio when compared to the corporate sector, their risky claims on different sectors of the economy, and the fact that their assets are in effect longer-term and less liquid than their liabilities.¹⁸⁹

Macro-economic factors such as market risk arising from risk of decline in underlying assets, interest rate risk, exchange risk, credit risk due to credit default or inability to repay loans, and liquidity risk all influence the health of banks.¹⁹⁰ These risks highlight the fact that the condition of banks is linked to the condition of its borrowers and the economy. Therefore, to ensure that financial markets and financial institutions operate without disruption despite change in circumstances,¹⁹¹ the SARB will get involved in instances where market conduct issues can introduce a systemic risk¹⁹² that can lead to bank failure or crisis. Such intervention would also consider appropriate protection of customers¹⁹³ as they have a vested interest in the continued viability of financial institutions that conduct business with them. For instance in the 2018 collapse of VBS Mutual Bank due to fraud, corruption and reckless lending to 'captors' at the expense of retail depositors,¹⁹⁴ the SARB stepped in to fund the repayment of these retail deposits up to R 100 000. However, customers with deposits above the R 100 000 threshold were forced to line up

¹⁸⁸ Bank for International Settlements 'Marrying the macro and microprudential dimensions of financial stability' available at <https://www.bis.org/publ/bppdf/bispap01.htm>, accessed 18 October 2023.

¹⁸⁹ BIS (n 189) at 92.

¹⁹⁰ BIS (n 189) at 92. See also Shaun De Wet, Ilse Botha & Marno Booysen 'Measuring the effect of the National Credit Act on indebtedness in South Africa' (2015) 8 *Journal of Economic and Financial Sciences* at 83 at 89.

¹⁹¹ Corlia van Heerden & Gerda van Niekerk 'Twin Peaks in South Africa: A new role for the central bank' (2018) 11 *Law and Financial Markets Review* 154 at 156.

¹⁹² Van Heerden & Van Niekerk (n 191) at 157.

¹⁹³ FSRA (n 80) at s 15(2)(b).

¹⁹⁴ Advocate Terry Motau 'VBS Mutual Bank – The great bank heist' *South African Reserve Bank* 30 September 2018 at 9, available at <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2018/8830>, accessed 23 October 2023. See also Liesl Pretorius 'Analysis: Did poor people lose money in VBS bank's collapse?' *The Citizen* 31 July 2019 available at <https://www.citizen.co.za/business/personal-finance/analysis-did-poor-people-lose-money-in-vbs-banks-collapse/>, accessed 23 October 2023. See also National Assembly 'Question to Written Reply Question Number: 2478 [NW2735E]' 24 August 2018 available at <https://www.treasury.gov.za/publications/other/MinAnsw/2018/PQ%202478%20-%20Shivambu%20-%20NW2735E.pdf>, accessed 07 October 2024.

with other creditors without any guarantee that they would recover full amounts deposited.¹⁹⁵ Included in this base are members of burial societies, stokvels and savings clubs which are mostly used by customers in disadvantaged communities for financial resource pooling.¹⁹⁶ Notably, as part of the resolution framework, South Africa promulgated the Financial Sector Laws Amendment Act 23 of 2021 amending the FSRA. The amendment enabled establishment of the Corporation for Deposit Insurance (CODI) and a deposit insurance scheme to serve as a financial ‘safety net’ to protect depositors in the event of bank failure with effect from April 2024. The Act designated the SARB as a resolution authority and deposits of qualifying natural persons will be protected up to R 100 000 but customers with retail deposits over this threshold must line up with other creditors. The chief executive officer of the PA and commissioner of the FSCA are members of CODI.¹⁹⁷

The Financial Stability Oversight Committee (FSOC) was established under section 20 of the FSRA to support the SARB in the performance of its functions relating to financial stability.¹⁹⁸ Members of the FSOC include the governor and deputy governors of the SARB, the chief executive officer of the Prudential Authority (PA), chief executive officer of the NCR, the director of the Financial Intelligence Centre (FIC), and the commissioner of the FSCA.¹⁹⁹ The FSOC is also responsible to facilitate collaboration co-operation and co-ordination between financial sector

¹⁹⁵ Joint communication from the South African Reserve Bank, the liquidator of VBS Mutual Bank (in liquidation) and Nedbank Limited ‘VBS Mutual Bank completes transfer of guaranteed retail deposits to Nedbank Limited’ 01 April 2021 available at <https://www.resbank.co.za/content/dam/sarb/publications/media-releases/2021/vbs-guaranteed-retail-deposits-at-nedbank/VBS%20completes%20transfer%20of%20guaranteed%20retail%20deposits%20to%20Nedbank%201%20April%202021.pdf>, accessed 07 October 2024.

¹⁹⁶ Polly Mashigo & Christie Schoeman ‘Stokvels as an instrument and channel to extend credit to poor households in South Africa’ (2012) 5 *Journal of Economic and Financial Sciences* 49 at 51. See also Rudzani Mulaudzi *From consumers to investors: an investigation into the character and nature of stokvels in South Africa's urban, peri-urban and rural centres using a phenomenological approach* (Unpublished Masters thesis, University of Cape Town, 2017) 14.

¹⁹⁷ SARB ‘The Corporation for Deposit Insurance (CODI) is South Africa’s deposit insurance scheme and the newest subsidiary of the South African Reserve Bank’ available at <https://www.resbank.co.za/en/home/what-we-do/Deposit-insurance#:~:text=CODI%20was%20established%20as%20part,compensate%20depositors%20using%20taxpayer%20money>, accessed 23 October 2023. See also Financial Stability Board ‘Peer review of South Africa: Review report’ FSB 16 March 2020 at 8, available at <https://www.fsb.org/wp-content/uploads/P160320.pdf>, accessed 26 October 2023.

¹⁹⁸ In terms of FSRA (n 80) at s 12(a), the SARB is responsible to manage those risks that may be raised by the FSOC.

¹⁹⁹ FSRA (n 80) at s 22(1).

regulators and the SARB on matters relating to financial stability.²⁰⁰ The Financial Sector Contingency Forum (FSCF) was also established under section 25 to assist the FSOC identify potential risks that may result in a systemic event and to co-ordinate appropriate plans, mechanisms, and structures to manage identified systemic risks.²⁰¹

The facilitatory and co-ordinating roles of the FSOC and FSCF are crucial not only to maintain stability, but to also protect customers. However, having many coordination agencies such as the Financial System Council of Regulators²⁰², the FSOC, the FSCF²⁰³ and the Financial Sector Inter-Ministerial Council,²⁰⁴ with no formal powers, poses a risk to operational inefficiency and political interference.²⁰⁵ Despite the stated good intentions of promoting collaboration and cooperation, there remains a real risk of regulator misalignment and drift in strategy if the responsible entities and cabinet members do not deliberately drive and measure the efficiency and effectiveness of this collaboration. Conflicting requirements, competing interests and uncoordinated information requested around similar or related topics can also contribute to regulatory fatigue amongst regulated firms.²⁰⁶

3.1.3 The role of the PA

The PA is established as a separate institution housed under the SARB.²⁰⁷ It is responsible for promoting and enhancing the safety and soundness of financial institutions, protecting ‘financial customers against the risk that financial institutions may fail to meet their obligations’ and assisting with financial stability.²⁰⁸ Thus the PA’s role in relation to customer outcomes is confined to ensuring the financial safety and stability of financial institutions in order to minimise risk of

²⁰⁰ Ibid at s 20(2)(b).

²⁰¹ Ibid at s 25(1)(a) and (b). See also Van Heerden & Van Niekerk (n 191) at 158.

²⁰² Ibid at s 79.

²⁰³ Ibid at s 25.

²⁰⁴ Ibid at s 83.

²⁰⁵ IMF (n 82) at 7.

²⁰⁶ See Niamh Moloney *How to protect investors – Lessons from the EC & UK 2010* at 11 –112 . See also Philip G Cerny ‘Rethinking financial regulation: risk, club goods and regulatory fatigue’ in Thomas Oatley and W. Kindred Winecoff eds *Handbook of the International Political Economy of Monetary Relations* 2014 at 360.

²⁰⁷ FSRA (n 80) at s 32.

²⁰⁸ FSRA (n 80) at ss 32 and 33. See also Van Niekerk & Van Heerden (n 38) at 112.

customer detriment. The PA is also enjoined to co-operate with other regulators including the FSCA and the NCR in the achievement of objectives of the FSRA.²⁰⁹

3.1.4 The role of the FSCA

The FSRA established the FSCA with effect from 1 April 2018 and conferred on the FSCA the direct supervisory and oversight mandate for promoting fair customer outcomes. The primary objective of the FSCA is to ‘enhance and support the efficiency and integrity of financial markets’;²¹⁰ protect financial customers through promoting fair treatment²¹¹ and to assist with financial stability.²¹² The financial consumer protection objective includes ensuring that financial customers and the public are empowered through providing financial education programs and tools to enable them to make informed and sound financial decisions.²¹³ The FSCA is also responsible for the monitoring of financial institutions to ensure that their financial products and services are appropriate and deliver fair customer outcomes, which meet customer needs and their reasonable expectations.²¹⁴

The 2021-2025 FSCA regulatory strategy issued in terms of the FSRA,²¹⁵ highlighted its aim to drive fair customer and market outcomes, to embed TCF principles in sector laws and to adopt a holistic TCF aligned supervisory approach.²¹⁶ According to the strategy, the identified financial consumer protection priorities include:

- a. Improving industry practices to deliver fair outcomes for financial customers.
- b. Acting against misconduct to support confidence and integrity in the sector.
- c. Promoting the development of an innovative, inclusive, and sustainable financial sector.

²⁰⁹ Ibid at s 34(1)(b).

²¹⁰ Ibid at s 57(a). Qumba (n 86) at 100.

²¹¹ Ibid at s 57(b).

²¹² Ibid at s 57 (c). Qumba (n 86) at 100.

²¹³ Ibid at s 57 (b)(ii). Qumba (n 86) at 100.

²¹⁴ Ibid at s 58(1)(i).

²¹⁵ Ibid at s 47.

²¹⁶ FSCA ‘Regulatory Strategy 2021-2025’ at 23 available at <https://www.fsca.co.za/News%20Documents/FSCA%20Regulatory%20Strategy%202021-2025.pdf>, accessed 16 February 2022.

d. Empowering the financial resilience of households and small businesses.²¹⁷

The FSRA significantly widened the purview of the FSCA beyond that of its predecessor the Financial Services Board (FSB), to include the conduct of retail banks and credit providers. This was achieved through the definition of ‘financial institution’ to include a financial product provider, a financial service provider and person licensed or required to be licensed in terms of a financial sector law.²¹⁸ Furthermore, financial product is defined in the Act to include deposits in terms of the Banks Act,²¹⁹ provision of credit and a facility or arrangement that includes a financial product related to lending,²²⁰ financial investments and managing financial risks.²²¹ On the other hand, the definition of financial services incorporates offering, promoting, marketing, distribution, provision of advice, recommendations or guidance in relation to financial products and services, as well as the provision of credit and intermediary services.²²²

The FSRA goes even further by creating scope for regulations to designate any facility or arrangement as a financial product if it serves as the means through which lending, investment, or the management of financial risk is conducted.²²³ A key benefit of widening the scope to cover both bank and non-bank activities, is narrowing the scope for regulatory arbitrage, and thus extending reach of consumer protection mechanisms. However, the extent of coverage and impact will be dependent on the ability of the FSCA to proactively identify new emerging risks and supervise evolving regulatory blind spots arising from innovation. The ability to timeously manage risks associated with novel and opaque business models (that customers are not familiar with) will minimise customer detriment instead of playing catch-up years after a practice has become embedded; as was the case with crypto assets and mobile money services provided through fintechs.²²⁴

²¹⁷ FSCA (n 216) at 6.

²¹⁸ FSRA (n 80) at s 1.

²¹⁹ Ibid at s 2(1)(e). Banks Act (n 5) at s 1(1).

²²⁰ Banks Act (n 5) at s 2(1)(g).

²²¹ Ibid at s 2(2) and (3).

²²² Ibid at 3.

²²³ Ibid at s 2(1)(e).

²²⁴ Ministry of Foreign Affairs of the Netherlands ‘Consumer risks in fintech: New manifestations of consumer risks and emerging regulatory approaches’ *World Bank Group* April 2021 at 2, available at <https://documents1.worldbank.org/curated/en/515771621921739154/pdf/Consumer-Risks-in-Fintech-New-Manifestations-of-Consumer-Risks-and-Emerging-Regulatory-Approaches-Policy-Research-Paper.pdf>, accessed 20 August 2023.

Principles-based and outcomes-focused regulation and supervision enables the FSCA to focus on substantive compliance and move beyond the reactive response to infraction of rules to pre-emptive identification, assessment, and monitoring of conduct risks.²²⁵ In principles-based regulation, principles play a dominant role in the formulation of regulations and in the regulator's approach to interpretation.²²⁶ In the event of disputes, issues would theoretically not be resolved through 'detailed linguistic (legal) interpretative approaches but through purposive interpretations and consequential reasoning'.²²⁷ From a rule setting perspective, the principles-based and outcomes-focused approach gives the FSCA the flexibility to adapt principles to the relevant context whilst allowing for appropriate rules and guidance to complement how to interpret and apply the principles or norms.²²⁸ A principles-based regime also enables the FSCA to be more responsive not just in its approach to regulated entities but also in the design and implementation of frameworks.²²⁹ Furthermore, the FSCA can influence behaviours of institutions through adopting an enforcement approach that is responsive to an institution's attitude, posture and behaviour.²³⁰ The risk-based approach introduced by the FSRA empowers the regulator to allocate resources appropriately based on the nature of the risk, and the quality of supervision can be proportional whilst sufficiently intense, intrusive, and effective to drive the right market outcomes.²³¹

With the advent of the FSRA, the Conduct Standard for Banks,²³² was published under the auspices of the FSCA to incorporate TCF principles and fairness controls for financial products and financial services.²³³ The TCF framework adopts a product life cycle view,²³⁴ covering product design and origination, advice, sales, service, disclosure, distribution, post-sales maintenance,

²²⁵ National Treasury (n 109) at 92.

²²⁶ Julia Black *The Rise, Fall and Fate of Principles Based Regulation* 2010 at 6 –8.

²²⁷ Black (n 226) at 9.

²²⁸ Ibid. FSCA 'Regulatory strategy of the Financial Sector Conduct Authority: October 2018 to September 2021' at 38 available at

<https://www.fsca.co.za/Customers/Consumers%20Documents/FCSA%20Strategy%202018.pdf#search=regulatory%20strategy>, accessed on 22 June 2020.

²²⁹ Robert Baldwin and Julia Black 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59 at 59.

²³⁰ Baldwin & Black (n 229) at 63.

²³¹ FSCA (n 228).

²³² Conduct Standard (n 17).

²³³ Ibid ss 2(5) and 5(2). See also Samantha Huneberg 'Consumer protection measures in non-life insurance contracts: a South African and Australasian trend?' (2019) 40 *Obiter* 170 at 178.

²³⁴ *Schroeder v Central Retirement Annuity Fund* (2015) 1 BPLR 94 (PFA). See also Huneberg (n 233) at 178.

complaints handling, customer education, culture, governance, and reporting. The TCF outcomes incorporated in the Conduct Standard are addressed in greater detail in Chapter 4 below.²³⁵

3.1.5 Multidimensional interconnected peaks

Even though the regulatory model is referred to as Twin Peaks, in reality the model reflects a multidimensional interconnected supervisory structure due to the presence of other stand-alone regulators with considerable statutory powers and capacity.²³⁶ For instance the NCR is considered to be a financial regulator and has a limited mandate to oversee the provision of credit²³⁷ under the auspices of the National Credit Act (NCA).²³⁸ The FIC continues to hold the primary mandate in respect to the requirements for establishment and termination of banking relationships with clients and the associated monitoring of customer activities for money laundering and terror financing risk in terms of the FIC Act.²³⁹

Below is an illustration of the actual regulatory peaks: ²⁴⁰

²³⁵ Conduct Standard (n 17) at 6. See Chapter 4 section 4.3.2.2 below for detailed discussion of TCF outcomes and conduct controls under the Conduct Standard.

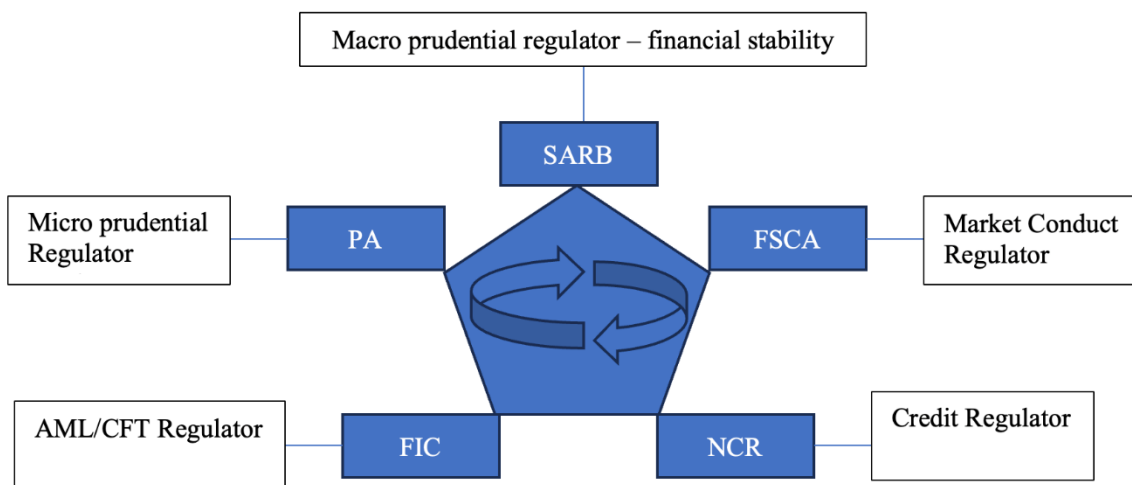
²³⁶ Van Niekerk & Van Heerden (n 38) at 113.

²³⁷ FSCA (n 228) at 16.

²³⁸ National Credit Act 35 of 2005.

²³⁹ Financial Intelligence Centre Act 38 of 2001.

²⁴⁰ See also Van Niekerk & Van Heerden (n 38) at 112 – 113 which confirms the SARB, the PA, the FSCA, the NCR and FIC as key financial sector regulators.



A common challenge with effective regulation in such complex regulatory models with multiple touch points, is poor collaboration and coordination.²⁴¹ Fragmentation of information across multiple regulatory systems and platforms limits the ability to connect the dots.²⁴² Conflicting requirements, competing interests and uncoordinated information requested around similar or related topics also contributes to regulatory fatigue amongst regulated firms. The FSRA in South Africa makes provision for collaboration, co-ordination, and cooperation between various regulators through the Financial System Council of Regulators,²⁴³ the Financial Sector Inter-Ministerial Council,²⁴⁴ the Financial Stability Oversight Committee,²⁴⁵ the Financial Sector Contingency Forum²⁴⁶ and the conclusion of MoUs between the respective regulators.²⁴⁷

²⁴¹ Godwin, Guo & Ramsay (n 177) at 10–12.

²⁴² Andromachi Georgosouli ‘Payment Protection Insurance (PPI) Mis-selling: Some lessons from the UK’ (2014) 21 *Connecticut Insurance Law Journal* 261 at 278. See also Qumba (n 86) at 107.

²⁴³ FSRA (n 80) at s 79.

²⁴⁴ *Ibid* at s 83.

²⁴⁵ *Ibid* at s 20 (b).

²⁴⁶ *Ibid* at s 25 (2).

²⁴⁷ *Ibid* at s 76 and s 77; FSCA Press Release ‘Release of the Financial Sector Conduct Authority’s regulatory strategy and memoranda of understanding’ *Financial Sector Conduct Authority* 11 October 2018, available at <https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20Regulatory%20Strategy%20and%20Memoranda%20of%20Understanding%20-%202011-10-2018.pdf#search=memorandum>, accessed 06 June 2022. See also FSCA ‘Memorandum of understanding between the FSCA & Local and foreign jurisdiction/bodies’ available at

The risk of the FSCA not achieving its mandate and interconnectedness with other regulators has been identified by the regulator as its top risk.²⁴⁸ Notably, the risk regarding mandate has been classified as having a cautious inherent rating, but the residual risk is rated as acceptable with increasing risk exposure.²⁴⁹ However, it is not evident what methodology was applied to assess the adequacy and effectiveness of risk mitigation measures to address this risk.

Despite encouraging efforts to promote collaboration and cooperation, the real risk of regulator misalignment and drift in strategy remains if there are no concrete actions to drive and measure the efficiency and effectiveness of this collaboration. The 2022 report published by the IMF flagged the lack of formal powers by coordination agencies established under the FSRA and the risk of operational inefficiency and political interference.²⁵⁰

3.1.6 ‘First mover’ responsibility where misconduct has a prudential flavour

Theoretically, the design of the twin peaks model should ensure a balanced and even-handed approach to protect both prudential and consumer interests without one assuming a superior or primary position over the interests of the other.²⁵¹ The prudential and market regulators should have equal importance, with each agency single-mindedly fulfilling its mandate without any regulator assuming pre-eminence over the other.²⁵² However, in practice, it is debatable whether there is equality between the consumer protection and system stability objectives,²⁵³ because

[https://www.fsca.co.za/Documents/LATEST%20LIST%20OF%20MEMORANDUM%20OF%20UNDERSTANDING%20BETWEEN%20THE%20FSCA%20AND%20OTHER%20AUTHORITIES%20\(January%202019\).pdf#search=memorandum](https://www.fsca.co.za/Documents/LATEST%20LIST%20OF%20MEMORANDUM%20OF%20UNDERSTANDING%20BETWEEN%20THE%20FSCA%20AND%20OTHER%20AUTHORITIES%20(January%202019).pdf#search=memorandum), accessed 06 June 2022; Memorandum of understanding between the FSCA & PA available at https://www.fsca.co.za/Regulatory%20Liaison/MOU_FSCA%20and%20PA.pdf accessed 06 June 2022; Qumba (n 86) at 109.

²⁴⁸ FSCA Integrated Report 2023-2024 at 48 available at

<https://www.fsca.co.za/Annual%20Reports/FSCA%20Integrated%20Report%202023-24.pdf>, accessed 06 December 2024.

²⁴⁹ FSCA (n 249) at 49.

²⁵⁰ IMF (n 82) at 6. The report also recommended the development of a framework to elaborate on the mandate of the PA and balance its objective of financial system safety and soundness with its ancillary objective of supporting inclusion and competition. Qumba (n 86) at 84.

²⁵¹ Van Niekerk & Van Heerden (n 38) at 109. See also Andrew Schmulow ‘Financial regulatory governance in South Africa: The move towards Twin Peaks’ (2017) 25 *African Journal of International and Comparative Law* 393 at 394.

²⁵² Andrew D Schmulow ‘Twin Peaks: An analysis of the Australian architecture’ in HJ Jung (ed) Proceedings of the 2016 Global Forum for Financial Consumers *International Academy of Financial Consumers* (2016) 10. Charles Goodhart et al ‘The institutional structure of financial regulation’ in *Financial Regulation: Why, How and Where Now?* (1998) 185.

²⁵³ Schmulow (n 252) at 20.

system stability objectives have often taken precedence due to the dire consequences of system instability. Although in practice system stability objectives have taken precedence, it remains critical to determine which regulatory agency has 'first mover' responsibility in instances where misconduct is identified, and it has both a market conduct and prudential flavour.²⁵⁴ Challenges in determining first mover responsibility became evident in Australia during the Hayne Commission.²⁵⁵ Furthermore, the problem is also apparent under section 144(6) of the FSRA requiring the PA's concurrence if the FSCA wants to issue a directive to a systemically important financial institution to cease offering a particular financial product or service. Section 144(6) is discussed in greater detail below.

3.2 THE FSCA AND APPROACH TO CONCURRENCE WITH THE PA

The MoU between the FSCA and the PA is fairly detailed and provides for the FSCA to take whatever action it is empowered to take under the FSRA without concurrence of the PA except for action set out in section 144(6) and section 157(4) of the FSRA. Section 144(6) presents a particular area of concern in as far as it relates to the mandate of the FSCA to ensure fair outcomes for customers. Section 144(6) relates to directives under section 144(5)(a) and (b) respectively to a systemically important financial institution to cease offering or providing a specific financial product or financial service or to modifying a specific financial product or service or the terms on which it is provided. Section 157(4) relates to declarations of significant owners of financial institutions.

Section 144(6) implies that the concurrence of the PA is required if the FSCA wants to issue a directive for a systemically important financial institution to cease offering a particular financial product or service,²⁵⁶ or to modify a specific financial product, service, or terms on which it is provided.²⁵⁷

²⁵⁴ Paul Krugman 'Looters in Loafers' New York Times 19 April 2010, available at <https://www.nytimes.com/2010/04/19/opinion/19krugman.html>, accessed on 21 February 2024; Debra Cassens Weiss 'SEC accuses Goldman Sachs of selling mortgage investment designed to fail' ABAJournal 16 April 2010 available at https://www.abajournal.com/news/article/sec_accuses_goldman_sachs_of_selling_mortgage_investment_designed_to_fail#google_vignette, accessed 25 June 2024.

²⁵⁵ Hayne (n 55) at 86.

²⁵⁶ FSRA (n 80) at s 144(5)(a).

²⁵⁷ Ibid at s 144(5)(b).

Nonetheless, section 282(2) of the FSRA provides for a mechanism to do away with the need for concurrence where there is agreement in the MoU that the proposed action does not prejudice the interest of the other regulator or if the parties agree that concurrence is not necessary. However, the published MoU between the PA and the FSCA does not contain such wording.

On the contrary, clause 9.3 of the MoU expressly states that concurrence of the PA is required for any action by the FSCA under section 144(6) and section 157(4) of the FSRA. The unintended consequence of section 144(6) is that if the FSCA were to find after an investigation or an inspection that a product, service, or term in a contract by a systemically important financial institution is unfair, it can issue a directive against such an institution to stop offering the product or service or to change the terms which are found to be unfair, only if the PA agrees. This may inadvertently make the interests of the customer subservient to such other interests as the PA may determine in the exercise of its discretion. It is anticipated that the PA would apply financial system safety and soundness considerations to mitigate against the risk and negative effects of bank failure. However, the FSRA and the MoU do not set out objective factors or guiding principles to consider in exercising such discretion by the PA particularly where products, services or terms are assessed as unfair by the FSCA. By contrast, the UK has incorporated accountability measures to ensure that the PRA's veto power aimed at protecting financial stability,²⁵⁸ is exercised in limited circumstances following a clear process that is administratively fair.²⁵⁹

Ultimately, the execution of statutory objectives set out in the FSRA, and the exercise of discretion given to regulators must be subject to constitutional prescripts and done in a manner that does not unduly prejudice the legal interests of customers. The current wording of clause 9.3 of the MoU and section 144(6) of the FSRA may result in an impasse in those scenarios where competing interests exist between the customer fairness objective of the FSCA and the safety and soundness objectives of the PA. Such an impasse may undermine the statutory objectives of the regulators.

²⁵⁸ Financial Service and Markets Act 2000 'FSMA' at s 31.

²⁵⁹ See Chapter 6, section 6.2.3.1 for a detailed discussion on how South Africa can learn from the UK and ensure application of principles of 'lawfulness, procedural fairness, and reasonableness' to regulatory action, particularly in the application of section 144(6).

3.3 RISK OF OVERLAPPING MANDATES IN OVERSIGHT RESPONSIBILITIES OF THE FSCA AND THE NCR REGARDING THE PROVISION OF CREDIT

Although the FSCA has been conferred with the supervisory mandate for fair customer outcomes in relation to financial products and services, the provision of credit remains regulated under the NCA for customers who are natural persons and juristic persons falling below the set threshold.²⁶⁰ The mandate of the NCR is to supervise and regulate the credit industry; inform policy development; conduct education and research; provide for registration of credit providers, credit bureaux and debt counselling services; investigate complaints and to enforce the NCA.²⁶¹ Consumer protection is an integral part of the NCA,²⁶² and consumer rights under the Act must be understood with the context of constitutional principles.²⁶³

Key protections afforded by the NCA include:

- a. stipulation of minimum terms and conditions to be disclosed and communicated to the customer before, during and after the time of contracting;²⁶⁴
- b. prohibited charges, cost of credit, liability for fees, charges and interest as well as related changes, and maximum pricing and fees that may be levied in relation to financial products;²⁶⁵
- c. provisions aimed at addressing over-indebtedness and reckless lending including specific provisions around conducting affordability assessments;²⁶⁶
- d. registration of credit providers, debt counsellors and credit bureaux;²⁶⁷
- e. credit marketing practices;²⁶⁸
- f. credit life insurance;²⁶⁹
- g. dispute resolution mechanisms;²⁷⁰

²⁶⁰ NCA (n 238) at s 4.

²⁶¹ ML Vessio ‘What does the National Credit Regulator Regulate?’ (2018) 2 *SA Merc LJ* 227 at 228.

²⁶² ML Vessio & J Moorcraft ‘The National Credit Act’ in *Banking Law and Practice* (2025) para 23.8.1.

²⁶³ Vessio & Moorcraft (n 262) para 23.8.1.

²⁶⁴ *Ibid* at ss 92, 93 and 108.

²⁶⁵ *Ibid* at ss 100 – 105.

²⁶⁶ *Ibid* at ss 78 – 88.

²⁶⁷ *Ibid* at ss 40 – 53.

²⁶⁸ *Ibid* at ss 74 – 77.

²⁶⁹ *Ibid* at s 106.

²⁷⁰ *Ibid* at ss 134 – 138.

- h. statutory reporting, disclosures including statistical returns by financial services institutions to enable monitoring and oversight by the NCR as well as inspectional and supervision powers;²⁷¹ and
- i. Unlawful provisions of credit agreements.²⁷²

Therefore, the NCR plays a pivotal role in promoting and advancing the social and economic welfare of South Africans by promoting a ‘fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry, and to protect consumers’.²⁷³ The objective of the NCR to prevent consumers from becoming overly indebted²⁷⁴ is particularly important considering high debt to income ratios coupled with relatively high credit impairments and non-performing loans influenced by adverse external market shocks.²⁷⁵ Adverse external shocks which make consumers vulnerable to over-indebtedness include changes in the prime lending rate, property prices, consumer consumption expenditure, disposable income to debt ratio and unemployment.²⁷⁶ Data published by Trading Economics in 2023 confirmed that household debt to income in South Africa was sitting at 61.90%.²⁷⁷ Even though the figure is below the debt to income ratio of 71% in 2013, it continues to illustrate the dependence of South Africans on credit. Banks account for R113.19 billion (79.83%) of total credit granted.²⁷⁸ At the same time, historically between 2006 to 2015, South Africa was reported to have one of the highest home foreclosures in the world.²⁷⁹

²⁷¹ Ibid at ss 15 – 16.

²⁷² Ibid s 90.

²⁷³ Ibid.

²⁷⁴ NCA (n 238) at s 3(c).

²⁷⁵ Experian ‘Consumer Default Index - Extended’ available at <https://www.experian.co.za/content/dam/noindex/emea/soafrica/consumer-index/CDIx-Podcast-2023-Q2.pdf>, accessed 26 October 2023. See also De Wet, Botha & Booysen (n 190) at 86.

²⁷⁶ De Wet, Botha & Booysen (n 190) at 83.

²⁷⁷ Trading Economics ‘South Africa households debt to income’ available at <https://tradingeconomics.com/south-africa/households-debt-to-income#:~:text=Households%20Debt%20to%20Income%20in,of%2036.00%20percent%20in%201969>, accessed 23 October 2023.

²⁷⁸ NCR ‘Consumer credit market report’ NCR March 2023 at 1, available at <https://www.ncr.org.za/documents/CCMR/CCMR%202023Q1.pdf>, accessed 24 October 2023.

²⁷⁹ Herbert Kawadza ‘Taming the mechanics of mortgage foreclosures: The case of *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) (2019) 52 *De Jure* 102 at 102–105.

Therefore, the NCA serves a crucial role to combat reckless lending by requiring credit providers to assess the financial means, prospects and obligations of consumers seeking credit and their ability to pay prior to granting such credit.²⁸⁰ The risks, costs, fees, interest, rights and obligation associated with the proposed provision of credit must also be adequately disclosed.²⁸¹

It is argued that although the NCA has had a positive material effect on overall levels of over-indebtedness, it has not succeeded in reducing vulnerability of consumers to adverse stress conditions due to affordability assessments that do not include credit stress testing during the credit application phase.²⁸² Unsecured loans and micro lending also present areas of special vulnerability.

Considering the various sources of consumer vulnerability and the imbalance in bargaining power,²⁸³ Part A of Chapter 4 of the NCA encapsulates consumer protection through affirmation of several rights afforded to customers.²⁸⁴ In order to promote an accessible consumer market, these include the right to apply to a credit provider for credit;²⁸⁵ the right not to be unfairly discriminated against;²⁸⁶ the right to information²⁸⁷ including the right to be provided with reasons for rejection of an application for credit provided in terms of the NCA;²⁸⁸ the right to confidential treatment and privacy;²⁸⁹ the right to information in an official language that the consumer reads or understands;²⁹⁰ the right to be provided with documentation required in terms of the Act in a plain language that the consumer can understand;²⁹¹ the right not to be penalised or otherwise prejudiced for exercising rights under the Act;²⁹² and right to removal of adverse credit information for paid up judgements.²⁹³ The Act also provides for cooling off rights,²⁹⁴ the rights to early

²⁸⁰ NCA (n 238) at ss 79–82. J.M. Otto ‘Onagsame wetsopstelling – die Nasionale Kredietwet op die operasietafel’ (2023) 2 *TSAR* 217 at 219.

²⁸¹ NCA (n 238) at ss 92 – 93 and 100 – 103. Otto (n 281) at 219.

²⁸² Otto (n 281) at 219. See also Kawadza (n 280).

²⁸³ M Kelly Louw ‘Consumer Credit’ 3ed in Harms et al (eds) *Law of South Africa* (2014) at 65.

²⁸⁴ See Vessio & Moorcraft (n 262) para 23.8.1.

²⁸⁵ NCA (n 238) at s 60.

²⁸⁶ *Ibid* at s 61(1).

²⁸⁷ *Ibid* at ss 62–65, 72, 93 and 120.

²⁸⁸ *Ibid* at s 62(1).

²⁸⁹ *Ibid* at s 68.

²⁹⁰ *Ibid* at s 63.

²⁹¹ *Ibid* at s 64.

²⁹² *Ibid* at s 66.

²⁹³ *Ibid* at s 70.

²⁹⁴ *Ibid* ss 121(2).

settlement.²⁹⁵ In addition, the NCA includes a list of unlawful agreements and provisions in a credit agreement that would be considered as unlawful²⁹⁶ as well as prohibited charges.²⁹⁷ Every right of a consumer has a corresponding obligation on a credit provider, their employees and employees.²⁹⁸

Although the NCA does not make direct reference to TCF principles, the purpose of the Act as outlined in section 3 encapsulates notions of fairness and public interest considerations of transparency, sustainability, and responsibility.²⁹⁹ Promotion of the development of an accessible credit market, particularly addressing the needs of historically disadvantaged persons, low-income persons, and providing for remote, isolated or low-density communities is also a key theme of the Act.³⁰⁰ Therefore the interpretation of the Act must be done in a manner that gives effect to these purposes set out in section 3.³⁰¹

A positive attribute of the Act is that it sets out a balanced approach to protecting both consumer rights and rights of the credit provider to ensure equity, whilst bearing in mind the relative information asymmetry and power imbalance between the credit provider and the consumer.³⁰² In fact, rights of the consumer are counterbalanced by rights of the credit provider which include the right to enforce the credit agreement, to suspend a credit facility and costs in relation to attachments.³⁰³ The objective to ‘strike an equitable balance between the interests of consumers and credit providers’³⁰⁴ was affirmed in *Investec v Motloung*.³⁰⁵ Furthermore, the Constitutional Court also had the opportunity to opine on the interpretation of section 3 of the NCA in the case of *Nkata v FirstRand Bank Ltd*.³⁰⁶ The applicant had approached the court arguing that her property should not have been sold in execution because the credit agreement was reinstated after she paid the amount owing to the bank. In a majority ruling, the Constitutional

²⁹⁵ Ibid ss 125(1) and 126(1).

²⁹⁶ Ibid ss 89–90. See also Vessio & Moorcraft (n 262) para 23.8.4.

²⁹⁷ Ibid s 100.

²⁹⁸ N Campbell ‘The consumer’s rights and credit provider’s obligation’ in JW Scholtz (ed) *Guide to the National Credit Act* (2024) para 6.1.

²⁹⁹ Ibid at s 3.

³⁰⁰ NCR ‘Home’ available at <https://www.ncr.org.za/>, accessed on 18 June 2020.

³⁰¹ NCA (n 238) at s 2(1).

³⁰² Ibid at s 3(d).

³⁰³ NCA (n 238) at ss 86(10), 129, 130 and 132. See also Campbell (n 298) para 6.4.

³⁰⁴ Reghard Brits ‘The National Credit Act’s remedies for reckless credit in the mortgage context’ (2018) 21 *Potchefstroom Electronic LJ* at 1 at 15.

³⁰⁵ *Investec Bank Limited v Motloung* (2017) ZAFSHC 36.

³⁰⁶ *Nkata v FirstRand Bank Ltd* 2016 (6) BCLR 794 (CC).

Court upheld the application against a decision of the Supreme Court of Appeal. The apex court noted that the constitutional values of fairness and equality inform the purposes of the NCA and therefore an interpretation of the Act ought to strike the appropriate balance between the competing rights of the consumer and credit provider.³⁰⁷ In delivering the majority judgement, Deputy Chief Justice Moseneke highlighted that the NCA sought to infuse fairness, good faith, reasonableness and equality in the relationship between credit providers and customers,³⁰⁸ and therefore the conduct of parties to a credit agreement must be permeated by these hallmark principles.³⁰⁹

Notwithstanding the scope of the NCA over credit agreements, section 58(2) of the FSRA provides that the FSCA may regulate financial institutions that are credit providers subject to the regulatory ambit of the NCR. The extent of the FSCA's oversight over credit agreements is limited only to those matters referred to in section 108 of the FSRA,³¹⁰ dealing with the setting of prudential standards, conduct standards and joint standards related to fit and proper requirements, governance, risk management and internal controls, record keeping and data management, reporting and management of conflicts of interests. The MoU signed between the FSCA and NRC confirms that the FSCA '...may regulate and supervise the financial institution's conduct in relation to the provision of credit under a credit agreement only in respect of those matters referred to in section 108'.³¹¹

The FSCA has noted in its Regulatory Strategy that their focus would exclude the actual content and entering into of credit agreements but rather focus on 'the provision of financial services related to the provision of credit'.³¹² Advice on credit, credit product distribution models and advertising and marketing of credit products would therefore fall within the FSCA's scope.³¹³ Similarly, oversight of 'the design, servicing and performance of transactional bank accounts' falls

³⁰⁷ *Nkata* (n 306) para 96.

³⁰⁸ *Ibid* para 94.

³⁰⁹ *Ibid*. See also *First National Bank v Lukhele and seven others* (2016) ZAGPPHC 616; *National Credit Regulator v Standard Bank of South Africa Limited and South African Human Rights Commission* (2019) ZAGPJHC 182; *ABSA Bank Limited v Hurwitz* (2016) ZAGPPHC 820.

³¹⁰ FSCA 'Memorandum of understanding between the FSCA and the NCR' *FSCA* 20 September 2018 at para 1.3, available at https://www.fsca.co.za/Regulatory%20Liaison/MoU_%20FSCA%20and%20NCR.pdf, accessed 27 June 2024.

³¹¹ FSCA MoU (n 310) at clause 1.3.

³¹² FSCA (n 228) at 18 and 42–54.

³¹³ FSRA (n 80) at s 58(2).

within the ambit of the FSCA.³¹⁴ The FSCA has also reported that it will adopt a proportional risk-based approach focusing on larger lenders and collaborating with the NCR under an MoU concluded between the two regulators to avoid misalignment.³¹⁵

Notably, section 106 of the FSRA confers powers on the FSCA to issue conduct standards to ensure that customers are treated fairly by financial institutions and their representatives. The draft Conduct Standard applicable to banks was published by the FSCA in 2019 and a subsequent version was tabled with Parliament in February 2020.³¹⁶ Whilst TCF principles were initially not legislated but served as a guideline, the final Conduct Standard published on 03 July 2020 codified them into law.³¹⁷ High level themes addressed in the Standard include the culture and governance in banks, design, suitability and performance requirements for financial products and financial services, advertising, disclosures, complaints, and refusal, closure, withdrawal, termination and switching of financial services or products.³¹⁸

Considering the scope of the Conduct Standard issued by the FSCA and the ambit of section 108 of the FSRA read with section 58(2), there remains the risk of some ambiguity amongst regulated entities and customers about the demarcation of responsibility as well as scope and jurisdiction of the respective regulators over credit agreements. For instance, operational requirements of financial institutions,³¹⁹ internal control requirements³²⁰ and record keeping,³²¹ which fall within the ambit of section 108, also have a direct bearing on compliance with the provisions of the NCA. The FSRA addresses this potential gap by requiring cooperation, collaboration, coordination, information sharing and alignment of supervisory strategies between regulators including the FSCA and the NCR.³²²

³¹⁴ FSCA (n 228) at 16.

³¹⁵ FSCA MoU (n 310) para 1.1 – 1.4. Para 8.3 of the MoU requires review every three years, however an updated MoU was not available publicly. See also FSCA (n 228) at 18.

³¹⁶ FSCA ‘Notice regarding the publication of the draft Conduct Standard 1 of 2019 (Banks)’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Banks.aspx>, accessed on 23 June 2020.

³¹⁷ Conduct Standard (n 17).

³¹⁸ Conduct Standard (n 17) at ss 3–10.

³¹⁹ FSRA (n 80) at s 108(2)(e).

³²⁰ *Ibid* at s 108(2)(g).

³²¹ *Ibid* at s 108(2)(i).

³²² *Ibid* at s 76.

Although the MoU addresses the important areas of information sharing, minimising duplication and talks about cooperation and collaboration, the principles are at a very high level and do not provide enough particularity around what exactly will be done to achieve these laudable objectives in order to minimise confusion, improve efficiency and how this will be done to promote better customer outcomes.

However, the FSRA introduces a reporting obligation on financial sector regulators and the SARB to report to the minister of finance, the Minister of Trade and Industry charged with oversight for the NCA and the National Assembly, on actions taken to cooperate and collaborate.³²³ These reporting obligations can be used to encourage cooperation, coordination and collaboration. Furthermore, the FSRA also provides a mechanism for periodic evaluation of effectiveness of cooperation and collaboration between regulators.³²⁴

Notwithstanding uncertainty, ambiguity or discrepancy between regulation and supervisory policy and approaches between regulators can undermine effective implementation of cooperation and coordination mechanisms thereby presenting opportunities for regulatory arbitrage³²⁵ or regulatory evasion and avoidance.³²⁶ Godwin raises a concern about having two market conduct regulators in relation to banking and the provision of credit and also recommends ‘effective coordination and consultation between the FSCA and the NCR’.³²⁷ It is noteworthy that the current MoU provides high level principles of information sharing, minimising duplication, areas of collaboration and cooperation.³²⁸ However, it does not cover practical details around standard or policy setting, model for supervision of conduct risk and the approach to industry engagement on market conduct risk issues.³²⁹ It is also unclear how the two regulatory bodies will ensure role clarity, allocate activities and tools, and manage overlap between functions due to

³²³ Ibid at s 72(2)

³²⁴ Ibid at s 86.

³²⁵ Allen (n 75) at 5. Also see Pollman (n 20) at 8.

³²⁶ Richard John Herring ‘International coordination of financial supervision: why has it grown? Will it be sustained?’ (2018) 10 *Journal of Financial Economic Policy* 213 at 214.

³²⁷ Godwin (n 182) at 184.

³²⁸ FSCA MoU (n 310) at clause 4 – 6.

³²⁹ Clive Briault ‘Revisiting the rationale for a single National Financial Services Regulator’ *Economic & Social Research Council* February 2002 at 17–20, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=427583, accessed 26 October 2023.

increased coordination anticipated under the FSRA.³³⁰ Interestingly, the FSCA acknowledged the need for better coordination in its 2021–2025 regulatory strategy and confirmed that attention must be paid not to duplicate data collection, licensing processes and supervisory engagements.³³¹ Both regulators are now considering ways to coordinate data collection through a shared service.³³²

It is therefore recommended that the MoU should be complemented by a more detailed coordination framework between the regulators to cover amongst others, policy and rule-making, supervision of entities subject to regulation by both the FSCA and NCR, single view of approved persons, coordination of information requests, returns and related tools, and reporting obligations for non-compliance and conduct failures.³³³

Whilst section 13(5) of the FSRA³³⁴ and better coordination may minimise the opportunity for regulatory arbitrage³³⁵ caused by disjointed supervisory approaches, there remains a risk that financial institutions may be pulled in different directions by competing demands, expectations, and priorities of multiple regulators.³³⁶ Inconsistent approaches, prioritisation and timelines can limit the ability to address issues coherently. A non-integrated approach and inconsistent flow of information amongst regulators can also result in unnecessary delays and issues falling through the cracks.³³⁷

³³⁰ Andrew Godwin, Steve Kourabas & Ian Ramsay ‘Twin Peaks and financial regulation: The challenges of increasing regulatory overlap and expanding responsibilities’ (2016) 49 *The International Lawyer* 273 at 280. See also Van Niekerk & Van Heerden (n 38) at 121.

³³¹ See FSCA (n 216) at 16.

³³² *Ibid.*

³³³ Godwin, Kourabas & Ramsay (n 330) at 286–291. See also Bank of England ‘Memorandum of understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-pra.pdf>, accessed 08 June 2022.

³³⁴ Lynette Visagie-Swart & Vivienne Lawack ‘An overview of the first draft of the Conduct of Financial Institutions Bill and the potential impact on the national payment system in South Africa’ (2020) 32 *SA Merc LJ* 129 at 138 and 151.

³³⁵ Danièle Nouy ‘Gaming the rules or ruling the game? – How to deal with regulatory arbitrage’ *European Central Bank* 15 September 2017, available at <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html>, accessed on 25 January 2021.

³³⁶ Herring (n 326) at 213.

³³⁷ Godwin, Kourabas & Ramsay (n 330) at 283.

It is interesting to note that section 77(3) provides that ‘the validity of any action taken by a financial sector regulator in terms of a financial sector law, including the NCA is not affected by a failure to comply with the section or an MoU contemplated in this section.’³³⁸ In effect, based on the wording of the Act, collaboration is based on goodwill and a system of voluntary co-operation amongst peer regulators. Therefore, in the absence of such goodwill and effective oversight by the relevant ministries or by parliament or any other legal mechanism to enforce the terms of the MoU, consumers and the industry may face competing regulatory interests and divergent supervisory approaches.

Whilst in theory the FSRA delineates the roles and responsibilities of the different regulators, in practical terms, this demarcation may be less clear. An illustration of the overlapping mandates became evident during the Covid-19 pandemic in 2020. The FSCF was actively engaged in coordination and communication to understand vulnerabilities and the PA issued a directive enabling cash relief by financial institutions to mitigate adverse impacts of the pandemic.³³⁹ Notwithstanding, a notable number of customers reported queries and complaints over some of the cashflow relief solutions offered by financial institutions in response to the lockdown.³⁴⁰ In this instance, the PA, FSCA and NCR all implemented measures to determine customer impact and track complaints although approaching it from different angles. Financial institutions were required to submit periodic reports including customer complaints data to the PA as part of its financial stability mandate to assess operational risks. At the same time, the FSCA exercised oversight around Covid-19 related customer complaints, assessing whether the product design,

³³⁸ FSRA (n 80) at s 77(3).

³³⁹ Financial Sector Contingency Forum ‘Lessons from the Covid-19 Pandemic in South Africa’ Centre of Excellence in Financial Services at 13 and 72 available at <https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-stability/Lessons%20from%20the%20Covid-19%20pandemic%20in%20South%20Africa.pdf>, accessed 08 December 2024.

³⁴⁰ See Financial Sector Contingency Forum (n 341) at 74 on the significant pressure experienced by the sector during the period for payment holidays and other cash flow relief solutions for qualifying customers. See also Financial Service Ombudsman ‘Insight summary: complaints resulting from Covid-19 and the impact on consumers and SMEs’ 24 August 2020 available at <https://www.financial-ombudsman.org.uk/data-insight/our-insight/insight-summary-complaints-resulting-covid-19-impact-consumers-smes>, accessed 08 December 2024. Although the report of the Ombudsman for Banking Services South Africa ‘Annual Report 2020’ at 9 available at https://www.obssa.co.za/wp-content/uploads/2021/05/J27909_BI_OBSSA_Annual-Report-2020_FA-Spreads.pdf, accessed 08 December 2024 indicates lower Covid-related complaints, this is different from data reported in other jurisdictions such as the UK and this may be due the classification of issues reported in South Africa.

disclosures and service resulted in fair customer outcomes. On the other hand, the NCR in terms of its mandate to investigate the complaints,³⁴¹ required reports and conducted compliance reviews to assess whether the credit agreements which formed the basis for the cash relief solutions complied with the provisions of the NCA. Interestingly, each of the information requests fell technically within the respective jurisdictions of the regulators under the FSRA. Although, it can be argued that the heightened regulatory interest in the topic was in the interest of customers, the multipronged supervisory approach adopted in relation to the Covid-19 related customer complaints demonstrated the need for better co-ordination amongst regulators. It also highlighted the risk of triangulation in communication between parties and regulators. In the current model, there is also an increased risk of confusion from conflicting supervisory approaches and ‘forum shopping’ in those instances where regulators hold differing opinions around the adequacy and effectiveness of an organisation’s response.

There are encouraging positive collaborative initiatives underway between the NCR, FSCA, SARB and the FIC. Most notable are the Steering Committee established to develop the National Register of Credit Agreements under section 69 of the NCA and participation in the Intergovernmental Fintech Working Group which has created a platform to test financial innovation that ‘pushes boundaries of existing regulation’.³⁴² The NCR also participates in the Market Conduct Committee established by FSCA.³⁴³ However, at the heart of these collaborative initiatives must be clear objectives and measurement to ensure that the initiatives do not only improve efficiencies and competition, but also contribute to fair outcomes for customers and consumer protection against new emerging threats which result in policy disruption.³⁴⁴

Alignment and clarity of roles and responsibilities between the FSCA, NCR and National Consumer Commission will also go a long way to close gaps that were demonstrated in *MFC v Botha*.³⁴⁵ In that case, Botha selected a vehicle (which later turned out to be defective) from the

³⁴¹ NCA (n 238) s 139.

³⁴² NCR ‘Annual Report 2022/2023’ available at <https://www.ncr.org.za/index.php/publications/annual-report>, accessed 24 October 2023. The FSCA & NCA are also collaborating around promoting consumer literacy.

³⁴³ FSCA (n 216) at 33.

³⁴⁴ Allen (n 75) at 2–3. See also Eric Biber et al ‘Regulating business innovation as policy disruption: From the Model T to Airbnb’ (2017) 70 *Vanderbilt Law Review* 1561 at 1565 which described ‘policy disruption’ as a ‘disjunction between the structure of the regulatory system and the industry that is being regulated’.

³⁴⁵ *MFC (a division of Nedbank Ltd) v Botha* (2013) JDR 1975 (WCC).

dealership, which was financed by MFC in terms of the instalment sale agreement under the NCA. Botha could not claim against the dealership for repayment of the purchase price upon return of the vehicle because there was technically no agreement between Botha and the car dealership. MFC denied liability on the basis of a term in the instalment sale agreement which excluded any warranty by MFC about the condition of the vehicle, although MFC took over ownership of the vehicle in security for the debt.³⁴⁶ The ruling also did not address section 90(2) of the NCA which states that any provision which directly or indirectly purports to waive or deprive a consumer of rights conferred under the NCA³⁴⁷ or which purports to exempt a credit provider or limit their liability is unlawful under the Act.³⁴⁸ Regrettably, despite the poor customer outcomes, the interpretation adopted by the court – that the role of MFC is limited to the role as credit provider – left Botha without any meaningful legal protection and recourse against both MFC and the dealership.³⁴⁹

One of the benefits publicly touted for Twin Peaks was simplicity of the regulatory architecture and doing away with the need to deal with multiple regulators with oversight around market conduct risk.³⁵⁰ Although the implementation of the FSRA is still ongoing, the illustration shared above indicates that reducing the complexity surrounding multiple regulators with overlapping mandates may still need further refinement.³⁵¹ Unless identified issues are adequately

³⁴⁶ *MFC* (n 347) para 10. Applicability of the CPA was also discussed in *Byleveld v Execor Twelve (Pty) Ltd t/a Motor City* 2014 ZANCT 2 (24 February 2014) paras 60–62 and 82.

³⁴⁷ NCA (n 238) at s 90 (2)(b).

³⁴⁸ *Ibid* at s 90 (2)(g).

³⁴⁹ Jannie Otto, Corlia M Van Heerden & Jacolien Barnard ‘Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement’ (2014) 26 *SA Merc LJ* 247 at 271. The authors criticized the ruling and argue that in such a case, the credit provider acts as both credit provider and a supplier in terms of the common law and for the purposes of the CPA. See also *Mercedes-Benz Financial Services South Africa (Pty) Ltd v National Credit Regulator* [2019] JOL 42506 (NCT).

³⁵⁰ Department of National Treasury South Africa ‘Implementing a twin peaks model of financial regulation in South Africa – Published for comment by the Financial Regulatory Reform Steering Committee’ available at <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf>, accessed 09 February 2024.

³⁵¹ See Howard Chitimira & Phemelo Magau ‘The Role of selected regulatory bodies in the promotion of financial education in South Africa’ (2023) 19 *Acta Universitatis Danubius Juridica* 28 at 41 on shortcomings in effective promotion of financial consumer education by the FSCA and NCR. Also see JS van Wyk ‘A Comparative Analysis of the Regulatory Independence of the Financial Sector Conduct Authority and the National Credit Register’ (2019) 82 *THRHR* 392 at 398 – 399.

addressed, Twin Peaks in South Africa may not result in administrative and regulatory simplification but may inadvertently introduce uncertainty.³⁵²

In order to promote greater certainty in commercial dealings, it is important that the MoU and the legislation is clear regarding which regulator would be considered the lead supervisor with the appropriate jurisdiction.³⁵³ It must also be clear how concurrent jurisdiction would apply in practical terms and how conflicting opinions will be resolved in instances where financial institutions must account to multiple regulatory bodies.

3.4 MANAGING OPERATIONAL COMPLEXITY DURING THE TRANSITIONAL PERIOD OF THE REGULATORY REFORM JOURNEY

The promulgation of the FSRA has not done away with sectoral law like FAIS but rather introduced consequential changes, aligning them with the Twin Peaks approach.³⁵⁴ Therefore sectoral law such as FAIS continue to apply. However, it is intended that COFI³⁵⁵ will introduce a ‘consolidated, comprehensive and consistent’ framework to regulate the conduct of financial institutions.³⁵⁶ Once enacted, COFI will embed a principles-based, outcomes-focused, activity-based, risk-based, and proportional approach,³⁵⁷ and will become the overarching primary legislation to regulate market conduct with financial services.³⁵⁸

³⁵² Bryane Michael et al ‘Does objectives-based financial regulation imply a rethink of legislatively mandated economic regulation? The case of Hong Kong and Twin Peaks financial regulation’ (2020) 46 *Notre Dame Journal of Legislation* 245 at 272.

³⁵³ Wilhelm G Schulze & S L W Mokobi ‘The case for further reform of the banks’ advisory duty in South Africa post the FAIS Act 37 of 2002’ (2021) 33 *SA Merc LJ* 419 at 424–425. The article correctly notes that banks prefer clear and relevant regulatory frameworks instead of ‘trying their luck at an impractical framework and have thus invested enormous resources into compliance’.

³⁵⁴ Jonathan Faurie ‘A new playing field with the introduction of the FSCA’ *Financial Intermediaries Association of Southern Africa* 18 June 2018, available at <https://fia.org.za/2018/06/18/a-new-playing-field-with-the-introduction-of-the-fsca/>, accessed 24 October 2023. See FSRA (n 80) at s 301(3).

³⁵⁵ COFI Bill (n 16).

³⁵⁶ *Ibid* at s 3(1).

³⁵⁷ National Treasury (n 98) at 9–13.

³⁵⁸ Finance Standing Committee ‘Conduct of Financial Institutions (COFI) Bill 2018 – draft’ *Parliamentary Monitoring Group* available at <https://pmg.org.za/call-for-comment/784/>, accessed 24 October 2023. See also Roy Havemann & Katherine Gibson ‘Financial Sector Regulation Bill 2013 Implementing Twin Peaks – Phase 1’ *Department of National Treasury South Africa* January 2014 at 7, available at [https://www.treasury.gov.za/twinpeaks/20140128%20\(workshops\)%20v4%20twin%20peaks%20presentation.pdf](https://www.treasury.gov.za/twinpeaks/20140128%20(workshops)%20v4%20twin%20peaks%20presentation.pdf), accessed 26 October 2023.

Importantly, one of the stated key objectives of COFI is to ensure financial consumer protection and the fair treatment of financial customers.³⁵⁹ Therefore, under COFI legislation,³⁶⁰ it is intended that sectoral law will ultimately be replaced by a new market conduct regulatory framework applicable to all institutions performing financial activities, aimed at placing TCF and customer centricity at the core of organisational strategy and organisational culture.³⁶¹ It is anticipated that a phased approach will be adopted to replace conduct requirements in existing sectoral laws.³⁶²

3.4.1. Transitional operational complexity related to FAIS

It can be expected that the full transition after COFI is promulgated and subsequent embedment of the outcomes-based approach to regulation will take several years. An area of possible operational complexity during the transition phase is the structure of conduct regulation under the Financial Advisory and Intermediary Services Act³⁶³ (FAIS) which is detailed, rules based and driven from a sectoral, industry and entity licensing perspective as opposed to a functional activity and outcomes-based view.³⁶⁴ As an example, there are around 155 board notices together with 856 FAIS notes published as of 21 June 2020 on the FSCA website.³⁶⁵ In addition there are several other codes of conduct that outline the minimum standard of conduct in client engagements.³⁶⁶

Therefore, the operational complexity associated with this transition should not be underestimated. It can be expected that the full transition and embedment of the outcomes-based approach to regulation will take a few years as financial institutions adapt their frameworks, policies, operating practices, and regulators settle into risk-based supervision. As part of the

³⁵⁹ COFI Bill (n 16) at s 3(1)(a) and (b).

³⁶⁰ *Ibid.*

³⁶¹ National Treasury (n 98) at 20.

³⁶² Finance Standing Committee (n 317). See also Havemann & Gibson (n 360) at 7.

³⁶³ Financial Advisory and Intermediary Services Act 37 of 2002.

³⁶⁴ Daleen Millard & Wendy Hattingh *The FAIS Act Explained* 2 ed (2017) 119.

³⁶⁵ FSCA Authority 'List of All Notices' available at

<https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>, accessed on 28 March 2024.

³⁶⁶ Millard & Hattingh (n 368) at 26. See FAIS codes of conduct for administrative and discretionary FSPs in Board Notice 79 of 2003 *GG* 25299 8 August 2003; General Code of Conduct for Authorised Financial Services Providers and Representatives in Board Notice (BN) 80 of 2003 *GG* 25299 8 August 2003 as amended; Code of Conduct for authorised financial services providers, and their representatives, involved in forex investment business in BN 48 of 2004 *GG* 26201 30 March 2004; and Notice on Specific Code of Conduct for authorised financial services providers and representatives conducting short-term deposit business in BN 102 of 2004 *GG* 26844 29 September 2004.

transition, a careful review of all applicable regulatory instruments needs to be undertaken to mitigate against the risk of conflicting positions or matters falling through the cracks during the transition period.³⁶⁷

Pending the alignment process, the consumer protection mechanisms available under FAIS and the FAIS General Code would continue to apply to advisory and intermediary services provided in relation to financial products. Importantly, FAIS³⁶⁸ and the General Code of Conduct ‘GCC’³⁶⁹ impose a general duty on providers to ‘render financial services honestly, fairly, and with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry’.³⁷⁰ Section 16(1)(b) of FAIS also requires that financial services providers ‘must act with circumspection and treat clients fairly in a situation of conflicting interests’. Section 6 of the GCC further states that ‘a financial services provider must, in all communications and dealings with a client, act honourably, professionally and with due regard to the convenience of the client’. The general duty is complemented by specific duties relating to disclosure; factual correctness of advice; plain language;³⁷¹ consideration of client needs and conducting a customer financial needs analysis;³⁷² the client’s level of education;³⁷³ and placing the client in a position where they can make an informed decision.³⁷⁴

There is an argument that FAIS and the FAIS General Code of Conduct already include fairness principles and that the flexibility associated with TCF principles introduces uncertainty.³⁷⁵ It is further argued that FAIS is adequate to ensure customers are treated fairly³⁷⁶ and that additional dedicated rules can be adopted by the legislature to protect the customer where necessary. Whilst there is some merit in this argument, it fails to consider that not all conduct of financial service providers is regulated under FAIS.³⁷⁷ For instance, FAIS applies to institutions

³⁶⁷ National Treasury (n 98) at 2.

³⁶⁸ FAIS (n 363) at s 16(1)(a).

³⁶⁹ BN 80 (n 368) at s 2 reconfirms the provisions of FAIS (n 363) at s 16(1)(a).

³⁷⁰ FAIS (n 363) at s 16(1)(a) and s 2 of the General Code of Conduct (GCC).

³⁷¹ BN 80 (n 368) at s 3(1)(a)(i) and (ii).

³⁷² *Ibid* at s 8(1)(b).

³⁷³ *Ibid* at s 3(1)(a)(iii). See also Henk Kloppers ‘The regulation of advice within the financial services sector’ (2022) 28 *Obiter* 113 at 137.

³⁷⁴ BN 80 (n 368) at s 8(2).

³⁷⁵ Millard & Maholo (n 115) at 595.

³⁷⁶ *Ibid* at 613.

³⁷⁷ Schulze & Mokobi (n 353).

conducting financial advisory and intermediary services in relation to financial products,³⁷⁸ however it does not apply to exempted financial products to the extent that such product is regulated by another law.³⁷⁹

In addition, definition of advice under FAIS excludes:

- a. any analysis or report on a financial product that does not have an express or implied recommendation, guidance, or proposal that a particular product is appropriate.³⁸⁰
- b. factual advice:³⁸¹
 - i. merely on the procedure for entering into a transaction in relation to a financial product.
 - ii. in relation to description of a financial product.
 - iii. answering routine administrative queries.
 - iv. Providing objective about a particular financial product.
 - v. The display or distribution of promotional material.

The argument that TCF is another name for existing principles, does not consider regulatory blind spots associated with business practices that have evolved beyond the existing legal framework, innovative digital solutions and organisational changes in a 21st century multidimensional and multifunctional financial services industry.³⁸² An example is the marked increase in ‘shadow banking’ activities undertaken by large non-bank entities which are interconnected with financial intermediaries.³⁸³ Likewise, fintechs have introduced alternative

³⁷⁸ Ibid at 420. See also FAIS (n 363) at s 1.

³⁷⁹ FAIS (n 363) at s 1(2).

³⁸⁰ FAIS (n 363) at s 1(3)(a)(ii).

³⁸¹ Ibid at s 1(3)(a)(i).

³⁸² Schulze & Mokobi (n 353) at 424.

³⁸³ Kabelo Khumalo ‘Shadow banking raising important policy concerns, says Reserve Bank’ *IOL News* 20 December 2017 available at <https://www.iol.co.za/business-report/shadowbanking-raising-important-policy-concerns-says-reserve-bank-12486404>, accessed on 07 March 2024. According to the article, in 2017 shadow banking was estimated to be in excess of R 2 trillion and activities covered ‘multi-asset funds, fixed-income funds, hedge funds, fund of funds, finance companies, activities of brokers, securitization schemes and credit insurance.’

payment and remittance mechanisms without directly carrying the regulatory responsibilities of operating as a bank.³⁸⁴

There is also a longstanding debate on whether or not the conduct of banks and their consideration of fair customer outcomes in relation to the design, servicing and performance of transactional bank accounts was subject to FAIS or specific regulatory oversight.³⁸⁵ However, the FSCA issued a guidance³⁸⁶ confirming deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990)³⁸⁷ is included as a product. However, the regulator also indicated that money lending transactions falling within the Usury Act, such as access bonds, revolving credit on motor vehicles, mortgage bonds, loans, credit cards and related financial services fall outside the definition of a product regulated under FAIS.³⁸⁷

The exclusion of certain activities from the statutory protection under FAIS has introduced an undesirable ‘statutory dichotomy’³⁸⁸ which does not take into consideration the fact that ordinary customers attach weight to information provided by bank staff, although some of this information provided may not be regulated under FAIS.³⁸⁹ The dichotomy in customer protection mechanisms is also complicated by the fact that there is no general duty in common law for a bank to advise current or prospective clients.³⁹⁰

The FSCA has reported instances where complaints were received from customers who dealt with licenced financial service providers under the incorrect assumption that they were

³⁸⁴ Sieg Eiselen ‘What to do with Bitcoin and Blockchain?’ (2019) 82 *THRHR* 632 at 632–633. See The Law Library of Congress ‘Regulation of cryptocurrency around the world’ available at https://jolt.richmond.edu/files/2021/02/Bull_crypto-currency-world-survey.pdf, accessed 28 March 2024. Market phenomena such as blockchain technology were available for over a decade without an appropriate law to classify or address such concepts.

³⁸⁵ FSCA (n 228) at 12. See also World Bank (n 106).

³⁸⁶ FSCA ‘Guidance note: ‘Deposit’ in the FAIS Act’ available at <https://www.fsc.co.za/Regulatory%20Frameworks/Guidance%20Notes/GuidanceNoteDepositFAISAct.pdf>, accessed 07 July 2024.

³⁸⁷ *Ibid.*

³⁸⁸ Schulze & Mokobi (n 353) at 421.

³⁸⁹ *Ibid* at 420. See also World Bank (n 106). The report highlighted that ‘the relationship and communications between the frontline staff and the consumer can resonate more than written disclosure information. In this respect, frontline staff are in a powerful position. Aggressive, high-pressure sales tactics, or even subtle de-emphasising of key product features and prices, can have a significant impact on a consumer’s understanding of a product and his or her ultimate purchase decision.

³⁹⁰ *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C). See also Schulze & Mokobi (n 353) at 421.

protected under FAIS.³⁹¹ However, these customers were sadly left without protections afforded under FAIS because the products fell outside the scope and ambit of the Act.³⁹² The unfair outcome was evident in the fact that affected customers were left without redress under FAIS due to a technical legal exclusion even though they were dealing with a licensed financial service provider.

Finally, a particular downside with the current FAIS rules set is that they were designed to ‘force’ a specific result although it may not necessarily influence the fairness of the outcome. An example is the requirement under section 8(8)(b) to make specific reference to the FAIS license held under FAIS in all marketing and advertising materials. Although this may assist a customer to check the registration status of the entity, it bears limited influence on the ultimate outcomes for fair treatment of customers. Some financial institutions tick the box in costly marketing and advertising campaigns to avoid harsh penalties for non-compliance although the ultimate customer outcome and value of such long citations is limited.³⁹³

The application of TCF principles and introduction of statutory fairness control mechanisms to all financial products and financial services across all product categories or classes and distributions channels will go a long way to minimise the ‘statutory dichotomy’ that exists.

3.5 CONCLUSION

There are clearly many moving parts in revamping the regulatory architecture to ultimately drive fair customer outcomes with several transitional arrangements being put in place. Based on the multiplicity of regulatory instruments under review, it is not evident at this stage if the regulatory reforms will simplify regulatory architecture and if the complexity will remain albeit in another form. Baldwin et al note five key tests to assess regulatory action:

- a. ‘Is the action or regime supported by regulatory authority?;
- b. Is there an appropriate scheme of accountability?;

³⁹¹ FSCA ‘Statement supporting the proposed amendments to the general code of conduct for authorised financial services providers and representatives, 2003’ available at <https://www.masthead.co.za/wp-content/uploads/2020/12/Annexure-A-Statement-need-impact-operation-supporting-the-Proposed-Amendments-to-the-General-Code-2020.pdf>, accessed 07 March 2024.

³⁹² FSCA (n 391) at 3.

³⁹³ On tick-box approach see D. Millard & B. Kuschke ‘Transparency, trust and security : an evaluation of the insurer's precontractual duties’ (2014)17 *Potchefstroom Electronic LJ* 2411 at 2412.

- c. Are procedures fair, accessible and open?;
- d. Is the regulator acting with sufficient expertise?
- e. Is the action or regime efficient?³⁹⁴

The above tests could be valuable in South Africa as part of the overall process to assess the efficacy of the regulatory architecture to promote delivery of fair customer outcomes. It is against these five factors that the regulatory regime to protect retail financial customer and deliver fair customer outcomes could be measured.

The PA through legacy transferred from SARB, has decades of extensive knowledge and experience supervising banks whilst the FSCA assumed full responsibility to supervise banks and credit providers more recently. Therefore, whilst it is necessary for the FSCA to lean on the supervisory experiences and techniques of the PA, in the interest of maintaining consumer protection at the centre of the FSCA's activities, it is key that the FSCA does not assume a secondary position in the regulator relationship.³⁹⁵

In a multidimensional pentagon peak structure (not limited to two peaks) there is heightened risk of poor collaboration, coordination, and fragmentation of information limiting the ability to have a holistic and integrated risk view.³⁹⁶ A poorly unintegrated approach contributes to regulatory fatigue amongst regulated firms because of conflicting requirements, competing interests and uncoordinated information requested around similar or related topics.

The operational standards or protocols of financial sector regulators should be enhanced to ensure that coordination, cooperation and collaboration mechanisms between the regulators are strengthened to embed a more proactive approach. The operational standards or protocols should limit creating multiple touch points with financial institutions around the same or similar topics and mitigate against the risk of issuing conflicting messages to the public and financial institutions.³⁹⁷ For instance, on the back of well-structured legitimate interest information sharing

³⁹⁴ Robert Baldwin, Martin Cave & Martin Lodge *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed (2011) 27.

³⁹⁵ See section 3.2 above for substantiation of the recommendation.

³⁹⁶ Georgosouli (n 242) at 278.

³⁹⁷ See section 3.2, 3.3 and 3.4 above for substantiation of the recommendation.

arrangements aligned with POPIA, the FSCA and the NCR can consolidate statutory reporting requirements around similar or related topics. They can also exchange and share data on aspects such as customer complaints and insights on high-risk products and trends. However, collaborative initiatives between regulators must be backed by clear objectives and measurement to ensure that the initiatives do not only improve efficiencies and competition but also contributes to fair outcomes for customers and consumer protection against emerging new threats. It is recommended that the MoU with the NCR should be complemented by a more detailed coordination framework between the regulators which includes practical details around policy and rule-making; supervision of entities subject to regulation by both the FSCA and NCR; coordination of information requests; returns and related tools; reporting obligations for non-compliance and conduct failures; and the approach to industry engagement on market conduct risk issues.³⁹⁸

There is also an opportunity for relevant regulatory bodies to participate in joint supervisory meetings and on-site inspections of financial institutions. Secondly, the MoUs between the regulators (PA, FSCA and NCR) should clarify how concurrent jurisdiction would work – where applicable – in as far as it relates to credit products. Thirdly, there must be an efficient mechanism to ensure accountability and measurement to effectively drive cooperation, collaboration, and co-ordination amongst regulators in order reduce unnecessary duplication and complexity.

Importantly, the COFI must address the uncertainty and financial consumer protection coverage gaps that have emerged from exclusion or omission of certain products, as is the case under FAIS. The wording around the scope and application of the fairness requirements under the Bill should also be principled and flexible enough to cater for product evolution and the introduction of new innovative offerings, channels, and solutions.

The regulatory framework and supervisory architecture must be designed in such a manner that it enables effective conduct risk management whilst allowing banks to operate profitably.³⁹⁹

The next Chapter will show that COFI must also ensure alignment with relevant fairness control mechanisms in the CPA.

³⁹⁸ Allen (n 75) at 2–3; Godwin, Kourabas & Ramsay (n 330) at 286–291; Biber et al (n 344) at 1565.

³⁹⁹ Antje Hargarter & Gary Van Vuuren ‘Assembly of a conduct risk regulatory model for developing market banks’ (2017) 20 *South African Journal of Economic and Management Sciences* 1 at 8.

CHAPTER 4: LESSONS FROM THE CONSUMER PROTECTION ACT ON THE APPROACH TO FAIRNESS AND CERTAIN OTHER CONSUMER RIGHTS

4.1 INTRODUCTION

The delivery of fair customer outcomes is intertwined with fairness control and fundamental consumer rights. However, in its current form, the structure of the COFI Bill is primarily focused at regulated entities such as banks, insurers, market infrastructures and other registered financial product or service providers.⁴⁰⁰ Therefore, to develop a regulatory framework directed at regulated entities whilst meaningfully addressing the protection of retail financial customers, it is necessary to provide a high level context regarding certain fundamental consumer rights available to general consumers in South Africa under the CPA. Furthermore, considering the centrality of the CPA as the primary consumer protection legislation in South Africa, it is crucial to analyse and understand fairness controls under the Act.

Consequently, this Chapter considers the application of the CPA to financial products and services and compares and analyses fairness controls under the COFI Bill and Conduct Standard with fairness controls under the CPA. Categories of fairness control mechanisms considered in this Chapter include incorporation controls, interpretation controls and content controls.⁴⁰¹ The Chapter also proposes adding conduct control as a fourth type of control which deals with requirements around culture, organisational practices or behaviours, governance, oversight, and operational execution related to products and services. Conduct control is a new category that is added and it groups together existing controls related to the conduct and practices of financial institutions, and it also includes a proposed new assessment criterion to determine the fairness of conduct (not just limited to contractual terms).

⁴⁰⁰ See National Treasury (n 98) at 21. FSRA (n 80) s 1.

⁴⁰¹ Naudé (n 23) at 346–365. See also Naudé (n 27) at 506.

4.2 DOES THE CPA APPLY TO FINANCIAL PRODUCTS AND FINANCIAL SERVICES?

In terms of section 5(1)(a) of the CPA, the Act applies to all transactions including supply of goods and services subject to certain exemptions. The definition of service under section 1 includes banking services or similar financial services. However, section 5(1)(b) – (d) and sections 5(2) – (4) sets out the limit of application of the CPA to financial products and financial services. The Financial Services Laws General Amendment Act⁴⁰² which was promulgated in 2013 specifically provided an exemption from the operation of the CPA.⁴⁰³ Section 28(2)(b) states that the CPA does not apply where ‘any function, act, transaction, good or services are subject to Financial Services Board (FSB) legislation... or any board or registrar referred to in the FSB legislation.’ The intention was presumably for the FSB (predecessor to the FSCA) to introduce a framework for consumer protection under the TCF initiative.⁴⁰⁴

Notwithstanding the above provision, confusion remained on the applicability of the CPA to financial services. For instance, certain authors hold the view that agreements between the bank and its customers including exemption clauses can be challenged for unfairness under the CPA,⁴⁰⁵ and that section 48 – 52 of the CPA regarding just, fair and reasonable terms and condition was available to consumers.⁴⁰⁶ However, the National Consumer Commission acknowledged that it had not exercised oversight on transactional accounts and fixed deposits because it held the view that post 2013, these should be addressed by financial sector law.⁴⁰⁷ On the other hand, the FSCA held the view that only FAIS related products were exempt from operation of the CPA.⁴⁰⁸

The FSRA now incorporates an express term that excludes the application of the CPA in relation to ‘a function, act, transaction, financial product or financial service that is subject to the

⁴⁰² Financial Services Laws General Amendment Act 45 of 2013. Section 66 substituted s 28 of the Financial Services Board Act 97 of 1990.

⁴⁰³ CPA (n 16).

⁴⁰⁴ Tjatie Naudé & Sieg Eiselen (eds) *A Commentary on the Consumer Protection Act* (Revision Service 10 2024) at Introduction-2.

⁴⁰⁵ Robert Sharrock *The Law of Banking and Payment in South Africa* 2016 at 279. Also see J Moorcroft & M L Vessio *Banking Law and Practice* (2024) at 37-4 – 37-7.

⁴⁰⁶ Ibid.

⁴⁰⁷ World Bank (n 106) at 51.

⁴⁰⁸ Ibid.

NPSA⁴⁰⁹ or a financial sector law and which is regulated by the FSCA in terms of a financial sector law'.⁴¹⁰ At first glance, the implication is that the FSRA now completely ousts the CPA from application to all financial products and services covered by financial sector law. However, there are concerns that the wording of section 10 is unclear,⁴¹¹ because section 10(1)(a) appears to oust the jurisdiction of the CPA in respect of goods and services subject to credit agreement once the transaction enters the national payment system.⁴¹² Therefore, there is a question whether 'strict liability, monitoring and recall' provisions in the CPA apply to the value chain in the financial services sector.⁴¹³ The wording seems to bar application of the CPA⁴¹⁴ – including the strict liability and product recall provisions⁴¹⁵ – even in respect of goods and services that are the subject of a credit agreement once the transaction enters the national payment system.⁴¹⁶ Furthermore, section 10(b) of the FSRA states the CPA does not apply in relation to the Reserve Bank, the PA, the FSCA, the Prudential Committee, the Executive Committee, the Chief Executive Officer, the Commissioner or a Deputy Commissioner. On a strict reading, this section also seems to oust the application of the CPA to activities subject to oversight by these entities including banking, insurance and investment.

If a strict interpretation is applied, the current wording of section 10(1)(b) will also have the absurd result of excluding the comprehensive protections available under the CPA for a range of banking and insurance products and services that fall under the regulatory and supervisory scope of the PA and FSCA, without equivalent protections under financial sector law.⁴¹⁷ For instance, although goods subject to a credit agreement fall within the ambit of the CPA in terms of section 5(2)(d),⁴¹⁸ some customers may be left without meaningful or timely redress, incurring legal costs and further financial risks for voluntary surrender of financed yet dysfunctional vehicles, because

⁴⁰⁹ NPSA (n 6).

⁴¹⁰ FSRA (n 80) at s 10(1)(a).

⁴¹¹ Moorcroft & Vessio (n 405) at 37-4.

⁴¹² Ibid at 37-7.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ CPA (n 16) at ss 5(5); 60 and 61.

⁴¹⁶ Monica Laura Vessio 'Twin peaks and the impact of the Consumer Protection Act on financial products and services' in Sarel du Toit & Charl Hugo (eds) *Annual Banking Law Update* (2019) at 114 and 127.

⁴¹⁷ Vessio (n 416) at 122.

⁴¹⁸ *Nedbank Limited v Sithole* (2024) ZAGPPHC 88 para 22.

lenders will not be liable in such instances.⁴¹⁹ Moreover, complex contractual arrangements between customers, lenders and dealers may inadvertently frustrate recourse against dealers,⁴²⁰ leaving customers without meaningful redress even though the dealers receive dealer incentive commission from lenders.⁴²¹ The triangulation, time bars and jurisdictional issues between the National Consumer Commission, the FSCA, the Motor Industry Ombudsman of South Africa, and the National Consumer Tribunal also indicate existing gaps that contribute to poor outcomes.⁴²²

Therefore, the wording, scope and ambit of section 10 of the FSRA requires further clarification by the legislature.⁴²³ In addition, the consumer protection regime in financial services should as a minimum reflect core CPA rights and protection supplemented by more specific industry specific requirements (similar to the approach in Australia discussed under Chapter 7).

Notably, in *Bester v MIT*⁴²⁴ the court found that an unlicensed forex trading business contravened section 42 and section 43 of the CPA by operating a pyramid scheme.⁴²⁵ But the court also found that business rendered financial services without a license in breach of section 7 of FAIS.⁴²⁶ Interestingly, there is another argument⁴²⁷ that the CPA continues to cover products and services falling outside the ambit of the NCA and FSCA legislation.

⁴¹⁹ *MFC* (n 347) para 10. *Mokgoke v Momentum Insure Company Limited* (2023) ZANCT 35; *Leutle v Kolev Motors CC* (2021) ZANCT 26. *Nedbank v Sithole* (n 420) para 22 stated that even though the bank cannot simply shrug off its responsibility by pointing to the dealer, '[i]t is when the consumer takes out a personal loan to purchase a car that the bank is solely a credit provider'.

⁴²⁰ See Otto, Van Heerden & Barnard (n 349) at 271.

⁴²¹ FSCA 'Request for information related to the payment of Vehicle and Asset Finance Dealer Introductory Commissions (DIC)' Information Request 4 of 2022 available at https://www.fsca.co.za/Notices/Forms/AllItems.aspx?Paged=TRUE&PagedPrev=TRUE&p_SortBehavior=0&p_Created=20220527%2018%3A05%3A08&p_ID=2349&PageFirstRow=31&&View=%7B46386E88-2C88-4172-996C-4754CE739CC8%7D, accessed 20 December 2024. See also Dealerfloor Motor Industry News 'Second gross: More important than ever' 16 October 2020 available at <https://dealerfloor.co.za/second-gross-more-important-than-ever>, accessed 20 December 2024 which reported that 59% of the average dealer profit per unit was attributable to dealer incentive commission.

⁴²² See *Mokgoke* (n 419) paras 11 and 26; *Leutle* (n 419) paras 10 – 11, 33, and 45 – 46. See also Ombudsman for Banking Services 'Consumer Note 2 – Vehicle Finance' available at <https://www.obssa.co.za/wp-content/uploads/2018/02/CIN-2-Vehicle-Finance-Final-February-2018.pdf>, accessed 20 December 2024.

⁴²³ Vessio (n 416) at 114.

⁴²⁴ *Bester NO v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI* (2023) ZAWCHC 83.

⁴²⁵ *Ibid* para 101.

⁴²⁶ *Ibid* paras 96 and 98–100.

⁴²⁷ Angela Itzikowitz & Era Gunning 'The application of the Consumer Protection Act to Open Banking' *ENSAfrica* 09 November 2021, available at <https://www.ensafrika.com/news/detail/4999/the-application-of-the-consumer->

Despite concerns around the extent of the carve out of financial products and services from operation of the CPA, there is a strong argument to be made that the protections afforded to users of retail financial products and services under financial sector law should not be less than those offered to general consumers under the CPA. Most notable are the control mechanisms incorporated in the CPA to protect the consumer against unconscionable conduct and against unfair contract terms.⁴²⁸

For purposes of this thesis, a high-level view is provided on consumer rights afforded under Chapter 2 of the CPA, with particular focus on rights afforded by sections 4, 8–10, 11–12, 40, 48, 49, 51, 52, 55 and regulation 44 of the CPA Regulations. The fairness control mechanisms under the CPA are compared with mechanisms offered under the COFI Bill and Conduct Standard. Specific recommendations are made to align fundamental fairness control mechanisms in COFI with the CPA.

4.3 THE COFI BILL'S FAIRNESS CONTROLS COMPARED WITH CONSUMER RIGHTS UNDER CHAPTER 2 OF THE CPA

Although this thesis does not intend to provide an in-depth analysis of consumer rights under Chapter 2 of the CPA nor to make recommendations regarding such rights, fundamental consumer rights should serve a baseline that underpins fairness controls. Therefore, consideration of some of these fundamental rights in relation to the COFI Bill is important because their violation underpins certain unfair commercial practices.⁴²⁹ Relevant provisions of the 2018⁴³⁰ and 2020 versions of the COFI Bill⁴³¹ are considered in the comparison of consumer rights under the CPA.

protection-ac, accessed 24 February 2022. For instance, in scenarios where financial institutions provide ancillary products which do not fall within the definition of financial products or financial services – such as electronic equipment – as part of their reward schemes, the CPA still applies. According to Phil Laplante & Nir Kshetri 'Open Banking: Definition and Description' (2021) 54 *Computing Economics* 122 at 123, open banking is defined as an ecosystem that 'provides third-party financial service providers open access to consumer banking, transaction, and other financial data from banks and nonbank financial institutions through the use of application programming interfaces'.

⁴²⁸ World Bank (n 106) at 6 and 91–94.

⁴²⁹ Jacolien Barnard 'Suppliers, consumers and redress for defective vehicles – the reach of the National Consumer Tribunal : Tshehla v Aucamp Eiendoms Beleggings' (2020) 137 *SALJ* 229 at 239.

⁴³⁰ First Draft of Conduct of Financial Institutions Bill in GN 642 *GG* 42114 of 14 December 2018.

⁴³¹ COFI Bill (n 16).

4.3.1 Realisation of consumer rights

Section 4 of the CPA includes the right of a person, or person acting on their behalf, a member of an interest group or association acting on behalf of such person – to approach the court, tribunal or commission about threatened or prohibited conduct or about infringement, impairment of a consumer’s rights. In matters before a court or Tribunal, the court and Tribunal are required to promote the spirit and purpose of the Act.⁴³² Furthermore, the CPA provides that the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights.⁴³³ The court and Tribunal can make appropriate orders giving practical effect to the consumer’s right of access to redress, including, making any innovative order that ‘better advances, protects, promotes and assures the realisation by consumers of their rights’ in terms of the Act.⁴³⁴ Section 2(10) provides that nothing under the CPA precludes a consumer from relying on a right they have under common law.⁴³⁵

By contrast, the objective of COFI (2020 draft Bill) is to establish a regulatory framework for the conduct of financial institutions to support the FSCA in achieving objectives set out in the FSRA,⁴³⁶ which includes promoting fair customer outcomes.⁴³⁷ Similarly, COFI requires that it be interpreted and applied to promote the achievement of the objects of section 7 of the FSRA, which includes fair treatment and protection of financial customers.⁴³⁸ The wording is distinguishable from the 2018 version of the COFI Bill, which expressly required that the Act be interpreted to promote achievement of the objects of financial consumer protection and fair treatment of customers.⁴³⁹ Overall the current wording of COFI seems to be primarily designed to regulate financial institutions and not so much to directly confer consumer rights. Furthermore, the COFI Bill is silent on who may approach the court, the Ombud, Tribunal or FSCA to enforce obligations under the Act.

⁴³² CPA (n 16) at ss 4(2)(b) and 4(3).

⁴³³ Ibid at s 4(2)(a). See also Tjakie Naudé & Elizabeth de Stadler ‘Innovative orders under the South African Consumer Protection Act 68 of 2008’ (2019) 22 *Potchefstroom Electronic LJ* 2 at 3–4.

⁴³⁴ CPA (n 16) at s 4(2)(b). Naudé & De Stadler (n 433) at 5.

⁴³⁵ Evert Van Eeden, & Jacolien Barnard *Consumer Protection Law in South Africa* 2ed (2018) 37–39. See also Naudé & Eiselen (n 404) at Introduction-2.

⁴³⁶ COFI Bill (n 16) at s 3(1).

⁴³⁷ FSRA (n 80) at s 57(b).

⁴³⁸ Ibid at s 7(c).

⁴³⁹ COFI Bill (n 16) at s 3(1)(a).

4.3.2 Right to equality and not to be unfairly discriminated against

The CPA (similar to the NCA) has embedded the right to equality in sections 8 – 10 which also recognises permissible reasonable grounds for differentiated treatment.⁴⁴⁰ In contrast, the COFI Bill does not have such an express provision affirming the right to equality and not to be unfairly discriminated against. The right to equality is enshrined as a fundamental human right in section 3 of the Bill of Rights,⁴⁴¹ and COFI needs to reflect constitutional values.⁴⁴²

4.3.3 Right to privacy

Sections 11 – 12 of the CPA entrench the right to privacy including the right to be left alone,⁴⁴³ and restriction on unwanted direct marketing. The CPA also affirms a broader right to information privacy, confirming that the Act must be read with the POPIA.⁴⁴⁴ Similarly, section 35(c) of the COFI Bill provides that financial institutions must provide acceptable levels of safety and security in relation to financial product, financial instruments, financial service, and personal information of financial customers. Additionally, financial institutions must maintain operational ability⁴⁴⁵ and retention of records⁴⁴⁶ to fulfil its responsibilities with the POPIA.

Although the right to privacy may be implicit in the above provisions, contravention of data protection laws and privacy rights under POPIA can result in unfair commercial practices that are prejudicial to the customer.⁴⁴⁷ The misuse of data introduces conduct risk,⁴⁴⁸ and warrants incorporation of data protection and privacy obligations.

⁴⁴⁰ CPA (n 16) at s 9.

⁴⁴¹ Constitution of the Republic of South Africa, 1996.

⁴⁴² See also Stephan van der Merwe ‘Judicial Intervention and the Call to Transformative Constitutionalism in the Context of Consumer Law, Debt Collection and the National Credit Act: Bayport Securitisation Ltd v University of Stellenbosch Law Clinic’ 2023 (140) *SALJ* 328 at 339.

⁴⁴³ *NM v Smith* 2007 (5) SA 250 (CC) para 32.

⁴⁴⁴ Protection of Personal Information Act 4 of 2013. See also Moorcroft & Vessio (n 405) at 37.

⁴⁴⁵ COFI Bill (n 16) at s 42(1)(c).

⁴⁴⁶ *Ibid* at s 55(1).

⁴⁴⁷ See article by Gilad Katzav ‘Compartmentalised data protection in South Africa: The right to privacy in the Protection of Personal Information Act’ (2022) 139 *SALJ* 432 at 434 which argues that right to privacy may be inadequate ‘to safeguard against the harms of data processing’.

⁴⁴⁸ OECD ‘Consumer Finance Risk Monitor’ 2024 at 36 and 48 available at <https://www.oecd-ilibrary.org/docserver/be5cb8fe-en.pdf?expires=1733928007&id=id&accname=guest&checksum=D680953C1C79B24CC3E4E3FD56A7B82B>, accessed 11 December 2024.

4.3.4 Right to choose the supplier, goods and services

The CPA entrenches the consumer's right to choose the supplier, and the goods and services they wish to purchase,⁴⁴⁹ and incorporates an implied term that products and services will be delivered and perform as agreed.⁴⁵⁰ These rights are implicit in the COFI Bill and a duty is imposed on financial institutions to ensure financial products and financial services are appropriate and perform as the financial institution has led customers to expect whether through information, advertisements, or other representation.⁴⁵¹ Considering that customers, regulators and society have a clear expectation around quality and safe financial products,⁴⁵² financial institutions are required to take steps to mitigate any material risk relating to unsuitable products or services.⁴⁵³ A number of provisions such as those relating to advertising and marketing,⁴⁵⁴ and post-sale barriers and obligations,⁴⁵⁵ also promote the ability of customers to make an informed choice.

Interestingly, the CPA provides that if a consumer enters a transaction solely on the basis of a description provided by the supplier, the product and services must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable assessment.⁴⁵⁶ Notably, the CPA also provides remedies against suppliers in the value chain if standards⁴⁵⁷ are not met.⁴⁵⁸ The COFI Bill does not have a similar provision regarding the assessment by a reasonably alert consumer nor is there express liability of suppliers or third parties in the value chain for breach of obligations.

⁴⁴⁹ CPA (n 16) at s 13–21.

⁴⁵⁰ Ibid at s 19(2). See also Moorcroft & Vessio (n 405) at para 37.6.3.

⁴⁵¹ COFI Bill (n 16) at s 26(1)–(2) and s 35(b).

⁴⁵² See Rhys A. Bollen 'Quality and Safety for Financial Services and Products' (2015) 26 *Journal of Banking and Finance Law and Practice* 1 – 30 at 1. Also see FSCA 'South African financial customer behaviour and sentiment study' July 2023 at xiii available at <https://www.fsca.co.za/Documents/South%20African%20Retail%20Financial%20Customer%20Behaviour%20and%20Sentiment%20Report.pdf>, accessed 20 October 2023.

⁴⁵³ COFI Bill (n 16) s 26(3).

⁴⁵⁴ Ibid s 29–31.

⁴⁵⁵ Ibid s 32–34.

⁴⁵⁶ CPA (n 16) at s 18(3).

⁴⁵⁷ CPA (n 16) at s 55.

⁴⁵⁸ Ibid at s 56.

4.3.5 Right to disclosure and information

The CPA confirms the right to information in plain and understandable language,⁴⁵⁹ and goes further to define what is considered plain language. Language is considered plain

if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import ...without undue effort.⁴⁶⁰

The plain language requirement has inspired research across continents and diverse fields to guide drafting,⁴⁶¹ and to improve access to quality information that will assist consumers to make better quality decisions.⁴⁶²

Under the COFI Bill financial customers must be given adequate, clear, and accurate information and be kept appropriately informed – before, during, and after the conclusion of the contract – to make informed decisions about the financial product or service.⁴⁶³ There is an obligation on financial institutions to disclose all relevant facts that could influence the financial customers’ decisions relating to the financial product or financial service, including benefits, risks, costs, contractual obligations, consequences of breach and available recourse options.⁴⁶⁴ Disclosure must use clear, plain, and unambiguous language appropriate for the target market.⁴⁶⁵ Disclosure must be adequate, appropriate, timely, relevant, complete, factually correct and not misleading or deceptive. It must promote understanding of the financial product or financial service and comparison across similar products or services. Financial institutions must also consider the nature and complexity of the financial product or service and the reasonably assumed knowledge, understanding and experience of the customer.⁴⁶⁶ Financial institutions must ensure that anyone publishing information on their behalf complies with Chapter 6.⁴⁶⁷

⁴⁵⁹ CPA (n 16) at s 22.

⁴⁶⁰ Ibid at s 22(2). See also Moorcroft & Vessio (n 405) para 37.6.4.1.

⁴⁶¹ Elizabeth de Stadler and Liezl van Zyl ‘Plain-language contracts: challenges and opportunities’ (2017) 29 *SA Merc LJ*: 95 at 96.

⁴⁶² Ibid at 99.

⁴⁶³ COFI Bill (n 16) at s 29(2).

⁴⁶⁴ Ibid at s 31(1).

⁴⁶⁵ Ibid at s 31(2)(a).

⁴⁶⁶ Ibid at s 31(2).

⁴⁶⁷ Ibid at s 31(3).

The CPA is distinguishable from the COFI Bill because section 31(2)(a) of COFI requires use of language that is clear, plain, unambiguous and appropriate for the target market but does not define plain language. However, the Conduct Standard requires financial institutions to consider the needs and presumed knowledge of the target,⁴⁶⁸ and defines plain language to mean communication that

(a) is clear and easy to understand; (b) avoids uncertainty and confusion; and (c) is adequate and appropriate in the circumstances, taking into account the factually established or reasonably assumed level of knowledge of the person or average persons to whom the communication is targeted.⁴⁶⁹

The plain language definition in the Conduct Standard is distinguishable from the CPA and ISO international standard on plain language⁴⁷⁰ in that it does not include direct consideration of the consumer's literacy skills, experience or expertise. Similarly, the definition does not expressly address the fact that communication must enable the reader to find and understand what they need.⁴⁷¹ However, these factors are included under section 7(2)(e) and section 7(3)(b) of the Conduct Standard. Ultimately, an 'outcomes-focused' definition is preferred which centres on the customer's ability to understand and use the document.⁴⁷²

Ultimately, having some definitions and disclosure provisions in COFI and others in the Conduct Standard introduces unnecessary complexity.

4.3.6 Right to fair and responsible marketing

The CPA addresses the right to fair and responsible marketing under section 29 – 39 and prohibits misleading, deceptive or false representations.⁴⁷³ This includes misleading information about the nature, properties, advantages and uses, manner and conditions of supply and any material aspect. There are minimum information requirements for customer loyalty programmes,⁴⁷⁴ and it is prohibited to offer participation in a customer loyalty programme where there is an intention not

⁴⁶⁸ Conduct Standard (n 17) at s 7 (3).

⁴⁶⁹ Ibid at ss 7(1)(b) and 7(4).

⁴⁷⁰ International Organization for Standardization 'ISO 24495-1:2023 Plain language' 2023 available at <https://www.iso.org/standard/78907.html>, accessed 17 December 2024.

⁴⁷¹ Ibid para 3.1.

⁴⁷² See de Stadler & Van Zyl (n 461) at 106.

⁴⁷³ CPA (n 16) at chapter 2 part E. See specifically s 29.

⁴⁷⁴ Ibid at s 35(3).

to provide it or to provide it in a manner other than as offered.⁴⁷⁵ There is also a prohibition on referral selling with the promise of the consumer to receive a commission or rebate, which is contingent upon the consumer agreeing to the transaction.⁴⁷⁶

By contrast, Chapter 6, sections 29–31 of the COFI Bill sets out overarching principles for advertising and disclosure without necessarily going into details about particular practices such as minimum disclosure requirements for loyalty programmes or rebates. Financial products and services are to be marketed and advertised in a clear, fair, unambiguous manner, not misleading or fraudulently.⁴⁷⁷ Advertising material must comply with Chapter 6, and the institution remains accountable for how its financial products and services are marketed or promoted.⁴⁷⁸ The FSCA is granted powers to prescribe conduct standards for marketing, including design, wording, plain and understandable language requirements, disclosure, appropriateness of medium used, direct marketing and unsolicited communication, inducement, loyalty programmes, publication of prices, and prohibited and predatory marketing practices.⁴⁷⁹ The published Conduct Standard addresses plain language, advertising and disclosure requirements,⁴⁸⁰ and the principles are drafted wide enough to apply to different financial products, services or practices.

4.3.7 Right to fair and honest dealing

Part F of the CPA deals with the right to fair and honest dealing including the prohibition of unconscionable conduct. In the COFI Bill, principles for the provision of financial products and financial services are covered in section 26, and includes ensuring that products and services are ‘appropriate for targeted or impacted financial customers’;⁴⁸¹ products and services are ‘provided in a way that is as objective as possible’;⁴⁸² products and services perform as customers were led to expect;⁴⁸³ and remedial action is taken if the financial institution identifies circumstances that introduce a material risk of unsuitable products, unfair outcome or products and services that do

⁴⁷⁵ Ibid at s 35(2). See also Moorcroft & Vessio (n 405) para 37.6.5.3.

⁴⁷⁶ CPA (n 16) at s 38(1).

⁴⁷⁷ COFI Bill (n 16) at ss 29(1) and 30(3).

⁴⁷⁸ Ibid at s 30(1)–(3).

⁴⁷⁹ Ibid at s 67.

⁴⁸⁰ Conduct Standard (n 17) at ss 1, 5 and 7.

⁴⁸¹ COFI Bill (n 16) at s 26(1)(a).

⁴⁸² Ibid at s 26(1)(b).

⁴⁸³ Ibid at s 26(2).

not perform as customers were led to expect.⁴⁸⁴ Personnel responsible for financial product and service design must have the necessary skills, knowledge and expertise required for the function.⁴⁸⁵ Additional principles⁴⁸⁶ applicable to retail financial customers are that :

- a. Agreements must be in writing whenever possible and financial institutions must act within the scope of the mandate given by the customer.⁴⁸⁷
- b. In designing, developing or changing financial products or services, financial institutions must consider adequate and relevant information on the customer's needs.⁴⁸⁸
- c. A competent person must conduct a thorough assessment of the characteristics of that product and service to ensure it is targeted at the correct customer base (whilst limiting access by those for whom the product or service is inappropriate) and to ensure that it is consistent with fair treatment of customers and applicable standards and risk management approach.⁴⁸⁹
- d. The design of the product or service must be sufficiently flexible to respond to reasonable expected changes throughout the customer lifecycle.⁴⁹⁰
- e. The financial institution must consider the intended distribution methods and related disclosure documents when designing, developing, or changing financial products or services.⁴⁹¹

There is a prohibition on unreasonable post sales barriers that may prevent the customer from holding the financial institution accountable for contractual obligations, unmet expectations or unfair treatment.⁴⁹² The CPA addresses some of the COFI provisions related to product suitability and quality under Part H on the right to fair value, good quality and safety.

A notable difference between the COFI Bill and the CPA is that section 40 of the CPA stipulates that it is unconscionable for a supplier knowingly to take advantage of the fact that a

⁴⁸⁴ Ibid at s 26(3).

⁴⁸⁵ Ibid at s 26(4)(a).

⁴⁸⁶ Ibid at s 27.

⁴⁸⁷ Ibid at s 27(1).

⁴⁸⁸ Ibid at s 27(2)(a).

⁴⁸⁹ Ibid at s 27(2)(b).

⁴⁹⁰ Ibid at s 27(2)(c).

⁴⁹¹ Ibid at s 27(3).

⁴⁹² Ibid at s 38.

consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.⁴⁹³ The prohibition of unconscionable conduct is not addressed in the COFI Bill. Interestingly, the 2018 version of the Bill defined unfair conduct as a 'term, condition or requirement that is unfair, unreasonable, unjust or unconscionable.'⁴⁹⁴ However, following substantive industry representation on the structure of the 2018 COFI Bill,⁴⁹⁵ this was deleted in the COFI Bill (2020) version.

4.3.8 Right to fair just and reasonable terms and conditions

Sections 48 – 52 of the CPA cover the right to fair, just and reasonable terms and conditions. There is a prohibition on suppliers from offering, supplying, or entering into an agreement to provide products or services at a price, on terms, or in a manner that is an unfair, unreasonable, or unjust.⁴⁹⁶ A supplier may not require a consumer to waive any rights, assume any obligations, or otherwise waive rights of the supplier on unfair, unreasonable, or unjust terms, or impose any such terms as a condition of entering a transaction.⁴⁹⁷

The term is defined as unfair, unreasonable or unjust if (a) it is excessively one-sided, (b) the terms are so adverse to the consumer as to be inequitable, (c) the consumer relied upon a false, misleading or deceptive, representation, or transaction or (d) the transaction or agreement was subject to notice requirements under section 49 and the term, condition or notice is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied requirements of section 49.

A notice must be written in plain language and drawn to the attention of the consumer in a conspicuous manner at the time of offer or when the consumer enters into the agreement, if the term is intended to limit risk or liability, constitutes an assumption of risk or liability by

⁴⁹³ CPA (n 16) at s 40.

⁴⁹⁴ COFI Bill (n 16) at s 33(2)(f)(i).

⁴⁹⁵ BASA 'Main submission on the Draft Conduct of Financial Institutions (COFI) Bill (v2) November 2020' available at <https://www.banking.org.za/news/submission-draft-conduct-financial-institutions-cofi-bill/>, accessed 17 December 2024.

⁴⁹⁶ CPA (n 16) at s 48(1)(a) and (b).

⁴⁹⁷ Ibid at s 48(1)(c).

the consumer, imposes an obligation on the consumer to indemnify the supplier or a third party, or amounts to an acknowledgement of any fact by the consumer.⁴⁹⁸

There is a ‘blacklist’ of transactions, contracts, terms and conditions that are prohibited outright.⁴⁹⁹ Such an agreement, term or transaction is void to the extent that it contravenes section 51 of the CPA.⁵⁰⁰ The CPA also has a ‘grey’ list of terms, transactions, terms, or conditions that are rebuttably presumed to be unfair,⁵⁰¹ until a court declares otherwise.⁵⁰² Powers of the court to ensure fair and just conduct terms and conditions include consideration of the value of the goods and services, the nature of the parties and their relationship, their relative capacity, education, experience, sophistication, and bargaining position, and the parties' conduct.⁵⁰³ Under section 52 only the court has the power to declare conduct as unconscionable, unjust, unreasonable or unfair.⁵⁰⁴ These provisions will be discussed in depth in the next part of this Chapter.

Notably, fundamental consumer rights may not be waived or otherwise limited by agreements.⁵⁰⁵

By contrast, the preamble of the 2020 version of the COFI Bill states that the Bill provides a regulatory framework for the conduct of financial institutions that will protect financial customers by promoting fair treatment.⁵⁰⁶ Under the Bill, licensed financial institutions must conduct their business in a manner that promotes fair treatment of customers.⁵⁰⁷ In conducting their business, licensed entities must act honestly, fairly, and with due skill, care and diligence.⁵⁰⁸ The corporate culture of licensed entities must also promote fair treatment of financial customers and fair market

⁴⁹⁸ Ibid at ss 49(1)–(3); 52(4) and 58(1). See *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* (2020) 1 All SA 857 (WCC). See also Moorcroft & Vessio (n 405) at para 37.6.5.7; Naudé (n 27); Naudé (n 23).

⁴⁹⁹ CPA (n 16) at s 51. See also Naude & Eiselen (n 404) at 48-1. In the EU directive these are considered as blacklisted terms that are absolutely prohibited.

⁵⁰⁰ CPA (n 16) at s 51(3).

⁵⁰¹ Consumer Protection Act Regulations in GN 293 GG. 34180 of 1 April 2011 at reg 44.

⁵⁰² Moorcroft & Vessio (n 405) at para 37.6.7.2.

⁵⁰³ CPA (n 16) at s 52(2).

⁵⁰⁴ CPA (n 16) at s 52. See also MA (Riette) Du Plessis ‘Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: The Watchdog’s Failure to Support an Accredited Industry Ombud - Alternative Suggestions’ (2022) 33 *SLR* 230 at 236.

⁵⁰⁵ CPA (n 16) at s 51(1)(b), (c), (h) and (i). See also CPA ss 51(2)(a) and 51(3).

⁵⁰⁶ COFI Bill (n 16) at s 2.

⁵⁰⁷ Ibid at s 17(1)(a).

⁵⁰⁸ Ibid at s 17(2)(b).

practices.⁵⁰⁹ Similarly, governance arrangements must prevent conflicts of interest and incentives that may threaten the fair treatment of customers.⁵¹⁰

However, there is no explicit general prohibition to offer, supply or agree to supply financial products or financial services at a price, on terms or in a manner that is unfair, unreasonable, or unjust. Furthermore, unlike the 2018 version of the Bill,⁵¹¹ financial institutions have no express overriding responsibility to conduct business in the best interests of financial customers.⁵¹²

The 2018 version of the COFI Bill had a dedicated section on unfair contract terms and obliged financial institutions to ensure that terms and conditions are fair, reasonable, and transparent.⁵¹³ However, the section on unfair contract terms was deleted in the 2020 draft version. In contrast, the 2018 version clarified that⁵¹⁴ ‘a term or condition is unfair or unreasonable if (a) it would cause a significant and unreasonable imbalance in the parties’ rights and obligations under the contract, (b) terms are so adverse to the retail customer that they are inequitable, (c) not reasonably necessary to protect the legitimate interests of the financial institution which will be advantaged by such term, (d) would cause undue detriment, whether financial or otherwise, (e) the consumer is required to waive any rights, assume any obligations or waive any obligation or liability of the financial institution on terms that are unfair or unreasonable, (f) the term, condition or requirement of the agreement is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or requirement was not appropriately disclosed to the retail financial customer in a manner that satisfied the prescribed notice requirements.⁵¹⁵

This section was also deleted in the current version. However, the 2020 draft version of COFI obliges financial institutions to take remedial action if they identify circumstances that give rise to the material risk of the product or service being unsuitable, not performing as the customer was led to expect or giving rise to any unfair customer outcomes.⁵¹⁶ The Bill has also omitted

⁵⁰⁹ Ibid at s 17(2)(c).

⁵¹⁰ Ibid at s 28(2)(b).

⁵¹¹ COFI (n 432) at ss 30(2)(b) and 30(2)(h).

⁵¹² Ibid at ss 30(2)(b) and 47(1).

⁵¹³ Ibid at s 33(1).

⁵¹⁴ Ibid at s 33(2).

⁵¹⁵ Ibid at s 33(2).

⁵¹⁶ COFI (n 16) at s 26(3).

defining when an outcome will be considered unfair.⁵¹⁷ Furthermore, implications or consequences of unfair terms and conditions are also not addressed in the 2020 COFI Bill. The deletion of the section on unfair contract terms in the 2020 COFI version is regrettable because it has removed a core pillar of controls that are necessary to ensure fairness of contracts with retail financial consumers. However, this risk is somewhat mitigated by inclusion of fairness control under the Conduct Standard although the definition of unfair terms and conditions is narrower.

Similarly, the COFI Bill does not include a ‘blacklist’ of terms that are *per se* prohibited⁵¹⁸ nor a non-exhaustive ‘grey-list’ of terms that are rebuttably presumed to be unfair,⁵¹⁹ although Chapter 7 on post sale barriers and obligations covers some prohibitions and limitations.⁵²⁰ The COFI Bill allows a conduct standard to declare a financial product or financial service to be a prohibited or unfair business conduct if it is likely to be materially inconsistent with the fair treatment of customers, or if it is likely to deceive or mislead customers, or is likely to prejudice customers or a category of customers unfairly, or impedes the attainment of objectives of financial sector law.⁵²¹

4.3.9 Right to fair value, good quality and safety

The CPA entrenches the right to quality service performed in a timely manner and as persons are generally entitled to expect,⁵²² and the right to good quality products suitable for the purpose for which they are intended.⁵²³ The requirement of reasonable suitability does not apply if the supplier informed the consumer of the product's condition and the consumer expressly agreed to accept it anyway.⁵²⁴ There is an implied warranty of quality and suitability.⁵²⁵ Where a product or service is associated with a risk of an unusual character or nature, or risk of which a consumer could not reasonably be expected to be aware of or which an ordinarily alert consumer could not reasonably be expected to contemplate, such risk must be explained in plain language and drawn to the

⁵¹⁷ Ibid at s 26(3).

⁵¹⁸ See CPA (n 16) at s 51.

⁵¹⁹ Ibid at regulation 44.

⁵²⁰ COFI Bill (n 16) at ss 32(1); 33(1) and 34.

⁵²¹ Ibid at part 16 – Amendment of FSRA (n 80) s 106(7).

⁵²² CPA (n 16) at s 54.

⁵²³ Ibid at s 55.

⁵²⁴ Ibid at s 55(6). See also Moorcroft & Vessio (n 405) at para 37.6.8.2.

⁵²⁵ Ibid at ss 56 and 57.

attention of the consumer in a conspicuous manner.⁵²⁶ There is strict product liability for harm caused to the consumer due to unsafe goods or product failure,⁵²⁷ regardless of whether the harm or damage was due to negligence.⁵²⁸ A supplier of services who, in conjunction with the performance of those services, provides access to any products must be regarded as a supplier of those goods to the consumer.⁵²⁹ The Act also states that a supplier may not offer to supply or enter into an agreement to supply any goods or services at a price, on terms, or in an unfair, unreasonable, or unjust manner.⁵³⁰ This introduces the right to receive products and services that are reasonably and suitably priced for their intended purpose.⁵³¹

By contrast, under the COFI Bill the consumer's right to fair value and good quality and safety is not entrenched but it is implicit. There is an obligation on licensed institutions to ensure products perform as the provider has led its customers to expect through the information, representations, and advertising.⁵³² Furthermore financial product and services must be sufficiently flexible to respond to 'reasonably expected changes in a financial customer's needs during the lifetime of the product or service'.⁵³³ Interestingly, the 2018 version of the Bill required financial product design to be done with due regard to the interest of financial customers, and designed in a manner that meets the needs of identified groups of financial customers, and targeted accordingly.⁵³⁴ However, reference to 'with due regard to the interest of financial customers' has been deleted in the 2020 version,⁵³⁵ although this wording has been retained under section 4(1) of the Conduct Standard.

4.3.10 Right to accountability of suppliers to customers

The CPA in sections 62 – 67 covers channels or mechanisms that facilitate the transfer of value, such as lay-bys, prepaid services, and access to service facilities. Section 63, which relates to

⁵²⁶ Ibid at ss 49(3) and 49(4)(a). See also Moorcroft & Vessio (n 405) para 37.6.8.3.

⁵²⁷ Ibid at s 53(1)(b) failure is defined to mean inability of the goods to perform in the intended manner or to the intended effect.

⁵²⁸ Ibid at s 61.

⁵²⁹ Ibid at s 61(2).

⁵³⁰ Ibid at s 48(1).

⁵³¹ Moorcroft & Vessio (n 405) at para 37.6.8.2.

⁵³² COFI Bill (n 16) at s 26(2).

⁵³³ Ibid at s 27(2)(c).

⁵³⁴ Ibid at s 47(1).

⁵³⁵ Ibid s 27(1)–(2). See COFI 2018 Bill ss 30(2)(h) and 47(1).

prepaid certificates, credits, and vouchers, is relevant. The COFI Bill is silent on similar payment instruments such as mobile money where a customer deposits value into a digital wallet and value is transferred from the wallet to a third party who is provided with a pin⁵³⁶ to access the value transferred.⁵³⁷ The Conduct Standard similarly does not specifically address such channels or mechanisms. Although it can be argued that the provisions of the Conduct Standard are channel agnostic and have universal application to banks, telecommunications related fintechs offering mobile money services would strictly fall outside the current limited scope of the Conduct Standard and only directly apply to banks that partner with such telcos to provide the product through outsourced services arrangements.⁵³⁸ Whilst the regulator can hold a bank liable for conduct breaches, inadequate coverage of material conduct risk points in the value chain present a risk of regulatory arbitrage and uncertainty.

4.3.11 Right to be heard and obtain redress

Section 4(2)(b) of the CPA, grants the Tribunal and the courts the power to make orders to give effect to the consumer's right to redress, including making innovative orders that are consistent with the objective and purposes of the Act and promote the realisation of consumer rights.⁵³⁹

By contrast, there is no specific provision in the COFI Bill granting powers to the Tribunal to make innovative orders not explicitly provided for in the FSRA or COFI. Notably, section 103 of the 2018 version of the COFI Bill⁵⁴⁰ stated that a financial customer that suffered loss or damages due to a contravention by a financial institution of a financial sector law may institute legal proceedings in a court with the relevant jurisdiction, seeking compensation or any other

⁵³⁶ FSCA 'Digital financial inclusion trends presentation and panel discussion – 21 July 2022' available at <https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Digital%20Financial%20Inclusion%20presentation.pdf#search=mobile%20money>, accessed 18 April 2024. Digital financial products and services introduce unfamiliar risks to customers. In instances where new providers and agents are not subject to a strong consumer protection regime, customers or users are vulnerable to abuse.

⁵³⁷ Conduct Standard (n 17) at s 2(1)–(2). See Bill Maurer, Taylor C Nelms & Stephen C Rea “‘Bridges to Cash’”: Channelling agency in mobile money’ (2013) 19 *The Journal of the Royal Anthropological Institute* 52 at 54–55. Mobile money is considered as a means of exchange, share of value or payment method.

⁵³⁸ On regulation of fintechs see Kagiso Mothibi & Dino Lazaridis FSCA ‘Fintech Digital Platforms – An investigation into fintech digital platform activity in South Africa and their regulatory implications’ FSCA 2021 at 4 and 6 available at https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Fintech_Digital-Platforms_An_investigation_into_Fintech_Digital_platform_activity_in_South_Africa_and_their_regulatory_implications.pdf, accessed 17 October 2024.

⁵³⁹ Naudé & De Stadler (n 433) at 2–3.

⁵⁴⁰ COFI Bill (n 432) at s 102–105.

redress as determined by the court.⁵⁴¹ In addition to its powers in terms of section 152 of the FSRA, it provided that the FSCA may apply to the High Court (on an *ex parte* basis), and the court may grant any appropriate order or relief.⁵⁴² The 2020 version subsequently deleted this section and replaced it with a proposed amendment to section 144(3) of the FSRA to the effect that the FSCA may issue a directive requiring a financial institution to provide redress to financial customers. There is a proposed amendment to section 152 of the FSRA enabling the regulator to apply to the High Court, and the court may grant different orders including declarators and orders to compel the financial institution to comply with legal requests, directives or instructions of the regulator.

Furthermore, the CPA explicitly prohibits a supplier from discriminating against or penalising a customer for exercising rights under the Act, but there is no similar provision in the COFI Bill.⁵⁴³

A positive feature of the COFI Bill is that it introduces specific obligations relating to the culture,⁵⁴⁴ governance,⁵⁴⁵ key persons,⁵⁴⁶ remuneration and compensation arrangements⁵⁴⁷ within financial institutions to support fair customer outcomes, principles for the provision of financial services,⁵⁴⁸ and post-sale barriers and obligations including service.⁵⁴⁹ However, notwithstanding the intention for COFI to become an overarching, comprehensive and consolidated market conduct framework, the above high-level comparison of the COFI Bill and the CPA highlights that certain relevant and material consumer protections afforded under the CPA are omitted from the COFI Bill. Based on the current draft of the COFI Bill, it appears as though the definition of fairness will be confined to the Conduct Standard. However, retail financial consumer protection can be better achieved by the inclusion of fundamental consumer rights in COFI as the primary overarching conduct legislation applicable to financial institutions because the limited application of the Conduct Standard to banks inadvertently excludes non-traditional channels and mechanisms such as fintechs that are non-banks.

⁵⁴¹ Ibid s 103.

⁵⁴² Ibid at s 104(1).

⁵⁴³ CPA (n 16) at s 68(1)(a) and (b).

⁵⁴⁴ COFI Bill (n 16) at s 16–17.

⁵⁴⁵ Ibid at s 19.

⁵⁴⁶ Ibid at s 24–25.

⁵⁴⁷ Ibid at s 20–22.

⁵⁴⁸ Ibid at s 26–27.

⁵⁴⁹ Ibid at s 32–35.

In addition, whilst one or more of the rights conferred under the CPA may be addressed in some other financial sector law, a fragmented consumer protection framework – spanning across the FSRA, COFI, existing financial sector laws and Conduct Standard – is complex and underscores the difficulty for ordinary citizens to ascertain and understand their rights and obligations. In its current form it will take more time, effort and cost for financial institutions, consumers and consumer advisors to find out about applicable provisions and their implications. Furthermore, a complex architecture is likely to dissuade consumers from reading to understand their rights and obligations. Since COFI is positioned as the overarching conduct legislation, it is likely that consumers and their advisors will consult this primary legislation as opposed to exploring the FSCA’s website or other databases to establish what other regulatory instruments may be applicable. Therefore, incorporation of consumer rights under COFI will make it easier for non-lawyers and consumers to find and access the information in the primary legislation as opposed to consulting a series of other sub-ordinate legislation.⁵⁵⁰ Financial institutions will also benefit from reduced complexity as it mitigates against compliance gaps.

4.4 FAIRNESS CONTROL MECHANISMS UNDER THE CONDUCT STANDARD COMPARED WITH FAIRNESS CONTROLS UNDER THE CPA

Although the FSRA excludes the operation of the CPA to a function, Act, transaction, financial product, or service that is subject to the NPS Act or financial sector law,⁵⁵¹ it is still necessary for the legislature and the FSCA to conduct a systematic assessment of the consumer protections under the COFI Bill and Conduct Standard, against the fundamental consumer rights afforded under Chapter 2⁵⁵² of the CPA. The objective is to ensure that retail financial consumers do not receive lesser protections than those afforded to general consumers under the CPA. Therefore, this part will focus on the consumer’s right to fair and just terms under the CPA in order to make recommendations for the COFI Bill and Conduct Standard.

⁵⁵⁰ See also de Stadler & Van Zyl (n 461) at 111.

⁵⁵¹ FSRA (n 80) at s 10(1)(a).

⁵⁵² CPA (n 16) at ss 8 – 67.

In analysing the consumer's right to fair and just terms under the CPA, Naudé⁵⁵³ categorises controls under the Act into three levels of control mechanisms. The first is what she terms incorporation controls, the second is content controls, and the third is interpretation controls. Incorporation controls refer to statutory provisions that sets certain minimum or threshold requirements for the incorporation of a contractual term into a contract. Content controls refer to provisions of the Act which make contract terms invalid based on their content. Interpretation controls cover those statutory provisions that guide the interpretation of contracts to protect the consumer's rights.⁵⁵⁴

Whilst the categories of fairness control mechanisms can be applied to protections afforded to retail financial customers in terms of the Conduct Standard,⁵⁵⁵ this thesis proposes introducing an additional fourth control mechanism termed conduct controls. These go beyond the contractual terms and conditions; they consider culture, practice, behaviour, governance, oversight, and operational and execution factors outside the contract. For purposes of this thesis, the TCF principles and mechanisms under the Conduct Standard related to the conduct, behaviour and practices of financial institutions (other than provisions dealing with contractual terms and conditions) are grouped together under conduct controls. The proposed assessment criterion to determine fairness of conduct is also considered as a conduct control. These conduct controls are intended to mitigate the risk of the bank's conduct causing customer detriment and prejudice. Illustrations of fairness control mechanisms under the CPA are provided below compared with fairness control mechanisms in the Conduct Standard.

4.4.1 Incorporation Controls in the Conduct Standard and CPA

Different financial sector laws, like FAIS⁵⁵⁶ and the NCA,⁵⁵⁷ have general and specific information disclosure obligations similar to those of the CPA. The Conduct Standard for Banks,⁵⁵⁸ issued in

⁵⁵³ Naudé (n 27) at 506.

⁵⁵⁴ Naudé & Eiselen (n 404) at 48.

⁵⁵⁵ Conduct Standard (n 17).

⁵⁵⁶ FAIS (n 363).

⁵⁵⁷ NCA (n 238).

⁵⁵⁸ Conduct Standard (n 17).

terms of the FSRA,⁵⁵⁹ has also introduced overarching disclosure requirements.⁵⁶⁰ These serve as incorporation controls introducing mandatory disclosure provisions that would similarly limit the *caveat subscriptor* rule.⁵⁶¹

A general disclosure obligation is established under section 2(5)(c) of the Conduct Standard stating that

financial customers [must] be given clear information and [be] kept appropriately informed before, during and after the time of entering into a contract in respect of a financial product or financial service offered or provided by a bank.

Section 7(1) of the Conduct Standard sets out principles and detailed factors that must be brought to the attention of a financial customer, which include a presentation of risks and benefits of the financial product or financial service; estimated costs and expected returns; contractual obligations of the bank and customer; and consequences upon breach and recourse available to the customer.⁵⁶² An obligation is imposed on banks to take reasonable steps before, during and after contracting to ensure that customers are made aware of relevant facts that could influence their decision. Mandatory incorporation controls under section 7(2) cover plain language, adequacy, appropriateness, factual correctness, relevance, timeliness, and completeness of disclosure.⁵⁶³ In contrast section 22 of the CPA introduces a general right to information in plain and understandable language and specific disclosure obligations are covered, amongst others under section 49 which introduces specific absolute notice and disclosure obligations for certain terms and conditions.

The wording of section 7(1) of the Conduct Standards introduces mandatory disclosures and requires the bank to take ‘reasonable steps to ensure that the customer is aware of relevant facts’. This current wording is open to interpretation. For instance, it is unclear whether section 7(1) imposes absolute requirements demanding inflexible application, whether banks have

⁵⁵⁹ FSRA (n 80) at s 106.

⁵⁶⁰ Conduct Standard (n 17) at s 7.

⁵⁶¹ *Van Wyk* (n 498) para 81.

⁵⁶² Conduct Standard (n 17) at s 7(1)(a)–(e).

⁵⁶³ COFI Bill (n 16) at s 31 addresses incorporation controls for information disclosure.

discretion in when and how they apply the provisions,⁵⁶⁴ or whether negligence or recklessness by the bank would be required to trigger regulatory action under this section. Even though several provisions in the FSRA address recourse for breach of financial sector law such as imposing administrative penalties for non-compliance,⁵⁶⁵ this will not be easily evident to users of financial instruments and it is also unclear what consequences would apply in the event of non-compliance with section 7(1).⁵⁶⁶

Furthermore, the wording of section 7(1) seems to place the onus on the financial institution to provide factual evidence and prove on a balance of probabilities,⁵⁶⁷ what steps were taken to bring the set information to the attention of the customer and to demonstrate that the steps were reasonable.⁵⁶⁸ Each case would have to be tackled on its merits considering its context and circumstances because there is no universal formula that would be appropriate in every case.⁵⁶⁹ Determining whether the actions were adequate to discharge the bank's obligations will require application of the reasonable person test,⁵⁷⁰ which considers the interest of an ordinarily alert consumer,⁵⁷¹ instead of a reasonable banker. The reasonable person test should therefore be:

[W]hether [an ordinary retail financial] customer ...of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a [retail financial] consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.⁵⁷²

⁵⁶⁴ *Van Wyk* (n 498) para 93.

⁵⁶⁵ FSRA (n 80) at ss 114(1)–(2); 120; 144(1) and (3); 149(1)–(3); 151; 152(2); 167(1); 170 and 278. See also Alexandra Pesci & Michel M Koekemoer 'The FSCA Conduct Standard for Banks as a means to reform the internal financial consumer complaint resolution mechanisms of South African banks' (2023) 44 *Obiter* 254 at 264.

⁵⁶⁶ See also FSRA (n 80) ss 132; 149; 167 and 206.

⁵⁶⁷ *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 204D.

⁵⁶⁸ Interestingly, section 31 of COFI does not refer to financial institutions taking 'reasonable steps' to disclose set information.

⁵⁶⁹ *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (2021) JOL 51592 (SCA) para 14. See also *Cenprop Real Estate (Pty) Ltd v Holtzhausen* (2022) ZASCA 183 para 17.

⁵⁷⁰ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. See also *First National Bank v Duvenhage* (5) SA 369 (SCA) para 2.

⁵⁷¹ See CPA (n 16) at ss 22(2) and 49(2)(b).

⁵⁷² *Ibid* at s 22(2).

In addressing the disclosure requirements under section 7(1), financial institutions should avoid formulaic legalese and adopt an inter-disciplinary approach of writing contracts with the reader in mind, merging ‘sound legal practices with the linguistic principles of document and information design’ to promote better document usability.⁵⁷³

The drafting of section 7 is based on principles and sets out core disclosure elements. Still, it falls short of being clear about the application and the implications of failure to satisfy the disclosure requirements.⁵⁷⁴ For instance, the Conduct Standard⁵⁷⁵ does not include procedural formalities and disclosure as an element to consider in determining whether conduct is unfair.⁵⁷⁶ Under the CPA, a ground of unfairness includes failing to draw the fact, nature and effect of the term, condition or notice referred to in section 49(1) to the consumer's attention.

Therefore, based on the current wording of the Conduct Standard, a procedural failure to satisfy section 7 or to conspicuously disclose problematic or high-risk terms would not render the contract, term, condition, or requirement null, void, or unfair,⁵⁷⁷ even though there is an overarching disclosure obligation.⁵⁷⁸

In the context of promoting fair customer outcomes, there is merit in avoiding a formalistic tick-box approach, moving beyond strict statutory formalities, and focusing on substantive outcomes of the process. However, in omitting to address the impact or implication of procedural failures, the Conduct Standard fails to consider that transparency, disclosure, and the procedure followed may impact the fairness of the substantive terms that the customers agree to – such as

⁵⁷³ See article by de Stadler & Van Zyl (n 461) at 95; 97 and 106 on challenges regarding to plain language and disclosure under the CPA. See also World Bank (n 106) at 52.

⁵⁷⁴ See Naudé & De Stadler (n 433) at 5 on a critique on the imperfect drafting of the CPA which in several instances, creates rights without setting a remedy.

⁵⁷⁵ Conduct Standard (n 17) at s 5(2).

⁵⁷⁶ Ibid at s 49(1).

⁵⁷⁷ See LF Van Huyssteen et al *Contract: General Principles* 6 ed (2020) 188. See also Franziska Myburgh ‘On constitutive formalities, estoppel and breaking the rules’ (2016) 27 *SLR* 254 at 256–257. Under South African law, ‘non-compliance with statutory formalities results in nullifying the contract unless otherwise provided for in legislation’. See Franziska Myburgh ‘The South African approach to the rectification of agreements subject to constitutive formalities: one step too many?’ (2014) 131 *SALJ* 787 at 787.

⁵⁷⁸ COFI Bill (n 16) at ss 29(2) and 31. COFI does not have a provision equivalent to s 52(4) of the CPA.

price, product features, service delivery or other conditions.⁵⁷⁹ Importantly, procedural responsibilities serve as a proactive and preventative control of unfairness and should not be confined to ‘judicial control of fairness’.⁵⁸⁰ Therefore, the Conduct Standard should include failure to satisfy procedural formalities as a factor in the fairness enquiry, even though it would not automatically render the term or contract void.

Considering the above arguments, ensuring clear language and alignment of wording, concepts, definitions, terminology, and implications of rights conferred under the Conduct Standards and COFI is vital.⁵⁸¹ The lack of clarity in statutes and regulations limits the effective operation of regulatory requirements outside the formal court process.⁵⁸² In considering the centrality of information disclosure and plain language to deliver fair customer outcomes, the Conduct Standard should be amended to remove the ambiguity associated with the reasonable endeavours provision in section 7(1). Therefore, section 7(1) should be reformulated to focus on the customer as the reader,⁵⁸³ and on steps necessary to ensure a reasonable consumer with average knowledge, literacy skills and minimal experience or exposure could be expected ‘to understand the content, significance and import’ of the term without undue effort.⁵⁸⁴ Otherwise, assessing the bank’s reasonable steps would always be subject to judicial control, resulting in time delays, costs, and litigation risks for the customer.⁵⁸⁵ The FSCA must also clarify the expected manner and form of disclosure for particular types of risky or problematic transactions, terms or contracts.⁵⁸⁶ Ultimately, regulatory instruments must also be precise regarding the impact and implication of procedural failures, especially as far as the determination of unfairness is concerned.

⁵⁷⁹ Philip N Stoop ‘Background to the regulation of fairness in consumer contracts’ (2015) 27 *SA Merc LJ* 191 at 201–202. See also Philip N Stoop & Chrizell Churr ‘Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008’ (2013) 16 *Potchefstroom Electronic LJ* 514 at 517–518.

⁵⁸⁰ Stoop (n 579) at 208–209.

⁵⁸¹ *Standard Bank Investment Corporation v Competition Commission. Liberty Life Association of Africa Ltd v Competition Commission* (2000) 2 SA 797 SCA para 16 reflecting judgement of Innes J in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 543. See Naudé & De Stadler (n 433) at 3.

⁵⁸² Tjakie Naudé & Jacolien Barnard ‘Enforcement and effectiveness of consumer law in South Africa’ in H Micklitz & G Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (2018) 18–19.

⁵⁸³ See also de Stadler & Van Zyl (n 461) at 104.

⁵⁸⁴ See discussion on reasonable person test under section 4.4.1.

⁵⁸⁵ See Naudé (n 27) at 509 on severe limitation of judicial control in the consumer context under the CPA.

⁵⁸⁶ Conduct Standard (n 17) at s 7(5).

Transparency and informed consent are key elements that are important to fair contracting. Moreover, receiving information in plain and understandable language improves transparency, consumer awareness, informed decision-making, and greater consumer responsibility. This in turn promotes fairness in contracting and reduces the risk of taking advantage of consumer through the use of impenetrable language.⁵⁸⁷ Setting minimum information disclosure requirements is a typical incorporation control that is aimed at ensuring that consumers are properly, adequately, and timeously advised about terms of their agreement with the supplier in order to give informed consent.

In recognising the centrality of clear disclosure of key information to the delivery of fair customer outcomes, the CPA⁵⁸⁸ specifically provides that terms in the contractual agreement must be brought to the attention of consumers in a conspicuous manner and highlighted to them in a plain language they can understand, where such term:

- a. seeks to limit the risk or liability of the supplier or any other person, impose an obligation on the consumer to indemnify the supplier or any other person for any cause.⁵⁸⁹
- b. constitutes an assumption of risk or liability by the consumer.⁵⁹⁰
- c. impose an obligation on the consumer to indemnify the supplier or any other person for any cause;⁵⁹¹ or
- d. Purports to be an acknowledgement of any fact by the consumer.⁵⁹²

A further information disclosure obligation applies where the term concerns an activity or facility that is subject to ‘risk of an unusual character or nature’ or relates to a risk that an ordinarily alert consumer could not reasonably be expected to contemplate.⁵⁹³ All written agreements must comply with section 22 regarding plain language.⁵⁹⁴ Plain language is discussed in detail above.⁵⁹⁵

⁵⁸⁷ See also de Stadler & Van Zyl (n 461) at 96–97. Philip N Stoop ‘The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts’ (2015) 18 *Potchefstroom Electronic LJ* 1092.

⁵⁸⁸ CPA (n 16) at s 49(1)(a)–(c).

⁵⁸⁹ *Ibid* at s 49(1)(a).

⁵⁹⁰ *Ibid* at s 49(1)(b).

⁵⁹¹ *Ibid* at s 49(1)(c).

⁵⁹² *Ibid* at s 49(1)(d).

⁵⁹³ *Ibid* at s 49(2).

⁵⁹⁴ CPA (n 16) at s 50(2)(b)(i).

⁵⁹⁵ For a detailed discussion see clause 4.3 above.

The objective is to impose an explicit obligation on a supplier to draw the fact, nature, and potential consequence of the above risks to the attention of the consumer to enable him or her to make an informed risk decision about the product.⁵⁹⁶ Therefore, an exemption or indemnity clause as contemplated in section 49(1)(a)-(d), must first meet the following minimum incorporation requirements:⁵⁹⁷

- a. must be written in plain language.⁵⁹⁸
- b. their existence, nature and consequence must be drawn to the attention of the consumer:
 - i. in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.⁵⁹⁹
 - ii. either at the time the consumer enters into the agreement or is engaged in the activity or enters the facility to which the term or notice relates; or the time at which the consumer is required or expected to offer ‘consideration’ for the transaction or agreement (whichever is the earlier of the two times);⁶⁰⁰
- c. the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice.⁶⁰¹ There is a requirement for the consumer to sign or initial the term to demonstrate his or her acknowledgement and assent to the provision and associated risks.

Notably, the Western Cape High Court in *Van Wyk t/a Skydive v UPS*⁶⁰² held that the obligations imposed by section 49 are absolute, meaning that there are no exceptions to its application and a supplier is not given the discretion to decide whether to give the notice or not.⁶⁰³ However, although the notice requirements address transparency and procedural fairness,⁶⁰⁴ failure to satisfy these procedural incorporation controls does not *per se* render the contract or term void,

⁵⁹⁶ See also de Stadler & Van Zyl (n 461) at 99–100.

⁵⁹⁷ Naudé (n 27) at 508. See also Naudé ‘Section 49’ in Naudé & Eiselen (n 404).

⁵⁹⁸ CPA (n 16) at s 49(3).

⁵⁹⁹ *Ibid* at s 49(4)(a).

⁶⁰⁰ *Ibid* at s 49(4)(b). Consideration is defined broadly in section 1 of the CPA as ‘anything of value given and accepted in exchange for goods or services’.

⁶⁰¹ *Ibid* at s 49(5).

⁶⁰² *Van Wyk* (n 498).

⁶⁰³ *Ibid* para 93.

⁶⁰⁴ Naudé & Eiselen (n 404).

but rather gives courts the power to declare the term void or unfair under s 52.⁶⁰⁵ Whilst judicial control to render such terms as void is legally sound, it fails to consider the time, effort, and financial cost of litigation on consumers.⁶⁰⁶

The obligation to ensure that the consumer is given adequate time to properly receive and understand the terms of an exemption clause, tempered the formalistic, harsh, unjust, and unfair application of the *caveat subscriptor* rule,⁶⁰⁷ especially on unsuspecting consumers with low literacy levels.⁶⁰⁸ Therefore, the statutory formalities under section 49(1)(a)-(d) are intended to mitigate against undue prejudice and protect the consumers from situations where they are caught off-guard or tripped up by unscrupulous or apathetic suppliers.⁶⁰⁹

The appeal by *UPS* to the SCA was dismissed with costs although the court did not find it necessary to deal with the issues raised regarding the CPA.⁶¹⁰

However, section 49 is not without criticism because it can operate as a ‘double-edged sword’.⁶¹¹ For instance, some product providers can assume that merely drawing a consumer’s attention to and countersigning a waiver of rights, limitation of liability, indemnity or assumption of risk provision is condonation thereof. Notwithstanding, the CPA prohibits certain problematic clauses like purported waivers of rights conferred by the Act or limitations of liability for gross negligence.⁶¹² In addition the ‘grey-list’ under Regulation 44 includes waiver of rights, limitation

⁶⁰⁵ Introduction to ss 48–52 and reg 44: Structure and purpose in Naudé & Eiselen (n 404) para 2. Under South African law, ‘non-compliance with statutory formalities results in nullifying the contract unless otherwise provided for in legislation’. See also Myburgh 2016 (n 577) at 256–257; Myburgh 2014 (n 577) at 787.

⁶⁰⁶ Naudé (n 27) at 509.

⁶⁰⁷ *Van Wyk* (n 498) was a departure from the formalistic application of the *caveat subscriptor* rule followed in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). In the latter case Brand JA held that the admission clerk was under no legal duty to bring the particular indemnity terms to the respondent’s attention and the respondent was bound thereby as if he had read it and had expressly agreed thereto.

⁶⁰⁸ *Van Wyk* (n 498) para 81. The judicial guidance in *Van Wyk* highlights that the formal requirements relating to plain language, transparency, and due notice are to be tested objectively. See also Mark Tait ‘Judicial guidance on the application of section 49 of the Consumer Protection Act 68 of 2008’ (2020) 41 *Obiter* 948 at para 957. Martin A Brenneke ‘Theory of Exploitation for Consumer Law: Online Choice Architectures, Dark Patterns, and Autonomy Violations’ *J Consum Policy* (2024) 47 127 at 128–129 refers to exploitation of customer behavioural biases in both analogue and digital architecture where a term may be transparent or prominent.

⁶⁰⁹ *Van Wyk* (n 498) para 86–88.

⁶¹⁰ *UPS SCS South Africa (Pty) Ltd v Hendrik Cornelis van Wyk t/a Skydive Mossel Bay* (2021) ZASCA 131.

⁶¹¹ Naudé & Eiselen (n 404) at 49–6.

⁶¹² CPA (n 16) at s 51(b)–(c).

of liability, indemnity or assumption of risk provisions.⁶¹³ Despite the critic of section 49, the conspicuous disclosure requirement remains useful and relevant for certain types of clauses. Section 7(2) of the Conduct Standard and section 31(2) of the COFI Bill should require prominent disclosure of terms dealing with material risks and assumption of risk by the customer.

4.4.2 Content Controls

Information disclosure and procedural fairness alone are not sufficient to take away the risk of the customers being offered products and services on terms and conditions that are unfair. Therefore, additional measures have been introduced to address the substantive content of contractual arrangements.

a. Content control under the Consumer Protection Act

As indicated above, the CPA entrenches the legal right to fair, just, and reasonable terms,⁶¹⁴ and addresses baseline terms that are considered unfair and impermissible in contracts with customers. Part G of the Act covers unfair, unreasonable, or unjust contracts with section 48 specifically focusing on terms that are regarded as unfair. Section 51 goes further by setting out a list of *per se* prohibited terms, whilst Regulation 44 outlines a grey-list of terms that are rebuttably presumed to be unfair. Therefore, the CPA creates mandatory rights complemented by fairness controls. The court is granted power in section 52 to strike out content of contractual terms that are considered unfair.⁶¹⁵

A supplier may not offer or otherwise supply goods or services to a consumer at a price or on terms that are unfair, unreasonable, or unjust.⁶¹⁶ However, provided the price is prominently displayed, there is a strong caution against judicial interference with market price-setting mechanisms unless there is misrepresentation, unconscionable conduct, or improper inducement.⁶¹⁷ Similarly, a supplier may not market goods and services in a manner that is unjust,

⁶¹³ Ibid.

⁶¹⁴ CPA (n 16) at chap 2 Part G.

⁶¹⁵ Naudé (n 27) at 506.

⁶¹⁶ CPA (n 16) at s 48(1)(a).

⁶¹⁷ Van Eeden & Barnard (n 435) at 257–258; Naudé & Eiselen (n 404) at 48-16 and 48-17.

See also Yeukai Mupangavanhu ‘Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008’ (2015) 48 *De Jure* 116 at 131.

unreasonable, or unfair.⁶¹⁸ An obligation is also imposed on suppliers not to require a consumer to waive their rights, assume any obligation or waive liability of the supplier on terms that are unjust, unreasonable or on unjust conditions.⁶¹⁹ A term, agreement or notice is unfair, unreasonable, or unjust terms under section 48(2) if:⁶²⁰

- a. it is excessively one-sided in favour of any person other than the consumer.
- b. the term of the transaction or agreement is so averse to the consumer as to be inequitable.
- c. the consumer relied upon a false, misleading, or deceptive representation or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- d. the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—the term, condition or notice is unfair, unreasonable, unjust, or unconscionable; or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Notably, section 48 considers substantive fairness⁶²¹ and procedural fairness⁶²² directed at the outcome of the contracting process.⁶²³ In addition, the CPA regulates the content of contracts through a list of *per se* prohibited terms (referred to as the ‘blacklist or red list’) under section 51.⁶²⁴ Notable *per se* prohibited terms include:

- a. a condition that seeks to defeat the purposes and objectives of the Act, or to mislead, deceive or subject the consumer to fraudulent conduct'.⁶²⁵

⁶¹⁸ CPA (n 16) at s 48(1)(b).

⁶¹⁹ Ibid at s 48(1)(c).

⁶²⁰ Ibid at s 48(2). See section 3.2.1(h) above on definition of fairness under the CPA.

⁶²¹ CPA (n 16) at s 48(2)(a)–(c).

⁶²² Ibid s 48(2)(d).

⁶²³ Stoop (n 587) at 1093.

⁶²⁴ Ibid at 1098. See also R D Sharrock ‘Judicial control of unfair contract terms: The implications of the Consumer Protection Act’ (2010) 22 *SA Merc LJ* 295 at 314.

⁶²⁵ CPA (n 16) at s 51(1)(a).

- b. a condition that directly or indirectly purports to waive or deprive of a consumer's right under the Act or otherwise avoid obligations of a supplier or authorising a supplier to do anything unlawful under the Act.⁶²⁶
- c. a condition purporting to limit or exempt a supplier from liability for any direct or indirect loss attributable to gross negligence or that amounts to a consumer's assumption of risk or liability for a loss due to gross negligence.⁶²⁷
- d. a condition that falsely expresses an acknowledgement by the consumer that before the agreement was concluded, no representations or warranties were made in connection with the agreement by the supplier or their representative or falsely indicating that goods, services or documents were delivered to the consumer.⁶²⁸
- e. a condition that requires the consumer to forfeit any money to the supplier if the consumer exercises rights under the Act or to which the supplier is not entitled.⁶²⁹

The essence of prohibited terms is to ensure that terms and contracts do not take away consumer rights conferred by the Act.

Moreover, section 52(2) sets out factors that the court must consider in applying section 40 (unconscionable conduct), section 41 (false, misleading, or deceptive representations), and section 48 (unfair, unreasonable, or unjust terms).⁶³⁰ Factors for consideration are:

- a. 'the fair value of the goods or services in question;
- b. the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- c. those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred, or agreement was made, irrespective of whether this Act was in force at that time;
- d. the conduct of the supplier and the consumer, respectively;

⁶²⁶ Ibid at s 51(1)(b).

⁶²⁷ Ibid at s 51(1)(c). Also see World Bank (n 106) at 53.

⁶²⁸ CPA (n 16) at s 51(1)(g).

⁶²⁹ Ibid at s 51(1)(h).

⁶³⁰ Tjakie Naudé & Charlotte Koep 'Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms' (2015) 26 *SLR* 85 at 85.

- e. whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
- f. whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- g. the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22 [on plain and understandable language];
- h. whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable, or unjust, having regard to any– (i) custom of trade; and (ii) any previous dealings between the parties;
- i. the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- j. in the case of supply of goods, whether the goods were manufactured, processed, or adapted to the special order of the consumer.’

Section 52(2) presupposes that the consumer takes action against a supplier and refers a matter to court. However, in the case of a challenge by regulators or consumer bodies which is not necessarily linked to an individual customer or individual transaction, the individual consumer characteristics listed above may not be directly applicable.⁶³¹ Notably, the COFI Bill is not clear on whether the regulator or consumer bodies – who are not parties to a contract with the financial institution – have the power to launch a challenge against unfair terms offered to the public generally. Therefore, a lack of authority by regulators or consumer bodies to take such action can have the unintended effect of forcing consumers to carry the cost of stemming unfair terms. Currently, section 152 of the FSRA empowers the responsible regulator to take legal action in the High Court to obtain an order compelling a person to comply with a financial sector law. Furthermore, under the COFI Bill, there is a proposed amendment to section 152 to allow regulators to approach the High Court, and the court may grant different types of orders. However, it is not clear from the current wording of either s 152 or the proposed amendment whether the relevant regulator can, on its own accord, bring a direct challenge of general conduct not linked to a particular individual or transaction.

⁶³¹ Naudé & Eiselen (n 404) at 52–3.

Regulation 44 outlines an indicative, non-exhaustive list of presumptively unfair terms.⁶³² Therefore, even though a term may be included in the grey-list, it may be fair considering the particular circumstances of the matter.⁶³³ Furthermore, a term may still be regarded as unfair under section 48.⁶³⁴ Ultimately, the supplier bears the burden of proving that such contractual terms are fair.⁶³⁵ Regulation 44 has a long list of terms that are rebuttably presumed to be unfair, and below are some of the grey-listed terms that are potentially relevant to agreements with retail financial customers. A term:

- a. excluding or restricting the consumer's legal rights or remedies against the supplier in the event of breach by the supplier of its obligations under the agreement;⁶³⁶
- b. limiting the supplier's obligation for commitments made by their agents or making the supplier's commitments subject to compliance with a particular condition which exclusively depends on the supplier;⁶³⁷
- c. limiting a supplier's vicarious liability for its agents;⁶³⁸
- d. demanding that the consumer indemnify the supplier against the supplier's liability to its third parties;⁶³⁹
- e. excluding or restricting the consumer from relying on the statutory defence of prescription.⁶⁴⁰
- f. modifying standard rules regarding risk distribution to the detriment of the consumer;⁶⁴¹

⁶³² CPA Regulations (n 501) reg 44(2)(a)–(b).

⁶³³ Ibid reg 44(2)(a).

⁶³⁴ Naudé & Eiselen (n 404) at reg 44-4.

⁶³⁵ Naudé & Eiselen (n 404) at reg 44-4.

⁶³⁶ CPA Regulations (n 501) at reg 44(3)(b).

⁶³⁷ Ibid reg 44(3)(c).

⁶³⁸ Ibid reg 44(3)(d). Also see World Bank (n 112) at 55.

⁶³⁹ CPA Regulations (n 501) at reg 44(3)(e). Also see World Bank (n 112) at 54.

⁶⁴⁰ CPA Regulations (n 501) at reg 44(3)(f).

⁶⁴¹ Ibid reg 44(3)(g).

- g. permitting the supplier to increase the price agreed upon when the agreement was concluded without affording the consumer the right to terminate the agreement (excluding those transactions, terms and agreements carved out in sub-regulation 44(4)(b)(i) – (iii));⁶⁴²
- h. enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service (excluding those transactions, terms and agreements carved out in sub-regulation 44(4)(c)(i) – (iv) including where the price is linked to ‘fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control’);⁶⁴³
- i. enabling the supplier to terminate an open-ended agreement without giving the customer reasonable notice except where there is material breach of contract by the customer;⁶⁴⁴
- j. permitting the supplier upon termination of the agreement to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure (excluding any penalty, fee or compensation which the supplier is entitled to charge under relevant legislation);⁶⁴⁵
- k. providing that the consumer is deemed to have made a statement or acknowledged a fact to their detriment, unless such term and its meaning is conspicuously drawn to the attention of the consumer and a suitable period of time is granted to them to make an express declaration regarding the term;⁶⁴⁶
- l. excluding or limiting the consumer’s right to take legal action or any other legal recourse, including subjecting disputes exclusively to arbitration not covered by the relevant legislation;⁶⁴⁷
- m. restricting evidentiary material or imposing on a consumer a burden of proof which, should lie with the supplier;⁶⁴⁸

⁶⁴² Ibid reg 44(3)(h). See also reg 44(4)(b)(i) – (iii).

⁶⁴³ Ibid reg 44(3)(i) and reg 44(4)(c)(i). See also Conduct Standard (n 17) at section 100.

⁶⁴⁴ CPA Regulations (n 501) at reg 44(3)(l). See also Conduct Standard (n 17) at s 10.

⁶⁴⁵ CPA Regulations (n 501) at reg 44(3)(s) and sub-reg 44(4)(d).

⁶⁴⁶ Ibid reg 44(3)(v). Also see World Bank (n 112) at 55.

⁶⁴⁷ CPA Regulations (n 501) at reg 44(3)(x).

⁶⁴⁸ Ibid reg 44(3)(y). Also see World Bank (n 106) at 55 – 56.

- n. allowing the supplier to claim legal or other costs on a higher scale than usual, where the customer is not afforded a similar right;⁶⁴⁹

The COFI Bill should be amended to ensure that the list of grey-listed terms applicable to contracts with retail financial customers is included as a schedule to COFI for easier access and prominence.⁶⁵⁰ Alternatively, an empowering provision can be included in COFI – in line with the proposed change to section 106 of the FSRA⁶⁵¹ – enabling the FSCA to issue such a list.⁶⁵² The list should be reviewed periodically as business practices evolve and new types of risks emerge. Including a grey-list will serve as a useful guide as businesses review their contracts and practices to ensure fairness. Considering that different institutions are at varying levels of maturity; the list will help guide and uplift practices across the industry to promote fairer contracting terms.⁶⁵³ Clear lists strengthen the hand of regulators and consumers; places the burden of proof on the supplier and not the customer; and businesses are more likely to respond to such lists on their own accord whilst any recalcitrant institutions will be less likely to go to court over problematic terms appearing on the list.⁶⁵⁴

A possible argument against introducing lists is that they reflect a prescriptive rule-based approach and are not principles-based. However, a key feature of principles-based regulation is that principles play a dominant role as a beacon of light setting fundamental norms to influence policy setting, interpretation, implementation, execution, monitoring, and enforcement but it does not mean the absence of rules.⁶⁵⁵ In fact, principles-based regulation unaided by rules, has been found to be flawed and potentially dangerous.⁶⁵⁶ Rather, rules and guidance (including lists) should emerge where necessary from principles-based regulation, and guide institutions in ‘thinking

⁶⁴⁹ CPA Regulations (n 501) at reg 44(3)(aa). Also see World Bank (n 106) at 90.

⁶⁵⁰ Philip Stoop *The Concept ‘Fairness’ in the Regulation of Contracts Under the Consumer Protection Act 68 of 2008* (LLD thesis, University of South Africa, 2012) at 220.

⁶⁵¹ COFI Bill (n 16) at part 16 s 9.

⁶⁵² Naudé & Eiselen (n 404) at reg 44-4. See also See FCA ‘FG 18/7: Fairness in variation terms in financial service contracts under the Consumer Rights Act 2015’ 2018 para 13 available at <https://www.fca.org.uk/publication/finalised-guidance/fg18-07.pdf>, accessed 18 October 2024.

⁶⁵³ See Consumer Rights Act 2015 Part 1 Schedule 2. Also see FCA FG 18/7 (n 652) at para 3–4.

⁶⁵⁴ Naudé & Eiselen (n 404) at reg 44-4; reg 44-4A and reg 44-5.

⁶⁵⁵ Black (n 226) at 6–8.

⁶⁵⁶ Julia Black ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilis Ferran & Jennifer Payne (eds) *The Oxford Handbook of Financial Regulation* (2015) at 230.

through the application of the [p]rinciples and rules in their own particular context'.⁶⁵⁷ In the retail financial services market, both principles and rules should work together in a complimentary manner, with the underlying principles informing and influencing regulators and institutions on policy formulation and application of the rules.⁶⁵⁸ However, it does not mean there must be rules on everything, but sometimes based on the context, it is adequate that principles are formulated broadly.

Ultimately, the court is granted the power to determine if an agreement, transaction or notice is unfair, unjust, or unreasonable. If found to be unfair, the court can render the transaction or agreement void and order either restoration of money or property to the consumer, compensation or to cease or alter any practice.⁶⁵⁹ An order of the court can sever or alter any part of the agreement to the extent necessary and reasonable or declare the entire agreement as void.⁶⁶⁰ Although section 52 grants judicial control to the court to adjudicate unfair, unjust, and unconscionable conduct, more proactive and consumer friendly measures are desirable – due to the risk, time, and cost limitations of litigation on consumers – to ensure effective resolution of complaints and disputes about unfair contractual terms.⁶⁶¹

b. Content Control under the Conduct Standard

The Conduct Standard has an overriding obligation⁶⁶² on financial institutions to act with integrity, honesty, fairness, due care, skill, and diligence, to act in a transparent manner and to avoid potential conflicts of interest. Section 5(1)(d) goes further to say that financial institutions must ensure that contractual terms and conditions, including fees and charges, are not unfair. According to section 5(2), a contract, term, or condition is considered unfair if:

⁶⁵⁷ Julia Black, Martyn Hopper & Christa Band 'Making a Success of Principles-based Regulation' (2007) *Law and Financial Markets Review* 191 at 204. See Julia Black 'Forms and paradoxes of principles based regulation' (2008) 3 *Capital Markets Law Journal* 425 at 439.

⁶⁵⁸ Black (n 226) at 7–8.

⁶⁵⁹ CPA (n 16) at s 52(3).

⁶⁶⁰ Ibid at s 52(4). See also Sharrock (n 624) at 315.

⁶⁶¹ Tjachie Naudé 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2010) 127 *SALJ* 515 at 516.

⁶⁶² Conduct Standard (n 17) at s 3(1).

- a. It would cause a significant and unreasonable imbalance in the rights and obligations between the financial institutions and the customer.⁶⁶³
- b. It is not reasonably necessary to protect the legitimate interests of the financial institution that will be unduly advantaged by the term, condition, or requirement.⁶⁶⁴
- c. It will result in an unfair outcome to the customer (whether financial or otherwise) if it was applied or relied upon.⁶⁶⁵
- d. It unreasonably requires the financial customer to waive any right or absolve the bank of any obligation or liability.⁶⁶⁶

Overall, the test of fairness set out in section 5(2) is balanced. It appears to be a combination of elements incorporated in the test for fairness under the Consumer Rights Act in the UK⁶⁶⁷ and the Australian Consumer Law (Annex to the Australian Securities and Investments Commission Act in Australia)⁶⁶⁸ which are discussed in greater detail in Chapters 6 and 7 below. Positive features of the test for fairness under section 5(2) are as follows:

- To avoid the application of a subjective lens in the determination of unfairness, the Conduct Standard correctly introduces the concept of materiality by referring to the significance and unreasonableness of the imbalance caused.⁶⁶⁹
- The section considers undue advantage to the financial institution arising from a term not reasonably necessary to protect their interest. Therefore, the test factors in the disproportionate and unreasonable tipping of contracting rights and obligations favouring financial institutions in circumstances where there is inherently unequal bargaining power.⁶⁷⁰
- The test does not seem to require actual detriment or actual reliance by the customer on the term or agreement for the term to be unfair. Instead, the test considers the

⁶⁶³ Conduct Standard (n 17) at s 5(2)(a).

⁶⁶⁴ Ibid at s 5(2)(b).

⁶⁶⁵ Ibid at s 5(2)(c).

⁶⁶⁶ Ibid at s 5(2)(d).

⁶⁶⁷ CRA (n 653) at s 62 (4).

⁶⁶⁸ Australian Securities and Investments Commission Act 2001 at s 12BG(1).

⁶⁶⁹ Conduct Standard (n 17) at s 5(2)(a).

⁶⁷⁰ See also Deeksha Bhana & Marius Pieterse 'Towards a reconciliation of contract and constitutional values: Brisley and Afrox Revisited' 2005 *SALJ* 865 at 887 on inequality in bargaining power.

likelihood of an unfair outcome if the term or agreement were to be applied or relied upon.

Nevertheless, the content control of fairness under the Conduct Standard has several material shortcomings. The Conduct Standard does not provide a list of *per se* prohibited terms or agreements (blacklist)⁶⁷¹ or a grey-list of terms or agreements rebuttably presumed to be unfair.⁶⁷² In contrast to the CPA, which includes the test of fairness,⁶⁷³ a blacklist and a grey-list, the Conduct Standard only addressed fairness content controls under section 5(2). Interestingly, section 5(2)(d) extends the test of unfairness to cover any contract, term or condition that unreasonably requires a customer to waive any rights or absolve the bank of liability.⁶⁷⁴ The implication is that there is no outright prohibition of waivers, limitation, or exclusion of liability, but rather such waivers, limitation, or exclusion of liability will first be tested for reasonableness. For instance, a limitation of liability for gross negligence, although not outrightly prohibited, is likely to be struck down for unfairness.⁶⁷⁵ Notwithstanding, there are still certain waivers, exemption, indemnity and limitation of liability clauses that are permitted in terms of the common law of contract (unless otherwise stated in legislation)⁶⁷⁶ but they may still be declared unfair in terms of section 5(2). Moreover, in instances where there is evidence of imbalance in the rights of the parties in favour of the financial institution as supplier, the question still remains whether there would be a defence available to the supplier in those instances where there was no actual prejudice suffered by the customer.⁶⁷⁷

However, the COFI Bill⁶⁷⁸ proposes an amendment to section 106 of the FSRA to allow for the development of conduct standards that may declare specific conduct, products, or services prohibited. As an example, terms that restrict the ability of customers to rely on the defence of prescription should be prohibited for being contrary to public policy.⁶⁷⁹ Therefore, the COFI Bill

⁶⁷¹ CPA (n 16) at s 51.

⁶⁷² CPA Regulations (n 501) at reg 44. For detailed discussion on blacklist and grey-list see clause 4.4.2. above.

⁶⁷³ CPA (n 16) at s 48(2).

⁶⁷⁴ Conduct Standard (n 17) at s 5(2)(d).

⁶⁷⁵ CPA (n 16) at s 51(1)(b)–(c).

⁶⁷⁶ On waivers, indemnities and limitation clauses see Tjakie Naudé & Siegfried Eiselen (eds) *A Commentary on the Consumer Protection Act* (Revision Service 1 2016) at reg 44–16; Mupangavanhu (n 576) at 118; Tjakie Naudé & Gerhard Lubbe ‘Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*’ 2005 *SALJ* 441 at 458–460.

⁶⁷⁷ See Jack Beatson & Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 242.

⁶⁷⁸ COFI Bill (n 16) at part 16 s 9.

⁶⁷⁹ Tjakie Naudé ‘Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008’ (2017) *TSAR* 138 at 144. See Van Huyssteen et al (n 577) at 609–610.

should be amended to incorporate both a blacklist and a grey-list. Alternatively, the FSCA should issue such lists to ensure that adequate fairness content controls are introduced.

4.4.3 Conduct Controls

There are instances in which unfairness is not introduced by the contract terms or conditions but by the conduct or behaviour of the supplier or his agents. Both the CPA and the Conduct Standards anticipate a few such scenarios and provide for conduct controls to protect the customer and to deliver fair outcomes.

For logical sequence, this additional category of fairness control is traversed below, before addressing interpretation controls.

a. Conduct controls under the Consumer Protection Act

Part F of the CPA deals with the right to fair and honest dealing and provides under section 40 headed ‘Unconscionable conduct’, that no supplier or agent thereof may apply duress, coercion, undue pressure, unfair tactics or similar conduct on a consumer in relation to the marketing, supply, provision of services or negotiations in respect thereto or in relation to any demand or recovery of goods from a customer. Section 40(2) goes further and deems it unconscionable for a supplier to knowingly take advantage of a consumer’s inability to protect his or her own interest whether this is due to disability, illiteracy, ignorance, inability to understand the language used in the contract or any other similar factor. In realising the consumer’s right, sections 4(5)(a) and (b) provide that:

‘In any dealings with a consumer in the ordinary course of business, a person must not – (a) engage in any conduct contrary to or calculated to frustrate or defeat the purposes and policy of this Act; (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive’

In defining the meaning of ‘unconscionable’ conduct, the CPA⁶⁸⁰ points to conduct of the nature contemplated in section 40 and conduct that is ‘unethical, or improper to a degree that would

⁶⁸⁰ CPA (n 16) at s 1.

shock the conscience of a reasonable person'.⁶⁸¹ The term 'unconscionable' was historically applied morally to disapprove of certain conduct types,⁶⁸² and applied to harsh and oppressive terms that were contrary to public policy.⁶⁸³ The first reference in South African consumer law to unconscionability was in the South African Law Commission report, which recommended legislating against unconscionable or oppressive contractual terms.⁶⁸⁴

Glover identified a two-part test to determine unconscionability. The first part of the test identifies circumstances that place a contracting party at a disadvantage and then identifies whether another party has exploited the advantage by imposing 'unduly onerous' contractual terms.⁶⁸⁵ In addition, there is a procedural and substantive element in determining whether conduct is unconscionable.⁶⁸⁶ Procedural unconscionability relates to the procedure and process around the negotiation and conclusion of the contract, where a stronger contracting party exploits the inability of a party to protect his own interests. Physical, mental, or cognitive factors – such as illness, ignorance, illiteracy, inexperience, language limitation, impaired faculties, financial need, or other similar circumstances – may create a special disadvantage that affects a customer's ability to protect or preserve their own interests or to negotiate on an equal footing with full appreciation of their best interest.⁶⁸⁷ Exploiting such a special disadvantage has the effect of tainting obtained consent.

Substantive unconscionability, on the other hand, refers to the outcome of exploiting or abusing a special disadvantage, which results in unfair and unreasonable contracting terms and conditions.⁶⁸⁸ It is a mixture of content and conduct control. In *AJVH Holdings v Steinhoff International*,⁶⁸⁹ in a matter related to alleged unconscionable abuse of legal personality under

⁶⁸¹ See *National Consumer Commission v Vodacom (Pty) Ltd* (2023) ZANCT 44 para 93.3.

⁶⁸² Graham B Glover 'Section 40 of the Consumer Protection Act in comparative perspective' (2013) 4 *SALJ* 689 at 690.

⁶⁸³ See *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA) para 23.

⁶⁸⁴ South African Law Commission (Project 47) *Stipulations in unreasonable contracts and rectification of contracts* (1998) para 1.1. See also High Court in *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 (1) PH A10 (BPD).

⁶⁸⁵ Glover (n 682) at 692.

⁶⁸⁶ Jacques Du Plessis 'Lessons from America? A South African perspective on the draft Restatement of the Law, Consumer Contracts' (2018) 30 *SA Merc LJ* 189 at 202.

⁶⁸⁷ Glover (n 682) at 692.

⁶⁸⁸ *Ibid* at 695.

⁶⁸⁹ *AJVH Holdings (Pty) Ltd v Steinhoff International Holdings N.V* (2021) ZAWCHC 17 at para 34.

section 20(9) of the Companies Act, the court cited with approval the Oxford English Dictionary meaning of unconscionable laid down in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst*⁶⁹⁰ which includes, ‘[s]howing no regard for conscience ... unreasonably excessive ... egregious, blatant ... unscrupulous’. The clause on unconscionable conduct, therefore, serves as a wide net to catch a range of conduct – the purpose, intention, or outcome of which identifies what is considered as acceptable standards of conduct and public policy or where the conditions are unduly biased in favour of the supplier who has taken advantage of some vulnerability of a customer. The determination of unconscionable conduct will be informed by the context of each.⁶⁹¹

b. Conduct Controls under the Conduct Standards

(i) TCF outcomes as a conduct control

The TCF framework was initially introduced in the UK and then in South Africa as non-binding guidelines to promote the delivery of fair customer outcomes. However, the non-binding nature of the principles limited the extent of legal enforceability.⁶⁹² Therefore, in both jurisdictions, TCF was subsequently codified into law and given statutory force as a foundation against which all banking financial products and service contracts, documents and conduct will be assessed.⁶⁹³

A positive feature of the COFI Bill is that it introduces specific obligations relating to the culture,⁶⁹⁴ governance,⁶⁹⁵ key persons,⁶⁹⁶ remuneration and compensation arrangements⁶⁹⁷ within financial institutions to support fair customer outcomes, principles for the provision of financial services,⁶⁹⁸ and post-sale barriers and obligations including service.⁶⁹⁹

⁶⁹⁰ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA).

⁶⁹¹ See *Stellenbosch University Law Clinic v Lifestyle Direct Group International (Pty) Ltd* (2021) 4 All SA 219 (WCC) at para 57.

⁶⁹² See *Schoombie v Central Retirement Annuity Fund* (2018) JOL 39854 (PFA).

⁶⁹³ Conduct Standard (n 17). See also Banking Conduct of Business Sourcebook (COBS) available at <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf>, accessed on 08 January 2025.

⁶⁹⁴ COFI Bill (n 16) at s 16–17.

⁶⁹⁵ *Ibid* at s 19.

⁶⁹⁶ *Ibid* at ss 24–25.

⁶⁹⁷ *Ibid* at ss 20–22.

⁶⁹⁸ *Ibid* at ss 26–27.

⁶⁹⁹ *Ibid* at ss 32–35.

Notably, the Conduct Standard which codifies TCF in South Africa, does not rigidly divide different types of fairness controls. Therefore, for purposes of this analysis, TCF outcomes under section 2(5) of the Conduct Standard are dealt with under the conduct controls. According to the Conduct Standard the following are TCF outcomes that should at least be achieved by the financial institution:

- a. Outcome 1: Customers must be confident that treating customers fairly is central to the bank's culture.⁷⁰⁰
- b. Outcome 2: Financial products and financial services must be suitably designed to meet the needs of identified types and categories of targeted customers.⁷⁰¹
- c. Outcome 3: There must be transparency of information and appropriate disclosure before, during and after contracting i.e. customers are given clear information and appropriately informed throughout the lifecycle.⁷⁰²
- d. Outcome 4: Financial advice must be suitable and in line with the customer's needs and circumstances.⁷⁰³
- e. Outcome 5: Product and service performance must be in line with what the bank or its representatives have led the customer to expect, and related customer service is in accordance with acceptable standards and expectations created.⁷⁰⁴
- f. Outcome 6: The customer must not experience unreasonable post sale barriers to replace or change a financial product or to submit or withdraw a complaint.⁷⁰⁵

A closer analysis of the TCF outcomes reveals that there are a number of factors that influence the conduct of contracting parties and introduce customer risk. These include information failure, data and digitalization failure, consumer traits and characteristics, culture and

⁷⁰⁰ Ibid at s 2(5)(a).

⁷⁰¹ Ibid at s 2(5)(b).

⁷⁰² Ibid at s 2(5)(c).

⁷⁰³ Ibid at s 2(5)(d).

⁷⁰⁴ Ibid at s 2(5)(e).

⁷⁰⁵ Ibid at s 2(5)(f).

characteristics of the financial institution as well as social norms and expectations.⁷⁰⁶ Therefore, to address identified customer risk, TCF requires the application of judgment to determine what is fair, especially within the context of a principles-based and outcomes-focused approach to regulation.

Despite the identified customer risks, a research by the FSCA revealed that customer sentiment towards financial institutions in South Africa is generally positive.⁷⁰⁷ However, there is limited understanding by customers about terms and conditions.⁷⁰⁸ Therefore, upfront choice and disclosures before, during and after contracting alone are not adequate.⁷⁰⁹ However, a positive feature of the TCF regime in South Africa is that it includes a TCF self-diagnosis tool,⁷¹⁰ submission of conduct of business returns to support an evidence-based and data driven supervisory approach,⁷¹¹ and the FSCA's participation in a pilot to develop a framework of customer outcome indicators.⁷¹²

However, fairness concerns around product and service quality or advice suitability have been observed when a financial institution fails to address the needs, reasonable expectations, and circumstances of a particular group or class of customers.⁷¹³ Therefore, sections 2(5)(b) and (d), read with section 5(1) of the Conduct Standard, places an obligation on financial institutions to

⁷⁰⁶ See Productivity Commission 'Review of Australia's Consumer Policy Framework' *Australian Government* 30 April 2008 at 44, available at <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>, accessed on 16 August 2022. Factors identified by the Productivity Commission are also relevant and applicable in South Africa due to the similarity in the nature of conduct risk affecting retail financial customers.

⁷⁰⁷ FSCA 'South African financial customer behaviour and sentiment study' July 2023 at 7 and 68 available at <https://www.fsca.co.za/Documents/South%20African%20Retail%20Financial%20Customer%20Behaviour%20and%20Sentiment%20Report.pdf>, accessed 20 October 2023.

⁷⁰⁸ *Ibid* at 21.

⁷⁰⁹ *Ibid* at xiii.

⁷¹⁰ FSB 'Assessing Your TCF Readiness-How to use the FSB's self-assessment tool' August 2022 available at <https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/Completing%20the%20self-assessment.pdf>, accessed 12 November 2024.

⁷¹¹ FAIS (n 363) at s 19(2)(b)(iii) and s 19(3). FSCA Communication 16 of 2022 'Publication of Roadmap for roll-out and implementation of cross-sectoral Conduct of Business Return (Omni-CBR)' available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/General-FSCA-Legislation.aspx>, accessed 06 December 2024. FSCA Communication 13 of 2024 (FAIS) 'Submission of annual financial statements and other statutory returns by Financial Service Providers' April 2024 available at <https://www.fsca.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2013%20of%202024.pdf>, accessed 12 November 2024.

⁷¹² Antonique Koning, Juan Carlos Izaguirre & Aveesha Singh 'Customer outcomes-based approach to consumer protection: a Guide to measuring outcomes – Lessons from a South Africa Pilot' *CGAP* June 2022 available at https://www.cgap.org/sites/default/files/publications/slidedeck/2022_06_Reading_Deck_Customer_Outcomes_Based_Approach_Consumer_Protection.pdf, accessed 12 November 2024.

⁷¹³ Conduct Standard (n 17) at s 5(2)(a). See also Koning, Izaguirre & Singh (n 712) at 69.

implement adequate measures and controls to manage the risk of introducing and maintaining unsuitable offerings throughout the product lifecycle including during product design and distribution stages or as market dynamics change. Additionally, section 5(1)(a) contemplates a product design process informed by the needs and reasonable expectations of the customer, coupled with a detailed assessment process on product suitability, marketing and disclosure requirements undertaken by competent persons within the financial institution with knowledge of key features and characteristics of the product or service.

Importantly, an obligation is imposed under section 2(6) of the Conduct Standards for the financial institution to render financial services according to the contractual relationship and reasonable instructions of the customer. Section 2(6) further requires the provision of financial services to be executed with due regard to the customer's interest and must be afforded appropriate priority over the institution's interests. Section 2(6) addresses conflicts of interest where some financial institutions put their own or agents' interests above the customer's interests.⁷¹⁴ Therefore, section 2(6) introduces a higher standard of care and a duty of general application for financial institutions in the execution of contracts to prioritise the interests of their customers over their own interests. At the same time, the approach adopted must ensure the objective balancing of the customer's interests and rights with the banks' rights, as referred to in *Investec v Motloung*.⁷¹⁵

A similar obligation is introduced in section 4(1), which states that product and service design must be done with due regard to the interests of the financial customer. However, the current wording of the Conduct Standard and the COFI Bill falls short of expressly requiring financial institutions to act in the customer's interest in the same way as the FAIS General Code of Conduct.⁷¹⁶ It is left to judicial interpretation whether the Conduct Standard and COFI create a fiduciary duty of banks towards their customers through prioritising customer interests.

⁷¹⁴ Stephen Lumpkin 'Consumer protection and financial innovation: A few basic propositions' (2010) 2010 *OECD Journal: Financial Market Trends* 117 at 8. See also Richard Rattue 'Conflicts of interest: Are you managing yours?' *MoneyMarketing* 02 July 2018 available at https://issuu.com/newmediab2b/docs/mm_july_18, accessed 21 April 2024.

⁷¹⁵ *Investec* note (n 305) at 36.

⁷¹⁶ FAIS (n 363) at s 16(1)(a); s 2 of the General Code of Conduct; *Singh v Marsh Proprietary Limited* (2023) ZAFST 39 para 5 and 56. See also Daleen Millard 'So much owed by so many to so few: How the Financial Advisory and Intermediaries Act 37 of 2002 addresses "conflict of interest"' (2012) 33 *Obiter* 152 at 156.

Furthermore, the Conduct Standard also falls short in addressing the potential consequences of non-compliance and failure to prioritise the customer's interests above those of the bank.

Therefore, the wording of both the Conduct Standard and the COFI Bill should be amended to clarify the obligation of financial institutions to act in the interest of their customers.⁷¹⁷ Furthermore, there must be practical guidance for both financial institutions and retail financial customers, similar to the Consumer Duty introduced in the UK to clarify expectations around the requirement to prioritise the interest of the customer over the interests of the provider.⁷¹⁸ One such factor to consider is an expectation for financial institutions to take reasonable steps to avoid foreseeable harm to the customer.⁷¹⁹

(ii) Omission of prohibition of unconscionable conduct as conduct control

In contrast to the review of the CPA above, neither the FSRA, the Conduct Standards or the COFI Bill have a provision that is similar to section 40 nor do any of these financial sector regulatory instruments refer to the concept of ‘unconscionable’ conduct as a content or conduct control mechanism.

The FSRA in section 106(4) makes provision for a Conduct Standard to declare specific conduct in connection with a financial product or a financial service to be considered as a prohibited practice or unfair business conduct if the conduct –

- a. ‘is or is likely to be materially inconsistent with the fair treatment of financial customers.
- b. is deceiving, misleading or is likely to deceive or mislead financial customers.
- c. is unfairly prejudicing or is likely to unfairly prejudice financial customers or a category of financial customers.

⁷¹⁷ See the following Chapter on the detailed discussion on good faith and duty to act in the best interest of the customer.

⁷¹⁸ FCA CP21/13 (n 74). For a detailed discussion see Chapter 6 below.

⁷¹⁹ FCA CP21/13 (n 74).

- d. impedes in any other way the achievement of any of the objectives of a financial sector law.’

Therefore, section 106(4) is adequate to enable the inclusion of a list of prohibited conduct or practices.⁷²⁰ Interestingly, the FSCA has noted the Unfair Commercial Practices Directive⁷²¹ which specifically prohibits unfair commercial practices and exploitation of vulnerable customers.⁷²² The Conduct Standard also prohibits certain practices such as unreasonable post sale barriers.⁷²³ Even so, the current provisions of the Conduct Standard are drafted in a way which creates a positive duty to embed organisational behaviours, policies and processes that support fairness of customer outcomes such as:

- a. the overarching responsibility of the bank to conduct its affairs in a manner that prioritises the interest of the customer.⁷²⁴
- b. providing for the financial institution to conduct their affairs in such a manner that customers are confident that the fair treatment of customers is central to the bank’s culture.⁷²⁵ This includes principles relating to culture requiring banks to act with integrity, honestly, fairly, transparently, with due care, skill and diligence in a manner that does not bring the sector into disrepute and to organise its affairs responsibly.⁷²⁶
- c. principles for effective governance arrangements that are proportionate to the nature, size, and scale of the business. This includes clarity on roles and responsibilities of the governing body and key persons, remuneration, compensation and incentive practices and disclosure of interests in related and interrelated parties.⁷²⁷

⁷²⁰ As at the date of completion of this thesis, a detailed Conduct Standard prohibiting the above practices had not been published. The current Conduct Standard prohibits unreasonable post sale barriers.

⁷²¹ Directive 2005/29/EC of the European Parliament and of the Council ‘concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council – (‘Unfair Commercial Terms Directive’)’ (2005) *Official Journal Of the European Union* L149/22 as amended chap 2 art 5.

⁷²² FSCA ‘FSCA Statement on Consumer Vulnerability’ March 2024 at 2 available at https://www.fsc.co.za/Documents/FSCA%20Statement%20on%20Consumer%20Vulnerability_PUBLISHED.pdf, accessed 20 October 2024.

⁷²³ Conduct Standard (n 17) at s 10(1). See also COFI Bill (n 16) at ss 32(1) and 33(1).

⁷²⁴ Conduct Standard (n 17) at s 2(4).

⁷²⁵ Ibid at s 2(5)(a).

⁷²⁶ Ibid at s 3(1).

⁷²⁷ Ibid at s 3(2) – (4).

- d. systematic risk-based monitoring of the market conduct risk associated with the business model and type of business.⁷²⁸
- e. oversight arrangements for product design, suitability, and performance.⁷²⁹

Value judgements about acceptable standards of behaviour and the principles of community morals enables conscionability to serve as a 'safety net' against systemic predatory models,⁷³⁰ and exploitative business practices. However, the doctrine of conscionability imposes a higher standard which is more difficult to reach than the test of unfairness.⁷³¹ Furthermore, there is a lack of general community understanding of the concept of conscionability because the term is not in plain language and is not often used in normal conversation.⁷³² Therefore, instead of directly adopting the doctrine into financial sector law, the COFI Bill should rather include an objective criterion to assess fairness of conduct outcomes and to include an overriding duty of good faith (proposed in Chapter 5).

4.4.4 Interpretation Controls under the CPA and Conduct Standard

In the event of any ambiguity about a provision in the CPA or document prepared by the supplier, section 4(3) and (4) directs that the Tribunal and the court must interpret the contract and such other documents to the benefit of the consumer and in a manner that is consistent with the objectives of the Act. Section 4(4) gives legislative force to the *contra proferentem* rule of interpretation meaning that consumer contracts must be interpreted against the supplier as framer of the contract and in favour of the consumer 'so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer'.⁷³³

The SCA in *Centriq Insurance Company Ltd v Oosthuizen*⁷³⁴ confirmed that 'the doctrine must not be applied mechanically,... [contractual clauses] must be construed in accordance with

⁷²⁸ Ibid at s 3(5)–(6).

⁷²⁹ Ibid at s 4.

⁷³⁰ Jeannie Paterson & Gerard Brody "'Safety Net" consumer protection: Using prohibitions on unfair and unconscionable conduct to respond to predatory business models' (2015) 38 *Journal of Consumer Policy* 331 at 344.

⁷³¹ *Bridge v Campbell Discount Co Ltd* (1962) AC 600 at 626. Glover (n 682) at 691.

⁷³² Nicholas Felstead 'Beyond unconscionability: Exploring the case for a new prohibition on unfair conduct' (2022) 45 *University of New South Wales LJ* 285 at 286.

⁷³³ Naudé (n 27) at 507. See also Elizabeth de Stadler & Sieg Eiselen 'Section 4' in Naudé & Eiselen (n 404) at 4-12.

⁷³⁴ *Centriq Insurance Company Limited v Oosthuizen* 2019 (3) SA 387 (SCA).

their language, context and purpose with a view to achieving a commercially sensible result'.⁷³⁵ The interpretation process must also be contextual, consider the interests of the supplier and be balanced with other legitimate social interests.⁷³⁶ Therefore, the *contra proferentem* rule does not mean that the court should adopt a construction more favourable to the customer or consumer than is permitted by the language of the contract properly construed.⁷³⁷

Unlike the CPA, there is no express provision in COFI that where a meaning is capable of more than one interpretation, the court, or Tribunal is required to interpret the form, document or contract (prepared by or on behalf of the supplier) to the benefit of the consumer.⁷³⁸

It is worth noting that based on the legacy of South Africa, many consumers still live in poverty,⁷³⁹ are illiterate⁷⁴⁰ and 'did not, as a result of our past, play an active role in our economy, from which they would be able to understand the nature and import of the obligations'.⁷⁴¹ The inherent and overwhelming information, power, size, scale, knowledge, skills, expertise, capacity and capability asymmetry between banks and retail customers means that contracting parties are generally not inherently at an even footing when agreeing on terms and conditions. The complexity of the banking systems, coupled with the inherent asymmetry referred to above, inadvertently results in an embedded bias in favour of the bank.

Therefore, considering the inherent information asymmetry, material mismatch in bargaining power between banking institutions versus retail financial consumers, and inherent consumer behavioural biases that increase customer vulnerability,⁷⁴² COFI must expressly affirm that – in the event of ambiguity of contractual terms – interpretation of contractual terms and conditions by the courts and the Tribunal regarding the provision of financial products and services should be done in a manner that aligns with the *contra proferentem* rule. Often standard forms are

⁷³⁵ Ibid para 18.

⁷³⁶ Naudé & De Stadler (n 433) at 5; Van Eeden & Barnard (n 435) para 1.2.

⁷³⁷ Ibid para 21.

⁷³⁸ See CPA (n 16) at s 4(4).

⁷³⁹ World Bank 'Poverty & Equity Brief Africa Eastern & Southern – South Africa' April 2024 available at <https://www.worldbank.org/en/topic/poverty/publication/poverty-and-equity-briefs> accessed 16 October 2024. The report estimates that 55% of the population is living in poverty.

⁷⁴⁰ Gail Pearson, Phillip N Stoop & Michelle Kelly-Louw 'Balancing responsibilities —Financial literacy' (2017) 20 *Potchefstroom Electronic LJ* at 2–3.

⁷⁴¹ *Van Wyk* (n 498) para 85. See also *Beadica* (n 32) at 119 and 121.

⁷⁴² *Armour et al* (n 91) at 206–207.

not negotiated due to unequal bargaining power and the *contra proferentem* rule is appropriate to protect customers in the event of ambiguity of contract terms in these circumstances.⁷⁴³

Although the *contra proferentem* rule is part of the common law, it is essential that consumers and consumer advisors have knowledge and understanding of applicable provisions without having to consult multiple sources of law to understand their rights. Furthermore, the right of access to the courts implies that consumers should have the skills to identify infringements of their rights and available remedies and know how to protect their rights and succeed.⁷⁴⁴ Therefore, the legislation must be crafted in a manner that is suitable for both lawyers and non-lawyers alike, by minimising the need for readers to consult multiple sources of law to understand relevant rights and obligations.⁷⁴⁵

4.5 CONCLUSION

It is evident from the comparison of the control mechanisms under the COFI Bill and Conduct Standard versus the CPA that there are still critical gaps that must be closed through amendment of the Conduct Standard and incorporation in COFI to address areas of ambiguity and to ensure the meaningful delivery of fair customer outcomes. To ensure that retail financial consumer protection mechanisms are adequate and effective and no less than what is enjoyed by general consumers, there must be a systematic assessment of the consumer protections under the COFI Bill against the fundamental consumer rights afforded under Chapter 2 of the CPA.⁷⁴⁶ Key changes to be made include:

- a. Clarifying the expected manner and form of disclosure for particular types of high risk or problematic transactions, terms, or contracts – for instance conspicuous disclosure and drawing such terms to the customer’s attention.
- b. Reviewing the test of unfairness to include failure to satisfy procedural formalities – for particular types of high risk or problematic transactions, terms,

⁷⁴³ Naude & Eiselen (n 404) at 4-12.

⁷⁴⁴ Geoff Budlender ‘Access to courts’ (2004) 121 *SALJ* 339 at 341.

⁷⁴⁵ Andrew Hutchison ‘Contractual interpretation: The South African blend of common, civil and indigenous law in comparative perspective’ in Pier Giuseppe Monateri (ed) *Comparative Contract Law* (2017) 466 highlights that looking at the contract through ‘the shoes of the recipient’ renders the law ‘more intelligible and open to those who are governed by it...’.

⁷⁴⁶ CPA (n 16) at ss 8–67.

or contracts – as a factor in the fairness enquiry, even though it would not automatically render the term or contract void.

- c. Introducing a blacklist of *per se* prohibited terms – although the overall test of fairness in section 5(2) of the Conduct Standard is commendable, such a blacklist will assist to lift the standards across the industry as financial institutions review their terms and conditions. Businesses will be more likely to respond spontaneously to such lists whilst discouraging undesirable practices by recalcitrant institutions.⁷⁴⁷ The list will complement the principles based approach by providing better guidance to institutions and strengthen the position of regulators and consumers.
- d. Introducing a non-exhaustive list of terms that are rebuttably presumed to be unfair – the list of terms which must be considered in the context – will serve as useful guide to financial institutions. Similar benefits as indicated above apply to the grey-list. It will also shift the burden of proof regarding fairness to the financial institution.
- e. Adding a provision that in the event of ambiguity, the courts and Tribunal will interpret terms and contracts to the benefit of the consumer.
- f. Amending section 7(1) of the Conduct Standard to include the reasonable person test to determine whether reasonable endeavours are adequate to discharge the bank's obligations.
- g. Providing practical guidance – similar to the Consumer Duty introduced in the UK – to clarify expectations around the requirement to prioritise the interest of the customer over the interests of the provider.
- h. Instead of directly adopting the doctrine of unconscionability into financial sector law, rather consider inclusion of an objective criterion to assess fairness of conduct outcomes and incorporate an overriding duty of good faith (discussed in Chapter 5) as a conduct control.

⁷⁴⁷ Naudé & Eiselen (n 404) at reg 44-4; reg 44-4A and reg 44-5.

Meaningful inroads have been made through the Conduct Standard⁷⁴⁸ to give statutory force to TCF principles and to establish them as a foundation against which all banking financial products and service contracts, documents and conduct will be assessed. Nonetheless, incorporation, content, conduct, and interpretation controls serve as an important lens through which to understand applicable regulatory mechanisms to ensure fair treatment of customers. A combination of controls can be used to proactively identify, assess, monitor, manage and mitigate the risk of procedural or substantive unfairness.

⁷⁴⁸ Pesci & Koekemoer (n 570) at 270.

CHAPTER 5: CONSIDERATION OF CASE LAW AND ACADEMIC WRITING WHICH IS BROADLY RELEVANT TO NOTIONS OF FAIRNESS

5.1 INTRODUCTION

Treating Customers Fairly (TCF) implies the application of judgement in determining what is fair. This chapter considers case law and academic writing, which is broadly relevant to notions of fairness, and its potential application within the context of a principles-based and outcomes-focused approach to regulation. There is limited case law related to TCF in banking within a principles-based and outcomes-focused regulatory approach, and therefore, cases broadly pertaining to standards of fairness in contracts have been considered together with the role of constitutional values and public policy in contracts. The chapter also examines the assessment criteria to be applied to establish whether conduct is fair and specifically looks at the courts' approach in relation to insurance and pension products which are also regulated under the FSRA. At the end of the chapter, a recommendation is made on objective criteria that can be applied by regulators to determine the fairness of financial products, services or conduct of financial institutions.

5.2 THE RISK OF SUBJECTIVE DETERMINATION OF FAIRNESS WITHIN A PRINCIPLE-BASED AND OUTCOMES FOCUSED REGULATORY APPROACH

The stated regulatory approach under the COFI Bill has been described as principles-based, outcomes-focused, activity-based, risk-based, and proportional.⁷⁴⁹ Principles-based regulation implies that at a substantive level, formal norms and principles should play a central role in the regulatory framework to influence behaviour⁷⁵⁰ in the relationship between financial institutions and customers. In principles-based regulation the principles play a dominant role in the formulation, interpretation and application of laws, norms, guidance and rules,⁷⁵¹ and require an interrogation of what is done and why.⁷⁵² This principles-based approach should give institutions

⁷⁴⁹ FSCA (n 228) .

⁷⁵⁰ Black (n 226) at 4.

⁷⁵¹ Ibid at 8.

⁷⁵² Ibid at 9.

a measure of flexibility on what processes and controls they must apply to deliver fair outcomes. What this means in practical terms, in as far as it relates to delivery of fair customer outcomes for retail customers of banking institutions, is still evolving because the Conduct Standard is still in the process of embedment and COFI is still in draft.

Financial sector regulation has historically been prescriptive, with rules and detailed requirements for banks and other financial service providers. FAIS is one such example of a rule-based regulatory instrument. In many respects, a rule-based approach was essentially binary in that an organisation was compliant or non-compliant.⁷⁵³ Although the TCF principles served as guiding principles, there was still limited room for the application of normative concepts of fairness or reasonableness by regulators in applying regulatory instruments. With the advent of the FSRA⁷⁵⁴ and the Conduct Standard, a transition has commenced to move to a more outcomes-focused approach driven by principles. The intention is to allow organisations the scope to define their internal operating processes and procedures to align with the stated principles.

However, within this construct, the FSCA, the relevant financial sector Ombud and the Tribunal in one form or another will assess the fairness of conduct, and ultimately, the courts reserve the right to judge whether a particular product, service, contractual term, or outcome is unfair. Therefore, there is ‘interpretive risk’ associated with a principles-based approach.⁷⁵⁵

It is therefore important for both banks and customers alike to understand what detailed assessment criteria will and ought to be applied in assessing what is fair. The FSCA has clearly stated in their supervisory strategy that they will take an interventionist approach to promote fair customer outcomes.⁷⁵⁶ Consequently, it will be critical to avoid subjective determinations of fairness and to have a system of checks and balances to ensure that judgement is exercised by regulators in a reasonable manner and that the criteria for assessment of fairness is consistently applied.

⁷⁵³ Andy Schmulow ‘Treating Customers Fairly (TCF) in the South African banking industry: Laying the groundwork for Twin Peaks’ (2022) 30 *African Journal of International and Comparative Law* 25 at 29.

⁷⁵⁴ FSRA (n 80).

⁷⁵⁵ Ibid at 9.

⁷⁵⁶ FSCA (n 228) at 54. See FSCA (n 216) on updated strategy.

In *Potgieter v Potgieter*,⁷⁵⁷ the SCA made an important observation around the risk of relying upon subjective notions of fairness, stating that:

[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. . . Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or . . . if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.

Theron J in delivering the majority judgement in *Beadica v Oregon Trust*⁷⁵⁸ reaffirmed that the rule of law requires that the law be clear and ascertainable. She confirmed the statement by the Constitutional Court in *Affordable Medicines Trust v Minister of Health* that ‘[t]he law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.’⁷⁵⁹ It is not perfect lucidity or absolute certainty that is required but rather reasonable certainty.⁷⁶⁰ These same principles regarding certainty and reasonably predictable outcomes ought to apply similarly to administrative action by supervisors and regulators so that both the regulated and retail customers understand the regulatory requirements and expectations. Determination around what constitutes fair customer outcomes should not be dependent on the subjective views of regulators about what is fair, reasonable, or just.

5.3 APPLICATION OF THE CONCEPT OF FAIRNESS IN CASE LAW

There is limited case law in South Africa on the application of TCF within the banking sector. Therefore, the analysis of judicial reasoning in cases across various areas of law will serve as a basis for recommendations on a possible objective assessment criterion to determine the fairness of conduct and outcomes.

⁷⁵⁷ *Potgieter v Potgieter* NO 2012 (1) SA 637 (SCA) para 34.

⁷⁵⁸ *Beadica* (n 32) para 81.

⁷⁵⁹ *Affordable Medicines Trust an Others v Minister of Health* 2006 (3) SA 247 (CC) para 108.

⁷⁶⁰ *Ibid.*

Therefore, to determine the objective criteria for assessing the fairness of conduct and outcomes, this section reviews various decisions by the Appellate Division, the SCA, and the Constitutional Court on the role of fairness and good faith within the standard of public policy in relation to contractual terms and conduct. The review considers how the courts have addressed the careful balancing of competing interests around freedom of contract versus application of public policy considerations.

The application of discretion by financial institutions such as insurers in determining fairness is also discussed.

5.3.1 Exercise of discretion by financial institutions in determining fairness

A lesson from other areas – such as insurance and pensions – is that an unfettered exercise of discretion by institutions in determining fairness of outcomes and a rigid tick box approach to TCF is undesirable. In instances where rules provide institutions with discretion, this must not be exercised unfairly, unreasonably, or capriciously.⁷⁶¹

For instance, in *Schoombie v Central Retirement Annuity Fund*,⁷⁶² the Pension Funds Adjudicator held that one policy charge was unreasonable, and the respondent was ordered to adjust the rate of interest applied. In arriving at his decision, the adjudicator placed reliance on the statement by Fourie J in *Old Mutual Life Assurance v Pension Funds Adjudicator* that:⁷⁶³

‘The fact that the policy does not specify a formula according to which the paid-up reduced benefit is to be calculated, does not mean that Applicant has an unfettered discretion to arbitrarily determine a value in a manner that is unfair, unreasonable, or capricious.’⁷⁶⁴

Although the adjudicator in *Schoombie* found no evidence of blatant disregard for the TCF objectives, general concern was expressed by the tribunal at the weakness in regulations in the retirement industry when viewed in light of the TCF outcome relating to information disclosure

⁷⁶¹ *Schoombie* (n 692).

⁷⁶² *Ibid.*

⁷⁶³ *Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator* 2007 (3) SA 458 (C).

⁷⁶⁴ *Ibid* para 35.

before, during and after the time of contracting.⁷⁶⁵ The tribunal's view was that most retirement annuity products failed to meet this TCF requirement around disclosure of drastic causal event charges or termination fees when a customer experiences financial distress.⁷⁶⁶

However, each case must still be assessed on its own merits. This was demonstrated in *Murray v Professional Provident Society Retirement Annuity Fund*,⁷⁶⁷ where discretionary causal event charges subject to the prescribed maximum of 30% of the fund value under the Long-Term Insurance Act,⁷⁶⁸ were found reasonable and lawful.

Therefore, in the absence of clear and unambiguous rules, the discretion is not unfettered, nor can it be exercised by a party solely in its own interests.⁷⁶⁹

5.3.2 Exercise of judicial control in determining what is fair

It is accepted that judicial discretion is not unfettered and must be exercised in line with 'legal and public policy'.⁷⁷⁰ Public policy is the prism through which judicial control of contracts has been exercised under the common law.⁷⁷¹ Fairness is related to public policy because under common law and the Constitution, contracts that are so unfair as to offend public policy can be struck down by the courts as unenforceable.⁷⁷² Nonetheless, the court has confirmed that the power to strike down contracts as being contrary to public policy must be exercised sparingly and only in the clearest cases.⁷⁷³ Although the courts can assess the constitutional validity of contractual terms, which ensures that constitutional values inform considerations of public policy, fairness is not a free-standing principle on which to challenge terms or their enforcement.⁷⁷⁴ Therefore, the

⁷⁶⁵ *Schoombie* (n 692) para 5.21. See also *Trustees for the time being of the Oregon Trust v Beadica 231 CC* (2019) ZASCA 29 para 23–24.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Murray v Professional Provident Society Retirement Annuity Fund* (2019) 1 BPLR 224 (PFA).

⁷⁶⁸ Long-term Insurance Act 52 of 1998.

⁷⁶⁹ *Tek Corporation Provident Fund v Lorentz* 2000 (3) BPLR 227 (SCA) para 29.

⁷⁷⁰ *Oregon Trust v Beadica 231 CC* (2019) ZASCA 29 para 24 citing *Bredenkamp v Standard Bank of South Africa Ltd* (2010) ZASCA 75 para 39.

⁷⁷¹ *Beadica* (n 32) para 28

⁷⁷² *Bank of Lisbon and South Africa Ltd v De Ornelus* (1988) ZASCA 35 at 13F-14A.

⁷⁷³ See *Eerste Nasionale Bank v Saayman NO* (1997) ZASCA 62 at 324B-G.

⁷⁷⁴ *Beadica* (n 32) para 175. See also Luca Siliquini–Cinelli & Andrew Hutchison 'Constitutionalism, good faith and the doctrine of specific performance: rights, duties and equitable discretion' (2016) 133 *SALJ* 73 at 81–82.

following section analyses considerations of public policy and constitutional values in the exercise of judicial control in determining the fairness of contracts.

5.3.3 Considerations of public policy and good faith under the common law of contract

The historical position reflected the view expressed by Kotze JA that ‘equity cannot and does not override a clear provision of our law’ and principles of equity are only of force if they have been authoritatively incorporated into law.⁷⁷⁵ The court developed the law further in *Sasfin v Beukes*,⁷⁷⁶ by striking down a cession clause that was considered unconscionable and contrary to public policy because it sought to turn the debtor into a slave of the creditor.⁷⁷⁷ *Eerste Nasionale Bank v Saayman*,⁷⁷⁸ and a number of other subsequent cases reconfirmed the accepted principle from the *Magna Alloys* case,⁷⁷⁹ that agreements that are contrary to public policy may be declared unenforceable and struck by our courts, ‘subject to the caveat that this power be exercised sparingly and only in the clearest of cases’.⁷⁸⁰

Following the adoption of the Constitution,⁷⁸¹ the SCA in *Brisley v Drotzky*⁷⁸² and *Afrox Health v Strydom*⁷⁸³ held that the Constitution and the underlying value system does not empower the court to declare a contract as invalid or unenforceable purely on the basis of the judge’s perceived notion of ‘unjustness’ or ‘imprecise notions of good faith’.⁷⁸⁴ Subsequently, Ngcobo J in *Barkhuizen v Napier* highlighted that sanctity of contract is subject to constitutional control.⁷⁸⁵

⁷⁷⁵ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 295.

⁷⁷⁶ *Sasfin (Pty) Ltd v Beukes* (1989) 1 All SA 347 (A).

⁷⁷⁷ *Ibid* at 7H-9G.

⁷⁷⁸ *Eerste Nasionale Bank* (n 773).

⁷⁷⁹ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

⁷⁸⁰ *Eerste Nasionale Bank* (n 773) at 324B-G.

⁷⁸¹ Constitution (n 441).

⁷⁸² *Brisley v Drotzky* 2002 (4) SA 1 (SCA) para 6. At para 22 the court cited with approval Dale Hutchison ‘Non-variation clauses: Any escape from the Shifren straitjacket?’ (2001) 118 *SALJ* 720 at 744 where the author notes that good faith is an ethical value ‘based on community standards of decency and fairness that underlies and informs the substantive law of contract’. It provides the moral and theoretical foundation of rules and doctrines. Although good faith has ‘a creative, controlling, legitimating or explanatory function’, it is not the only value that underlies contract law.

⁷⁸³ *Afrox* (n 607) para 32.

⁷⁸⁴ *Brisley* (n 782) paras 6–7. See also Andrew Hutchison ‘Good faith in contract: A uniquely South African perspective’ (2019) 1 *Journal of Commonwealth Law* 227.

⁷⁸⁵ *Barkhuizen* (n 26).

The majority judgment however acknowledged that public policy still required parties to honour agreements they have entered into, where they have done so freely and voluntarily.⁷⁸⁶

It was held that ‘notions of fairness, justice and equity – as informed by constitutional values – cannot be separated from public policy’,⁷⁸⁷ and should take account of ‘the need to do simple justice between individuals and is informed by the concept of ubuntu’.⁷⁸⁸ An *obiter dictum* in *Everfresh Market Virginia*⁷⁸⁹ explained ubuntu as emphasising ‘the communal nature of society and carries in it the ideas of humaneness, social justice and fairness and envelopes the “key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”’.⁷⁹⁰

The ambit of principles set out in *Barkhuizen* was tested by the SCA in *Bredenkamp*.⁷⁹¹ In that matter the applicant submitted that if the court does not find the termination of his banking contract to have violated constitutional values, the court should consider that the termination of his banking relationship with Standard Bank was contrary to the principle of fairness. After considering the arguments presented, the SCA continued to apply ‘perceptive restraint’ and held the view that termination of a banking contract ‘did not offend any identifiable constitutional value and was not otherwise contrary to any public policy consideration.’⁷⁹² The court further maintained the view that fairness, reasonableness, and good faith are not self-standing grounds upon which a court may refuse to enforce a contractual term on the basis of public policy.⁷⁹³

Interestingly, although the Roman law concept of good faith was imported into the South African law of contract,⁷⁹⁴ traditionally before the constitutional era, courts held firmly to freedom of contract. However, Sachs J in the minority judgement in *Barkhuizen v Napier*⁷⁹⁵ cited with

⁷⁸⁶ Ibid para 73.

⁷⁸⁷ Ibid para 51.

⁷⁸⁸ Ibid.

⁷⁸⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁷⁹⁰ Ibid para 71.

⁷⁹¹ *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).

⁷⁹² Ibid para 64.

⁷⁹³ Ibid paras 40; 41 and 42.

⁷⁹⁴ Reinhard Zimmermann ‘Good faith and equity’ in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 at 239–41.

⁷⁹⁵ *Barkhuizen* (n 26) para 140.

approval the view expressed by Hutchison that ‘the concept of good faith,...[has a role to play] as a means of developing a doctrine of unconscionability to ensure greater fairness in contractual relations.’⁷⁹⁶ The Constitutional Court in *Botha v Rich NO*⁷⁹⁷ went further and stated that good faith is ‘the lens through which we come to understand contracts’.⁷⁹⁸

The controversy around the application of judicial discretion in the enforcement of contracts was finally settled by the Constitutional Court in *Beadica*⁷⁹⁹ in which that court reconfirmed that the values of good faith, fairness, and reasonableness ‘play a profound role in our law of contract under our new constitutional dispensation’.

Theron J in asserting the transformative role of the court to ‘search for substantive justice’ in line with the Constitution,⁸⁰⁰ pointed out that there is no basis for privileging *pacta sunt servanda* over other constitutional rights or values. Where there are competing interests, there must be a careful balancing exercise undertaken to determine if enforcement would be contrary to public policy in the particular circumstances.⁸⁰¹ The court went further and clarified that the application of abstract values of good faith, fairness and reasonableness have not been accorded an autonomous, self-standing status but are foundational pieces of contract law that are mediated through rules of contract. She stated that ‘it is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it’.⁸⁰²

Froneman J in the minority judgement highlighted that the law of contract and good faith complement each other.⁸⁰³ He further confirmed that modern remedies against unfairness were founded either in unconscionability or good faith,⁸⁰⁴ with civil law jurisdictions preferring the latter while common law jurisdictions preferred the former although there was cross pollination.⁸⁰⁵

⁷⁹⁶ Dale Hutchison & Chris-James Pretorius Plessis (eds) *The Law of Contract in South Africa* 4 ed (2022) para 1.9.4.

⁷⁹⁷ *Botha v Rich NO* (n 35).

⁷⁹⁸ *Ibid* paras 45–46.

⁷⁹⁹ *Beadica* (n 32).

⁸⁰⁰ *Ibid* para 74.

⁸⁰¹ *Ibid* para 87.

⁸⁰² *Ibid* para 81.

⁸⁰³ *Beadica* (n 32) paras 176 – 177.

⁸⁰⁴ *Ibid* para 123

⁸⁰⁵ *Ibid*.

The Constitutional Court in *Beadica*⁸⁰⁶ confirmed the following judicial principles laid down by the Supreme Court of Appeal in *AB v Pridwin Preparatory School*⁸⁰⁷ subject to qualifications which will be discussed below:

- a. 'Public policy demands that contracts freely and consciously entered into must be honoured.
- b. A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy.
- c. Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it.
- d. The party who attacks the contract or its enforcement bears the onus to establish the facts.
- e. A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds.
- f. A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.'

Theron J clarified two points arising from the principles. First, sanctity of contract under the *pacta servanda* principle gives effect to constitutional values of freedom and equality and plays a crucial role in judicial control of contracts through the lens of public policy.⁸⁰⁸ Second, the principle of perceptive restraint should not dissuade courts from infusing constitutional values into public policy.⁸⁰⁹ The idea that 'there must be substantial and incontestable harm to the public' before a court refuses to enforce a contract was confirmed to be foreign to the South African law of contract.⁸¹⁰

⁸⁰⁶ Ibid para 82.

⁸⁰⁷ *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA) para 27. The Constitutional Court in *AB v Pridwin Preparatory School* (2020) ZACC 12 at 2 set aside the order of the SCA.

⁸⁰⁸ *Beadica* (n 32) para 88.

⁸⁰⁹ Ibid para 90

⁸¹⁰ Ibid.

Ultimately a balancing exercise is needed to establish whether a contractual term, or its enforcement, is contrary to public policy.⁸¹¹ The public policy considerations and principles affirmed by the Constitutional Court in *Beadica* (although applied narrowly) are instructive to both financial services regulators and organisations on the approach to follow to proactively assess the fairness of financial products, services, and contractual terms against the requirements of the Standard.

It is noteworthy that *Beadica* involved a business-to-business contract where the Constitutional Court held that fairness is not a free-standing basis to challenge contracts or conduct governed by common law or the Constitution. In a business to customer relationship, it is probable that the South African courts will follow common law jurisdictions like the UK and not uphold fairness or TCF outcomes as free standing and independently actionable under the common law.⁸¹² However, *Beadica* acknowledged that there are civil law jurisdictions where good faith exists as a free standing doctrine.⁸¹³

Interestingly, in a judgement handed down on the same day as *Beadica* by the same court in *AB v Pridwin Preparatory School*,⁸¹⁴ the majority upheld a ‘horizontally applied constitutional right (right to education) via section 8(2) of the Constitution to the benefit of boys impacted by the decision of the school to terminate the children’s schooling in a procedurally unfair manner.’⁸¹⁵ The court held that the court ‘should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute’ but limited this application to education and not commercial contracts.⁸¹⁶ Therefore, *Pridwin* leaves some room for the court to impose on private parties novel constitutional obligations ‘if, and to the extent that [they are applicable]’.⁸¹⁷

Therefore, under the common law the standard used is public policy. In turn, public policy is informed by fairness, ubuntu and good faith although these are not free-standing principles on

⁸¹¹ *Beadica* (n 32) para 72.

⁸¹² See Chapter 6 on case law in the UK on whether TCF principles are independently actionable.

⁸¹³ *Beadica* (n 32) para 61.

⁸¹⁴ *Pridwin* (n 807) para 126 and 130.

⁸¹⁵ Alistair Price ‘Contractual fairness: Conflict resolved?’ 2021 *AJ* 321 at 321 and 335.

⁸¹⁶ *Pridwin* (n 807) para 130.

⁸¹⁷ Price (n 815) at 201. Constitution (n 441) at s 8(2).

which to challenge contractual terms or their enforcement. However, a statute can alter the common law if this is clearly enacted. Consequently, it is up to the legislature to clearly enact values of fairness and good faith as free standing principles if the intention is to alter the common law position.⁸¹⁸

5.3.4 Lessons from the determination of fairness in insurance and retirement contracts

The majority of reported cases which address fair treatment of customers or fair contracting terms in the financial services sector are in the insurance and pension fund industries as opposed to banking. However, considering that insurance, pension funds and banking all form part of the financial services sector regulated under the FSRA,⁸¹⁹ the reported cases are instructive to understand how fairness has been interpreted in other parts of the sector.

The Covid-19 pandemic and lockdown regulation imposed by the South African government as a result triggered a lot of economic hardships which also presented a legal test around fairness in the interpretation of contractual provisions by financial institutions. The first such case appeared before the Western Cape High Court and was subsequently heard by the SCA in *Guardrisk Insurance Company Limited v Café Chameleon*.⁸²⁰ Café Chameleon experienced loss of income due to business interruption following imposition of strict lockdown regulations across the country including the Western Cape. The court ruled in favour of Café Chameleon and reaffirmed the principles set out by the SCA in *Centriq Insurance v Oosthuizen*⁸²¹ to the effect that:

Insurance contracts are contracts like any other and must be construed by having regard to the language, context, and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended,

⁸¹⁸ *Bayport Securitisation Ltd v University of Stellenbosch Law* (2021) ZASCA 156 para 15. See section 5.3.5 below on legislative incorporation of values of fairness and good faith.

⁸¹⁹ FSRA (n 80) at s 3.

⁸²⁰ *Guardrisk Insurance Company Limited v Café Chameleon* 2021 (2) SA 323 (SCA).

⁸²¹ *Centriq* (n 734).

having regard to the words they used [in] the light of the document as a whole and of the factual matrix within which they concluded the contract.⁸²²

Cachalia JA in the majority decision noted that insurance contracts are contracts of indemnity and must be interpreted ‘reasonably and fairly to this end’.⁸²³ The court referenced the English law principle adopted by Schreiner JA that:

No rule, in the interpretation of a policy, is more established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain the claim and cover the loss, must in preference be adopted.⁸²⁴

The court concurred with the *court a quo* which looked with a jaundiced eye at ‘the narrow peering of words’, which was not in alignment with the proper approach to the interpretation of contract.⁸²⁵ Notably, principles of commercial sensibility, reasonableness and fairness were applied by the court in the matter to arrive at the conclusion in favour of the insured.⁸²⁶

It follows from the *Guardrisk* matter that a technical and legalistic approach to contracts will be problematic. Considerations of reasonableness, reality, good business, common sense, fairness, and sensibility are key as an alternative to adopting a strict and rigid approach to the legal interpretation of contracts.⁸²⁷

In *Slabbert v Liberty*⁸²⁸ the court affirmed the duty to treat customers fairly, but the court also held that implementation of express policy terms cannot be characterised as unfair.⁸²⁹ The case highlights the inclination not to address the fair treatment of customers as a self-standing principle but rather within the construct of the express contractual terms.

⁸²² *Guardrisk* (n 820) para 12.

⁸²³ *Ibid* para 13.

⁸²⁴ *Ibid* para 13.

⁸²⁵ *Ibid* para 17 and 24.

⁸²⁶ *Ibid* para 39. The court cited *Minister of Safety and Security v Van Duivenboden* (2002) 3 All SA 741 (SCA) where Nugent JA stated that ‘common sense has to prevail over strict logic’. See also *Ma-Afrika Hotels (Pty) Ltd v Santam Limited* (2021) 1 All SA 195 (WCC) and *Interfax (Pty)Ltd v Old Mutual Insure Limited* (2020) JOL 49197 (SCA).

⁸²⁷ *Guardrisk* (n 820) para 39.

⁸²⁸ *Slabbert v Liberty Group Limited* (2022) ZAECPEHC 34.

⁸²⁹ *Ibid* paras 25; 28 and 29.

5.3.5 Legislative incorporation of the values of fairness and good faith as free standing principles

It is evident from the above discussion that good faith – which includes notions of fairness, justice, and reasonableness – is not a foreign concept to South African law.⁸³⁰ However, Du Plessis argues that there is a need to focus on good faith as a constitutional value, which is not just equated with reasonableness or fairness but established as ‘a standard of altruism or minimum degree of concern for the interests of one’s contracting party’.⁸³¹ Ubuntu is also characterised as a transformative and substantive constitutional value but it is not clear whether other values such as fairness are constitutional values.⁸³²

Considering the inherent information asymmetry and weaker bargaining position of retail financial customers, it is competent for the legislature to infuse values of fairness and good faith in financial sector law to protect retail financial consumers.⁸³³ There are other areas such as the CPA and Conduct Standard, where notwithstanding the existence of a contract, parliament has legislated to protect vulnerable persons and for fairness to operate as an independent free-standing ground – within the context of the legislation – to challenge contracts.⁸³⁴

Indeed there is a valid case to make out that consumer rights touch on a fundamental constitutional right to human dignity⁸³⁵ and that consumer legislation, underlying contracts and conduct must still be tested against constitutional values. In *Bayport v University of Stellenbosch Law Clinic (USLC)*,⁸³⁶ the SCA affirmed that constitutional values were infused into the objectives

⁸³⁰ *Beadica* (n 32) para 176.

⁸³¹ Jacques Du Plessis ‘Fairness in the Law of Contract: Reflections on *Beadica*’ (2022) 12 *Constitutional Court Review* 197 at 197.

⁸³² Ibid at 200. *Beadica* (n 32) para 206 confirms ubuntu as a constitutional value.

⁸³³ National Financial Ombud Scheme (NFO) ‘CR385 Exclusion of psychiatric disorders; constitutional rights infringed?’ available at <https://nfosa.co.za/cr385-exclusion-of-psychiatric-disorders-constitutional-rights-infringed/>, accessed 30 June 2024 noted that the NFO does not have power or jurisdiction to consider the question of the infringement of constitutional rights. The position highlights the need for such values to be embodied in the law and regulations.

⁸³⁴ CPA (n 16) ss 48 and 52; and Conduct Standard (n 17) s 5(2). The NCA (n 238) under s 3(3)(iii) sets protection from unfair conduct as one of the objectives of the but Act does not include a test for unfairness. See also minority judgment by Victor AJ in *Beadica* (n 32) at para 219.

⁸³⁵ *Ivy Puseletso Nzwana v Dukes Motors t/a Dampier Nissan* (2019) ZAECGHC 81 para 22. See Constitution (n 441) at s 10.

⁸³⁶ *Bayport* (n 818).

of the NCA.⁸³⁷ Nonetheless, constitutional considerations did not influence the interpretation of section 103(5) of the NCA on collection costs and the final judgment.⁸³⁸

Hutchison⁸³⁹ argues that there is a need in consumer protection law for fairness jurisdiction to be given to the courts, tribunals and [regulators] to protect retail consumers who may be in a weaker bargaining position – his observation is that there is an opportunity for a transformed constitutional regime incorporating values such as ubuntu to be reflected in the interpretation of various laws.

Therefore, unless COFI and the Conduct Standard are clear in entrenching fairness and good faith as free-standing principles that underpin delivery of fair customer outcomes and making failure to deliver such normative fair customer outcomes actionable in law, the common law principles will continue to hold sway. To promote fair outcomes for retail financial consumers, a contextual approach is important to ensure substance over form and to avoid a purely legalistic approach that operates outside constitutional values.

5.4 PROPOSED ASSESSMENT CRITERIA TO DETERMINE FAIRNESS OF CONDUCT AND OUTCOMES

TCF is about asking more normative questions about whether outcomes are fair and not merely looking at the contract terms concluded with a customer.⁸⁴⁰ Therefore, an objective test should be applied to determine whether market conduct or outcomes are fair instead of adopting a purely subjective determination of fairness.⁸⁴¹ Failure to establish and apply an objective test and

⁸³⁷ Ibid para 3. See also Stephan van der Merwe ‘Judicial intervention and the call to transformative constitutionalism in the context of consumer law, debt collection and the National Credit Act: Bayport Securitisation Ltd v University of Stellenbosch Law Clinic’ (2023) 140 *SALJ* 328–364.

⁸³⁸ Stephan van der Merwe ‘Judicial intervention and the call to transformative constitutionalism in the context of consumer law, debt collection and the National Credit Act: Bayport Securitisation Ltd v University of Stellenbosch Law Clinic’ (2023) 140 *SALJ* 328–364. Constitutional considerations did not influence the interpretation of section 103(5) of the NCA on collection costs and the final judgment in *Bayport*.

⁸³⁹ Hutchison (n 784) at 270. See also Naudé (n 661) at 516–517.

⁸⁴⁰ Sabine Mayser & Florian von Wangenheim ‘Perceived Fairness of Differential Customer Treatment: Consumers’ Understanding of Distributive Justice Really Matters’ (2013)16 *Journal of Service Research* 99 at 109.

⁸⁴¹ Hawthorne (n 22) at 398.

assessment criterion of fairness could introduce the risk of arbitrary and subjective decision making, which may increase uncertainty for financial institutions and customers.

Fairness of contracts and conduct exists within the context of established laws and regulations and not in isolation. Notably – as illustrated in Chapter 4 – section 5(2) of the Conduct Standard sheds light on circumstances in which a contract term or condition would be considered unfair. However, the Conduct Standard is silent on specific factors to be considered or circumstances under which specific conduct or outcomes would be considered unfair. The wording of section 5(2) refers specifically to a ‘term, condition or requirement of a contract’ and does not necessarily extend to conduct or practices. Similarly, neither the Conduct Standard nor the COFI Bill have a blacklist of prohibited terms, prohibited conduct or an indicative, non-exhaustive grey-list indicating unfair terms, conduct or outcomes. Whilst the lack of detail may be in line with the principles-based approach and probably intended to allow for flexibility to deal with each case on its merits, in the interest of certainty and to avoid the arbitrary exercise of judgement, there is merit in setting out a criterion or a test to guide the regulators, organisations and customers in assessing fairness of conduct and outcomes.

To the extent that legislation results in lack of clarity, uncertainty, or ambiguity about the assessment of fairness, reasonableness or conscionability of certain conduct or outcomes, the principles outlined in section 40 of the CPA on unconscionable conduct, read with section 52(2) regarding factors the court must consider in ensuring fair and just conduct, terms and conditions,⁸⁴² are informative to guide the development of criterion to assess fairness of conduct and outcomes.

Therefore, a proposal is for the Conduct Standard to develop one simplified and understandable composite criterion to determine fairness of conduct, practices or outcomes (as opposed to only contractual terms) – derived from the abovementioned CPA provisions.⁸⁴³ The proposed criterion requires looking at the unique circumstances of the case and determining if conduct or outcomes considered in light of the TCF principles set out in section 2 (5) of the Standard is unreasonable, absurd, or unduly harsh and contrary to good faith. The determination should consider factors such as whether there is significant imbalance in the nature of the

⁸⁴² CPA (n 16).

⁸⁴³ Ibid.

relationship between the parties (considering their relative capacity, expertise, education, experience, sophistication or situational disadvantage),⁸⁴⁴ their relative bargaining power,⁸⁴⁵ and whether the customer suffered or was likely to suffer detriment or harm as a result of the conduct.⁸⁴⁶

It is submitted that the organisation should bear the onus of proving that the TCF principles – referred to in section 2(5) of the Standard – were satisfied.

The above proposed criterion, if adopted, would provide clearer and more objective guidance to market participants on the logical steps to follow in order to test for fairness of conduct or outcomes. Each case must understandably be assessed on its own merits.

5.5 CONCLUSION

It is trite that the legislature can make provision for fairness to operate as an independent free-standing basis to challenge contract terms.⁸⁴⁷ The minority judgement by Froneman J also correctly highlighted the importance of developing more detailed and practical rules or objective principles to guide parties when engaging in fairness control.⁸⁴⁸ Such an approach includes taking account of the reasonable expectations of the parties and the wider community.⁸⁴⁹ Therefore, the test for fairness under the Conduct Standard and COFI presents an opportunity to develop these rules and principles.

Ultimately, application and interpretation of terms and conditions within contracts concluded with retail financial customers will require an objective analysis of the language, context, and purpose of these contracts.⁸⁵⁰ Infusing the equitable principle of good faith into relevant financial sector law will be central to any process to determine the fairness of terms, conditions, requirements, and general conduct. Relevant case law and the regulatory approach in

⁸⁴⁴ See CPA (n 16) s 52(2)(b). See also 62(4) of the CRA.

⁸⁴⁵ *Ibid.*

⁸⁴⁶ Adapted from the fairness test under section 62(4) of the CRA.

⁸⁴⁷ See *Beadica* (n 32) para 219. *Bayport* (n 818) at 15.

⁸⁴⁸ *Ibid* para 107. Cf *Du Plessis* (n 831) at 214–219 and 222.

⁸⁴⁹ *Ibid* para 108.

⁸⁵⁰ *Guardrisk* (n 820) para 24.

comparable common law jurisdiction will serve as a very useful guidepost in navigating this relatively new and uncharted territory around statutory entrenchment of TCF principles within the financial services sector in South Africa.

The following two chapters consider and compare the overarching regulatory framework, supervisory architecture, and fairness control mechanisms in the UK and Australia for the fair treatment of customers with the approach adopted in South Africa in order to draw guidance from those jurisdictions.

CHAPTER 6: TREATING RETAIL FINANCIAL CUSTOMERS FAIRLY UNDER THE UK REGULATORY FRAMEWORK

6.1 INTRODUCTION

This chapter considers the regulatory framework for the fair treatment of retail financial customers in the UK. The analysis reviews the overarching regulatory framework, the mandate of the FCA, control mechanisms for the delivery of fair customer outcomes and relevant case law. A comparison is done between key features of the UK regulatory framework and the current regulatory construct in South Africa. Recommendations are made on further enhancement of the regulatory architecture for the fair treatment of retail financial customers in South Africa based on some best practice lessons observed from the approach adopted in the UK.

6.2 OVERARCHING REGULATORY FRAMEWORK IN THE UK FOR FAIR TREATMENT OF RETAIL FINANCIAL CUSTOMERS

6.2.1 Financial consumer protection and the Financial Services and Markets Act, 2000

The FCA is the independent conduct regulatory body in the UK responsible for regulating the fair treatment of customers in the financial industry. It was established on 1 April 2013 after taking over responsibility from its predecessor, the Financial Services Authority.⁸⁵¹ It is worth noting that prominent changes were made to the FSMA in 2023 in terms of Financial Service and Markets Act 2023 which repealed and amended certain parts of the 2000 Act to strengthen the regulatory regime. The strategic objective of the FCA under the Financial Services and Markets Act (FSMA)⁸⁵² is to ensure that markets function well⁸⁵³ and one of its operational objectives is consumer protection.⁸⁵⁴ Section 1B (4) of the FSMA specifically provides that:

⁸⁵¹ FSMA (n 258) at Part 1A. Also see Robert Hockett ‘The macroprudential turn: From institutional safety and soundness to systematic financial stability in financial supervision’ (2015) 9 *Virginia Law & Business Review* 201 at 252.

⁸⁵² FSMA (n 258) as amended.

⁸⁵³ *Ibid* at Part 1A s 1B.

⁸⁵⁴ *Ibid* at Part 1A s 1C.

‘The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers.’.

Three primary objectives emerge from section 1B (4) of the FSMA. The first is the consumer protection objective which specifically relates to the need to ‘secure an appropriate degree of protection for consumers.’⁸⁵⁵ In assessing the appropriate degree of protection, the FCA must consider the following factors:⁸⁵⁶

- a. Differing degrees of risk involved in different kinds of transactions.
- b. Differing degrees of experience and expertise of different consumers.
- c. The need for consumers to have the timely provision of information and advice that is accurate and fit for purpose.
- d. The general principle that consumers should take responsibility for their decisions.
- e. The general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate ‘having regard to the degree of risk involved in relation to the ... transaction and the capabilities’ of the consumers in question.
- f. The differing expectations that consumers may have in relation to the transaction.
- g. Any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A of the Financial Markets Act.

It is argued that an intervention to assess the appropriate degree of protection is justified in those markets where experience and the quality of the goods or services cannot be determined by the consumer even after purchase, or where there is a risk of adverse selection due to information asymmetry.⁸⁵⁷

Considerations that inform the appropriateness of the type of intervention introduced by the FCA⁸⁵⁸ include the nature of risk introduced by a financial product or financial service, understanding the relevant consumer population across market segments, their relative experience,

⁸⁵⁵ Ibid at Part 1A s 1C(1).

⁸⁵⁶ Ibid at s 1C(2).

⁸⁵⁷ Katalin Cseres and Annette Schrauwen ‘Empowering consumer-citizens: Changing rights or merely discourse?’ in Dagmar Schiek (ed) *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (2013) 131.

⁸⁵⁸ Julian Smith ‘Financial Services Regulation’ in LexisNexis (5 ed) *Halsbury's Laws of England* vol 50 and 50A (2022) paras 1-589 and 590-1072.

expertise and capabilities, and the need for relevant information disclosure and appropriate due care by financial service providers.⁸⁵⁹ In referring to an appropriate degree of consumer protection, the FSMA indirectly brings to bear concepts of reasonableness and proportionality in measures introduced and applied to protect consumers, similar to the requirement for proportionality under section 7(1)(a) of the COFI Bill. Furthermore, even though the FSMA reinforces the protection of financial consumers in general, it maintains a form of balance by recognising the need for consumers to take responsibility for their decisions. This serves as a key provision to ensure that the regulator acts ‘with due deference to the important right of autonomy’.⁸⁶⁰

The second FCA objective relates to integrity⁸⁶¹ and covers soundness, stability and resilience as well as protecting and enhancing the integrity of the UK financial system so that it is not used for financial crime. This integrity objective encompasses integrity in market conduct and customer fairness issues related to implementation of anti-money laundering controls.

The third objective is to promote competition in the interest of consumers. This requires the FCA to have regard to the needs of different consumers, including their need for information to make informed choices; the ease with which consumers can use the financial services and also change the person from whom they obtain them; the ability of consumers in areas affected by social or economic deprivation to access the service; the ease of market entry by new participants and the extent to which competition is encouraging innovation.⁸⁶²

The FSMA is comparable to the South African FSRA in that both pieces of legislation institute a system of financial regulation. The FSMA established the Prudential Regulation Authority ‘PRA’ and the Financial Conduct Authority ‘FCA’ in the UK. The FSRA established the PA and the FSCA in South Africa. Both Acts confer powers on these respective entities with the aim of preserving and enhancing financial stability, ensuring safety and soundness of the financial system, and improving market conduct for the protection of consumers. These Acts also give the regulators rule making powers to regulate and supervise financial institutions and firms

⁸⁵⁹ O’Mahony, Twigg-Flesner & Akinbami (n 47) at 117.

⁸⁶⁰ *Day v Forex Capital Markets Ltd* (2023) EWHC 1349 (Comm) para 27. See also *Peter Quinn v IG Index Ltd* (2018) EWHC 2478 (Ch) para 79. See also Cseres & Schrauwen (n 857) at 3 and 5.

⁸⁶¹ FSMA (n 258) at s 1D (1)–(2).

⁸⁶² *Ibid* at s 1E(2).

falling within their jurisdictions. However, although one of the objects of the FSRA is the fair treatment and protection of financial customers,⁸⁶³ it does not give insight on the principles to guide the fair treatment of customers in the same manner that the FSMA does.

6.2.2 Financial consumer protection and the Consumer Rights Act 2015

The Consumer Rights Act (CRA),⁸⁶⁴ which is the overarching consumer protection legislation in the UK effective 1 October 2015, empowers the FCA as regulator and ‘unfair contract terms enforcer’.⁸⁶⁵ The Unfair Terms in Consumer Contracts Regulations (UTCCR)⁸⁶⁶ which implemented the European Union Unfair Terms in Consumer Contracts Directive⁸⁶⁷ applied to contracts that were concluded prior to 1 October 2015 and fell within the regulation and supervision ambit of the FCA in relation to firms in the financial industry.

The CRA replaced the UTCCR, and consolidated and harmonised several consumer protection regulations in the UK to provide comprehensive protection for consumers and reduce complexity.⁸⁶⁸ The Act carried forward protections afforded to consumers under the UTCCR whilst adding other new provisions and extending the framework in some respects.⁸⁶⁹ The Act also distinguished fairness controls applicable to consumer contracts under the Act and those applicable to contracts concluded under the Unfair Contract Terms Act applicable between traders and between traders and non-consumers.⁸⁷⁰ In 2024 the UK passed the Digital Markets, Competition and Consumers Act⁸⁷¹ (DMCCA) which replaces and updates the Consumer Protection from Unfair Trading Regulations 2008 in the digital space and prohibits unfair commercial practices.⁸⁷² The DMCCA aligns the UK with the EU’s Unfair Commercial Practices Directive⁸⁷³ which was also amended in 2019 and in 2024.

⁸⁶³ FSRA (n 80) at s 7(1)(c).

⁸⁶⁴ CRA (n 653).

⁸⁶⁵ Ibid at Schedule 3 para 8.1.

⁸⁶⁶ The Unfair Terms in Consumer Contracts Regulations 1999 ‘UTCCR’.

⁸⁶⁷ European Union Unfair Terms in Consumer Contracts Directive No 13 of 1993.

⁸⁶⁸ See Simon Whittaker ‘Consumer Contracts’ in Hugh G Beale (ed) *Chitty on Contracts* (35 ed) 2023 para 41-247.

⁸⁶⁹ Ibid para 41-252

⁸⁷⁰ Unfair Contract Terms Act 1977 as amended has been revised to apply between traders and between traders and non-consumers. Whittaker (n 868) para 41-247.

⁸⁷¹ Digital Markets, Competition and Consumer Act 2024 ‘DMCCA’. There was also a prominent amendment in 2006 to the Consumer Credit Act 1974 (CCA 1974). The UK also has the Consumer Protection Act 1987 dealing with liability for defective products which is not relevant for the current thesis.

⁸⁷² DMCCA (n 902) Schedules 20–27.

⁸⁷³ EU Directive (n 721).

According to Part 1 Chapter 2 section 3 of the CRA, the Act applies to contracts for a trader to supply goods to consumers and to sales contracts, contracts for hire of goods, contracts for transfer of goods and hire-purchase agreements.⁸⁷⁴ Contracts for the supply of coins or notes,⁸⁷⁵ currency exchange agreements,⁸⁷⁶ contracts for goods sold in execution,⁸⁷⁷ and contracts that are intended to operate as a mortgage, pledge, charge, or other security are excluded.⁸⁷⁸ Part 1 Chapter 4 applies specifically to service supply contracts.⁸⁷⁹ The provisions relevant to the supply of a service render the CRA applicable to financial products and financial services.

For purposes of enforcement of the rights afforded to consumers against unfair contract terms, section 70 of the CRA confers enforcement and investigative powers to the Competition and Markets Authority (CMA) – which superseded the Office of Fair Trading – and other regulators as outlined in Schedule 3 and Schedule 5 respectively. The FCA is a regulator under the CRA⁸⁸⁰ and a qualifying body under the Unfair Terms in Consumer Contracts Regulations. In addition, the CMA has concluded an MoU with the FCA on the use of concurrent powers. In terms of this arrangement, the FCA has the mandate to consider the fairness of financial contracts and notices falling within the scope of the MoU.⁸⁸¹ The functions of the FCA under Schedule 3 of the CRA are treated as functions of the authority under the FSMA.⁸⁸² Notably, the FCA is vested with rule making powers under the FSMA.⁸⁸³

Therefore, the FCA does not only look at contract terms but also at the conduct of financial institutions. The handbook issued by the FCA⁸⁸⁴ and the relevant Unfair Contract Terms and Consumer Notices Regulatory Guide⁸⁸⁵ sets out how the FCA uses its powers under the CRA.⁸⁸⁶ The Authority is mandated, amongst other things, to do the following:

⁸⁷⁴ CRA (n 653) at s 3(2).

⁸⁷⁵ CRA (n 653) at s 3(3)(a).

⁸⁷⁶ CRA (n 653) at s 3(3)(a).

⁸⁷⁷ *Ibid* at section 3(3)(b).

⁸⁷⁸ *Ibid* at section 3(3)(c).

⁸⁷⁹ CRA (n 653) at s 48(1).

⁸⁸⁰ CRA (n 653) at Schedule 3 para 8(1)(d).

⁸⁸¹ FCA 'The Unfair Contract Terms Regulatory Guide' available at <https://www.handbook.fca.org.uk/handbook/UNFCOG.pdf>, accessed on 29 March 2022.

⁸⁸² CRA (n 653) Schedule 3 para 10.

⁸⁸³ *Ibid* at s138(1). Graeme Baber 'The Financial Conduct Authority and financial conduct: Hand in glove?' (2015) 36 *The Company Lawyer* 263 at 265.

⁸⁸⁴ FCA Handbook available at <https://www.handbook.fca.org.uk/>, accessed 10 January 2025.

⁸⁸⁵ FCA (n 881). The Regulatory Guide is issued under the FSMA (n 258) s 139A.

⁸⁸⁶ *Ibid* at s 1(1).

- a. Set statutory objectives and formulate policy to govern the discharge of functions under the CRA.⁸⁸⁷
- b. Consider complaints about unfair contract terms and notices.⁸⁸⁸
- c. Conduct investigations.⁸⁸⁹
- d. Apply for an injunction or interdict in relation to unfair terms and notices⁸⁹⁰ or if a term or notice breaches the transparency requirement under section 68.
- e. Require undertakings from firms in relation to the abovementioned conduct.⁸⁹¹
- f. Give guidance and also publish cases that result in the change in terms and notices issued by a firm.⁸⁹²
- g. Make full use of its information disclosure powers.⁸⁹³
- h. Make rules related to designated activities including rules for liability and compensation as well as enforcement.⁸⁹⁴
- i. Impose directions on persons related to designated activities.⁸⁹⁵

It is evident from the above analysis that the UK has one primary financial services consumer protection legislation⁸⁹⁶ supported by streamlined policy formulation and regulatory oversight structures between the CMA and the FCA as empowered by the FSMA. This regulatory architecture and regulatory oversight structure is much clearer, less complex and has far fewer overlapping mandates than the current position in South Africa.

6.2.3 Comparison of the UK and South African supervisory and regulatory oversight structure

The regulatory architecture and oversight mandate for retail financial consumer protection under the FSMA and the CRA is distinguishable from the mandate of the FSCA in South Africa under the FSRA in the following material respects:

⁸⁸⁷ CRA (n 653) at Schedule 5 para 10.

⁸⁸⁸ Ibid at Schedule 3 para 2(1).

⁸⁸⁹ CRA (n 653) at Schedule 5 para 1.

⁸⁹⁰ Ibid Schedule 5 para 3(1).

⁸⁹¹ Ibid Schedule 5 para 6(1).

⁸⁹² Ibid Schedule 5 para 7(1).

⁸⁹³ Ibid Schedule 5 paras 13 and 14.

⁸⁹⁴ FSMA (n 258) paras 29; 71P and 71Q.

⁸⁹⁵ FSMA (n 258) at ss 71N and 71O.

⁸⁹⁶ There are other relevant statutes in the UK such as the CCA 1974 (n 871), the Consumer Protection from Unfair Trading Regulations 2008 and the DMCCA (n 902).

Description	UK	South Africa
Consumer protection objective	<ul style="list-style-type: none"> • The CRA is the overarching consumer protection legislation. • Oversight mandate is held by the FCA in terms of the FSMA.⁸⁹⁷ • The FCA is also a regulator under the CRA⁸⁹⁸ and has mandate to consider fairness of products and services falling within its ambit. The FCA derives its mandate from an MoU concluded with the CMA which is the primary regulator for enforcement of the CRA. • The FCA regulates and supervises the provision of credit under the Consumer Credit Act. • Whilst the PRA has the general mandate of safety and soundness of the financial system, it has no direct mandate in relation 	<ul style="list-style-type: none"> • Pending the promulgation of COFI, multiple financial sector laws apply.⁹⁰⁰ The NCA applies in respect of credit agreements and the CPA applies to financial products and financial services that fall outside the scope of section 10 of the FSRA. Section 10 specially excludes from operation of the CPA ‘a function, act, transaction, financial product, financial service that is subject to the NPSA⁹⁰¹ or financial sector law’ • Oversight mandate for promoting fair treatment of financial customers is held by the FSCA in terms of the FSRA⁹⁰² and other relevant financial sector laws like FAIS.⁹⁰³ • The PA regulates and supervises banks⁹⁰⁴ and this includes operational resilience. The PA has responsibility to protect financial customers against the risk that regulated financial institutions may fail to meet their obligations.⁹⁰⁵ • The NCR is also considered a financial sector regulator but is independent. It has oversight mandate over the NCA⁹⁰⁶ which has the primary objective of

⁸⁹⁷ FSMA (n 258) at s 1C.

⁸⁹⁸ CRA (n 653) at Schedule 3.

⁹⁰⁰ FSRA (n 80) at Schedule 1.

⁹⁰¹ NPSA (n 6).

⁹⁰² FSRA (n 80) at ss 57 and 58.

⁹⁰³ FAIS (n 363).

⁹⁰⁴ FSRA (n 80) at s 34.

⁹⁰⁵ Ibid at s 33(c).

⁹⁰⁶ NCA (n 238).

	<p>to protection of financial customers.⁸⁹⁹</p>	<p>promoting a fair and non-discriminatory marketplace for access to consumer credit and to protect consumers.⁹⁰⁷ The FSCA in performing its functions must consider the NCA and regulatory instruments applicable to financial institutions regulated under this Act.⁹⁰⁸</p> <ul style="list-style-type: none"> • The CPA is not considered as a financial sector law in terms of the FSRA.⁹⁰⁹ Furthermore the FSRA⁹¹⁰ excludes application of the CPA in relation to ‘a function, act, transaction, financial product, or financial service that is subject to the NPSA or a financial sector law, and which is regulated by the FSCA in terms of a financial sector law’. However, any other unregulated product or service falling outside this exclusion would fall within the ambit of the CPA and the remit of the National Consumer Commission which is tasked with oversight of compliance with the CPA.⁹¹¹ • Section 85 of the FSRA makes provision for a process under which cabinet members responsible for consumer protection and consumer credit may request the Inter-Ministerial Council to provide for protection of financial customers equivalent to or
--	--	--

⁸⁹⁹ FSMA (n 258) at s 2B.

⁹⁰⁷ Ibid at s 3.

⁹⁰⁸ FSRA (n 80) at s 58(5)(a).

⁹⁰⁹ Ibid at Schedule 1.

⁹¹⁰ Ibid at s 10.

⁹¹¹ CPA (n 16) at s 85.

		higher than protection offered under the NCA or the CPA.
Integrity objective	<ul style="list-style-type: none"> • Oversight mandate for soundness, stability and resilience including financial crime is held by the FCA in terms of the FSMA.⁹¹² 	<ul style="list-style-type: none"> • Safety and soundness mandate⁹¹³ as well as supervision of banks in respect of financial crime is held by the PA.⁹¹⁴ The PA may make standards to reduce the risk of financial crime.⁹¹⁵ • Policy setting mandate for financial crime rests with the FIC in terms of the FIC Act.⁹¹⁶ The FIC is considered a financial sector regulator.⁹¹⁷
Competition objective	<ul style="list-style-type: none"> • Oversight mandate held by the FCA in terms of the FSMA.⁹¹⁸ 	<ul style="list-style-type: none"> • The Competition Commission holds the statutory mandate for compliance with the Competition Act. • To the extent consistent with its objectives, the FSCA is required to promote sustainable competition in the provision of financial products and financial services and cooperate with the Competition Commission in terms of the Competition Act.⁹¹⁹ • The PA is required to support sustainable competition in the provision of financial products and financial services including to co-operate and collaborate with the Competition Authority.⁹²⁰

⁹¹² FSMA (n 258) at s 1D.

⁹¹³ FSRA (n 80) at s 33(a).

⁹¹⁴ Ibid at s 34(1)(a).

⁹¹⁵ Ibid at s 105(2)(b).

⁹¹⁶ FIC Act (n 233).

⁹¹⁷ FSRA (n 80) at s 1.

⁹¹⁸ Ibid at s 1(e).

⁹¹⁹ Competition Act 89 of 1998.

⁹²⁰ FSRA (n 80) at s 34(1)(d).

		<ul style="list-style-type: none"> • The NCR may refer to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms 10 of the Competition Act, 1998 (Act No. 89 of 1998).
--	--	--

a. Cooperation, coordination, and collaboration

The UK is several years ahead of South Africa because a system of Twin Peaks regulation was implemented in 2013 in that jurisdiction. Therefore, the UK offers useful lessons and insights about developing a regulatory framework that reduces ambiguity, complexity, and the risk of regulatory arbitrage. For a detailed analysis of regulator coordination and collaboration mechanisms in South Africa, please see section 3.2, 3.3 and 3.4 above.

The FCA in the UK concluded an MoU with the CMA in 2019⁹²¹ which established a framework for cooperation between the two regulators in as far as it relates to the exercise of powers in terms of applicable consumer protection laws. This MoU espouses principles of early information sharing, consultation and coordination of enforcement action.⁹²² The FCA is empowered to consider issues of fairness under the CRA and the UTCCR in financial services including mortgages, insurance, banking, pensions, investments, consumer credit, consumer hire, credit related activities and claims management.⁹²³ Furthermore, the FCA as a designated enforcer under the CRA, can obtain a court order against firms that fail to act fairly and meet their legal obligations to customers.⁹²⁴ Within the Bank of England, the Financial Policy Committee is overall

⁹²¹ FCA ‘Memorandum of understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation’ available at <https://www.fca.org.uk/publication/mou/fca-cma-consumer-protection-mou-2019.pdf>, accessed 08 June 2022.

⁹²² Ibid para 13(b)–(c).

⁹²³ Ibid paras 13(b)–(c) and 20.

⁹²⁴ Ibid paras 13(b)–(c) and 11.

responsible for protecting and enhancing the resilience of the UK financial system and the chief executive officer of the FCA is a member.⁹²⁵

The initial MoU between the FCA and the PRA⁹²⁶ provided for a duty to consult before exercising its powers to impose requirements of a regulated firm or before ‘issuing warnings or decision notices’.⁹²⁷ This arrangement also made provision for a regulator to inform the other before civil or criminal action is instituted against a dually regulated firm.⁹²⁸ However, the PRA was given the right to veto regulatory action by the FCA where such action would ‘threaten the stability of the UK financial system; or result in the failure of a [PRA]-authorised firm that would adversely affect the UK financial system’.⁹²⁹ Clause 51 of the MoU specifically provided that

‘The PRA must consult the FCA before giving such a direction. The FCA is not required to comply if in its opinion it would be incompatible with any EU obligation or any other international obligation of the UK. A direction from the PRA must be given or confirmed in writing and must be accompanied by a statement of the reasons for giving it. Where the PRA exercises this veto, it must provide a copy of the direction and a statement to the Treasury. The Treasury will lay these documents before Parliament unless the PRA considers that it would be against the public interest to do so for the time being.’

Importantly, the PRA was required to ‘seek as far as possible not to prevent the FCA’s delivery of its objectives’.⁹³⁰ The distinct feature of this MoU concluded between the regulators in the UK was emphasis on the importance of preserving the statutory objectives of the respective regulators. Focus was placed on providing clarity around limited circumstances under which a veto power can be exercised and the expectation to provide reasons for decisions which can be subjected to oversight and parliamentary scrutiny. The process outlined in the UK allowed for application of administration of justice principles around ‘how power is exercised, how rights are defined and

⁹²⁵ Bank of England ‘Members of the Financial Policy Committee’ available at <https://www.bankofengland.co.uk/about/people/financial-policy-committee>, accessed 19 December 2024. Also see Eilís Ferran ‘The Break-up of the Financial Services Authority’ (2011) 31 *Oxford Journal of Legal Studies* 455 at 456–457.

⁹²⁶ Bank of England ‘Memorandum of understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-pra.pdf>, accessed 08 June 2022.

⁹²⁷ *Ibid* paras 43 and 48.

⁹²⁸ *Ibid* para 46.

⁹²⁹ FSMA (n 258) at s 31. FCA MoU (n 926) para 46.

⁹³⁰ FCA MoU (n 926) at 52.

protected and how interests are represented'.⁹³¹ In this way, a mechanism was introduced to ensure that the consumer protection objective was also considered alongside financial stability.

Interestingly, the IMF in its 2011 UK country report⁹³² which – amongst other things – reviewed the proposed Twin Peaks structure, expressed concern that the veto right ‘without appropriate safeguards, ... has the potential to limit the FCA’s independence and also to cause uncertainty in decision making, particularly in times of stress’. The MoU was subsequently revised and direct reference to the PRA’s veto power deleted.⁹³³ The revised MoU focuses rather on consultation between the FCA and PRA and resolution of potential areas of conflict through management and governance structures.⁹³⁴ This is particularly relevant where there may be a conflict between regulatory objectives.⁹³⁵

In the South African context, the administrative law principles of ‘lawfulness, procedural fairness, and reasonableness’ must be applied to regulatory action. Therefore, the operational standards or protocols of the regulators must ensure that these principles are applied specially in the application of section 144(6) regarding concurrence.⁹³⁶ Focus must be placed on consultation between regulators and clear accountability measures must be incorporated to ensure that the requirement for concurrence by the PA⁹³⁷ –aimed at protecting financial stability– is exercised in limited circumstances following a clear process that is administratively fair.⁹³⁸ It is vital to ensure

⁹³¹ See Robert Thomas, Andrew Gamble & Michael Adler ‘The Changing Context of Governance: Implication for Administration and Justice’ in Michael Adler (ed) *Administrative Justice in Context* (2010) 542 on principles of administrative justice.

⁹³² IMF ‘United Kingdom: IOSCO objectives and principles of securities regulation: Detailed assessment of implementation’ *IMF* 3 August 2011 at 23, available at <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/United-Kingdom-IOSCO-Objectives-and-Principles-of-Securities-Regulation-Detailed-Assessment-25124>, accessed 21 June 2022.

⁹³³ Bank of England ‘Memorandum of understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ April 2024 available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/mou-fca-and-boe.pdf>, accessed 19 December 2024.

⁹³⁴ *Ibid* paras 17 and 19.

⁹³⁵ Iris H-Y CHIU ‘A Rational Regulatory Strategy for Governing Financial Innovation’ (2017) 8 *European Journal of Risk Regulation* 743 at 752–753.

⁹³⁶ R C Alberts et al ‘EIA decision-making and administrative justice: an empirical analysis’ (2021) 65 *Journal of Environmental Planning and Management* 1914 at 1915.

⁹³⁷ FSMA (n 258) at s 31.

⁹³⁸ See Chapter 6, section 6.2.3.1 for a detailed discussion on how South Africa can learn from the UK and ensure application of principles of ‘lawfulness, procedural fairness, and reasonableness’ to regulatory action, particularly in the application of s 144(6).

functional independence of the FSCA,⁹³⁹ whilst ensuring that the consumer protection objective is not inadvertently frustrated by the need for concurrence.

Although the respective MoUs referred to in South Africa are not legally binding, they are intended to give effect to the legal requirement of ensuring coordination and cooperation.⁹⁴⁰ At a practical and operational level, they have a significant bearing on how regulators with overlapping mandates interact and exercise oversight on matters of consumer protection. Therefore, the empowering provisions in the FSRA must be interpreted and applied in a manner that accords with the Promotion of Administrative Justice Act,⁹⁴¹ and also in a manner that promotes clarity and certainty.

In the UK, the FCA's mandate applies across product types, services and distribution channels and the regulator serves as the nodal point for the policy setting and regulatory oversight for financial consumer protection. In South Africa, it is anticipated that COFI will go some way to harmonise the regulatory framework in South Africa. Although progress is being made, the country still has a long journey ahead to ensure a more effective, coherent, and efficient regulatory, oversight and supervision approach for the fair treatment of customers. Alignment of financial retail consumer protection regulations with protections afforded under general consumer protection law is crucial.

Historically, UK consumer law was considered unnecessarily complex and fragmented because it had developed piecemeal over time.⁹⁴² The CRA – which is equivalent to the CPA in South Africa – now forms an integral part of the regime for the delivery of fair outcomes for financial consumers under the auspices of the FCA. It was established as a framework that ‘consolidates in one place key consumer rights’ in the UK.⁹⁴³ The FCA's rule making powers⁹⁴⁴

⁹³⁹ Van Wyk (n 350) at 397–398.

⁹⁴⁰ FSRA (n 80) at ss 76 and 77.

⁹⁴¹ Promotion of Administrative Justice Act 3 of 2000. See also FSRA (n 80) at ss 91 and 92.

⁹⁴² CRA (n 653) Chapter 15 Explanatory Notes s 3.

⁹⁴³ Ibid.

⁹⁴⁴ FSMA (n 258) at s 137A.

allows the regulatory regime to be adapted to the specific circumstances and requirements of the financial services industry through the FCA Handbook.⁹⁴⁵

Therefore, the regulatory construct in the UK ensures that retail financial customers do not lose appropriate and reasonable protections available under the CRA whilst simultaneously creating a mechanism to incorporate the nuances of the banking sector. This position is distinguishable from South Africa where there are conflicting provisions in the FSRA and the CPA about applicability of the CPA to financial product and financial services.⁹⁴⁶ As part of the process to streamline and simplify the regulatory regime, it is necessary to avoid a scenario where there are materially different regulatory regimes applicable to protection of general consumers versus protections afforded to retail financial consumers.

6.3 UK COMMON LAW AND PRINCIPLES OF FAIRNESS

The concept of fairness in the English common law of contract has been laced with controversy and characterised by judicial reluctance to intervene on grounds of fairness or at least substantive fairness. Collins⁹⁴⁷ echoed the prevailing view that

‘A system of contract law committed to freedom of contract must reject controls over the fairness of contracts.... Tests of procedural propriety are both compatible with and required by the principle of freedom of contract, but any examination of the fairness of the substance of the contract must be forbidden.’

Although English law does not have a ‘general doctrine of inequality of bargaining power’,⁹⁴⁸ below are two types of cases – relevant for the current analysis – where the courts have exercised their discretion and ruled that the contracts are unfair:⁹⁴⁹

- a. Protection offered by the courts to vulnerable persons who are considered ‘poor and ignorant’ in circumstances where the transaction could not be said to be fair, just, and reasonable.⁹⁵⁰

⁹⁴⁵ FCA Handbook (n 884).

⁹⁴⁶ See section 4.3 above for a detailed discussion.

⁹⁴⁷ Hugh Collins *The Law of Contract* (2003) at 270–271. See also Whittaker (n 868) para 41-241.

⁹⁴⁸ *National Westminster Bank v Morgan* (1985) AC 686 at 671.

⁹⁴⁹ Jack Beatson, Andrew Burrows & John Cartwright *Anson’s Law of Contracts* 31 ed (2020) 664.

⁹⁵⁰ *Credit Lyonnais Bank Nederland NV v Burach* (1997) 1 All ER 144.

- b. Contracts where there was evidence of exploitation of a party in circumstances of extreme difficulty have also been held to be unfair.⁹⁵¹

However, in *Libya Investment Authority v Goldman Sachs*⁹⁵² Rose J noted that ‘generally speaking the law will not intervene to save people from making improvident bargains’. However, Lord Denning in *Lloyds Bank Ltd v Bundy*⁹⁵³ made the point that courts will set aside a contract when the bargaining power of one party is so strong and that of the other so weak that ‘as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.’⁹⁵⁴ *Strydom v Vendside Ltd*⁹⁵⁵ outlined elements that must be satisfied before a contract will be set aside due to unfairness arising from an unconscionable bargain.⁹⁵⁶ A party must have been exploited in such a morally culpable manner that it results in material disadvantage to that party and the transaction must be oppressive or overreaching.⁹⁵⁷ Due to the stringent nature of the test which requires all elements to be present before a contract can be set aside, there are few cases reported regarding unfairness arising from an unconscionable bargain.

The British courts have not developed the common law to embrace the concept of good faith in contracts as a standalone principle.⁹⁵⁸ However, the orthodox position adopted in the UK is said to be ‘swimming against the tide’.⁹⁵⁹ Notably, in *Yam Seng Pte v International Trade Corporation*⁹⁶⁰ the court found that although English law did not traditionally recognise a general duty of good faith, Leggat J held that a general duty of good faith could be an implied term in longer term relational commercial contracts.⁹⁶¹ It has been argued that ‘good faith does play a substantial role in contract law, but in a submerged or subterranean way, through particular rules

⁹⁵¹ *Financial Services Authority v Asset LI Inc.* (2013) EWHC 178 (Ch).

⁹⁵² *Libya Investment Authority v Goldman Sachs International* (2016) EWHC 2530 (Ch) at 132.

⁹⁵³ *Lloyds Bank Ltd v Bundy* (1975) QB 326.

⁹⁵⁴ *Ibid* at 336–337.

⁹⁵⁵ *Strydom v Vendside Ltd* (2009) EWHC 2130 (QB).

⁹⁵⁶ *National Westminster* (n 982). See also *Pao On v Lau Yiu Long* (1980) AC 616 and *Portman Building Society v Dusangh* (2000) 2 All ER (Comm) 221.

⁹⁵⁷ *Strydom* (n 955) at 39.

⁹⁵⁸ *Walford v Miles* (1992) 1 All ER 453 at 460–461. See Anne de Moor ‘Common and civil law conceptions of contract and European law of contract: The case of the Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 257. See also Johan Steyn ‘Contract law: Fulfilling the reasonable expectations of honest men’ (1997) 113 *Law Quarterly Review* 433.

⁹⁵⁹ See Sarah Healy ‘Swimming against the Tide’ (2016) 6 *King’s Inn Law Review* 39 at 41. Roger Brownsword ‘Two concepts of good faith’ (1994) 7 *Journal of Contract Law* 197. See also Roger Brownsword ‘“Good faith in contract” revisited’ (1996) 49 *Current Legal Problems* 111.

⁹⁶⁰ *Yam Seng Pte Ltd v International Trade Corporation Ltd* (2013) EWHC 111 (QB).

⁹⁶¹ *Ibid* para 135 and 145.

rather than broad general statements'.⁹⁶² The Supreme Court affirmed in *Pakistan International Airline Corporation v Times Travel*⁹⁶³ that English law has never recognised the general duty of good faith in contracting although it is up to the legislature to regulate inequality in bargain power.⁹⁶⁴

Aside from the instances referred to above, the courts in the UK have generally been reluctant to develop the common law principles of fairness.⁹⁶⁵ In the ordinary course, it is the responsibility of parliament and the legislature to introduce restrictions on unfair terms and conditions.⁹⁶⁶ Even then, Beatson et al argues that legislation and regulatory instruments are only applicable to transactions that fall within their ambit and cannot apply analogously to those cases that fall outside their scope.⁹⁶⁷

The position in the UK is comparable to the approach in South Africa in that under common law, values of fairness, good faith, justice and equity in contract law are not standalone principles capable of independent action.⁹⁶⁸ Therefore, it rests upon parliament to develop the law and statutorily introduce fairness control mechanisms into consumer law.

6.4 SPECIFIC LEGISLATIVE PROVISIONS DEALING WITH UNFAIR CONTRACT TERMS AND NOTICES

The CRA applies to contracts with natural persons for the supply of goods, services and digital content.⁹⁶⁹ It is acknowledged that banking and financial contracts are considered special considering the nature and impact of transactions. Consequently, controlling fairness of terms is

⁹⁶² See Michael P Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 17 ed (2016) 33–34 where Furmston cites *Braganza v BP Shipping* (2015) UKSC 17 to confirm an implied requirement of good faith and rationality in decisioning. See also Hector Lewis MacQueen 'Good faith in the Scots law of contract: An undisclosed principle?' in ADM Forte (ed) *Good Faith in Contract and Property Law* (1999) at 5–37.

⁹⁶³ *Pakistan International Airline Corporation v Times Travel (UK) Ltd* (2021) UKSC 40 paras 26–27.

⁹⁶⁴ Gerard McMeel 'United Kingdom' in Danny Busch & Matthias Lehmann (eds) *Unfair Terms in Banking and Financial Contracts* (2023) 583. See also *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* (2015) EWHC 283 (Comm) para 97.

⁹⁶⁵ Beatson, Burrows & Cartwright (n 949) at 671.

⁹⁶⁶ See Whittaker (n 868) at 782–783 on development of the law and legislative protection of consumers.

⁹⁶⁷ Beatson, Burrows & Cartwright (n 949) at 669.

⁹⁶⁸ *Beadica* (n 32).

⁹⁶⁹ CRA (n 653). See also Whittaker (n 868) paras 41-034 and 41-497.

‘even more necessary than usual’.⁹⁷⁰ Busch & Lehmann argue that it does not warrant a completely different methodology to be applied for financial products and services although it may be necessary to adopt certain special rules.⁹⁷¹ Furthermore, decoupling retail financial consumer protection from general consumer protection regulation introduces difficulties in characterising what types of transactions are included or excluded and limits the ability to draw lessons from other sectors although the core issues are similar.⁹⁷² Issues regarding characterisation are evident in the uncertainty around applicability of the CPA to financial services in South Africa as discussed under section 4.2 of this thesis.

In the UK, fairness controls under the CRA also apply to financial products and services. Part 2 of the CRA⁹⁷³ deals with unfair terms and applies to contracts between a trader and a consumer⁹⁷⁴ – subject to certain exceptions. Importantly, section 62(4) provides that a term or notice is considered unfair if it is contrary to the requirement of good faith, and it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.⁹⁷⁵ Effectively, section 62(4) which is regarded as the basic test of unfairness,⁹⁷⁶ sets out minimum content controls of fairness and outlines three elements⁹⁷⁷ to be satisfied for a term to be considered unfair.

- a. First the term or notice must be contrary to the requirement of good faith or there must be absence of good faith. This element introduces a statutory requirement to act in good faith – but limited to terms, and not conduct generally.
- b. Second, the term or notice causes significant imbalance in the contractual rights and obligations of the parties.
- c. Third, there is a risk of customer detriment because of the term.

⁹⁷⁰ Danny Busch & Matthias Lehmann ‘Towards an Unfair Terms regulation’ in Danny Busch & Matthias Lehmann (eds) *Unfair Terms in Banking and Financial Contracts* (2023) 634.

⁹⁷¹ *Ibid.*

⁹⁷² *Ibid.*

⁹⁷³ CRA (n 653) at Schedule 3 and 5.

⁹⁷⁴ *Ibid* at s 61.

⁹⁷⁵ *Ibid* at ss 62(4) and 62(6).

⁹⁷⁶ Whittaker (n 868) para 41-296.

⁹⁷⁷ See also McKendrick *Contract Law* 15 ed (2023) 385.

Article 3 (1) of the Unfair Terms in Consumer Contracts Directive issued by the EU Council ⁹⁷⁸ also states that ‘a contractual term which has not been individually negotiated shall be regarded as unfair, if contrary to the principle of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. The UK initially gave effect to this Directive through the UTCCR⁹⁷⁹ which captured the identical wording.⁹⁸⁰

Similarly, a notice is unfair in terms of section 62(6), if contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations of the parties to the detriment of the customer. Under section 62(7) the determination of the fairness of notices must be made taking into account the nature of the subject matter of the notice, the circumstances at the time of conclusion of the contract and the terms of the contract.

Under the CRA, factors to consider in determining whether a term or notice is unfair include the nature of the subject matter of the contract, all the prevailing circumstances at the time of conclusion of the contract, and all other terms in the contract or any other contract on which it depends.⁹⁸¹ For instance, in *Financial Services Authority v Asset LI Inc*⁹⁸² a telemarketing pitch was taken into account in determining fairness, despite the telemarketer not having the authority to say what he did.⁹⁸³

Section 64(1) excludes a term from assessment of fairness under section 62 if it specifies the main subject matter of the contract or it is in respect of the price payable under the contract by comparison with goods and services, digital content or services supplied.⁹⁸⁴ Subject matter relates to ‘core provisions regarding what the supplier is selling’ and price is about what the consumer is paying in exchange.⁹⁸⁵ The two areas are excluded from assessment provided they are transparent i.e. in plain and intelligible language and prominent (in the sense that the term is brought to the attention of the consumer in a form that the ‘average consumer would be aware of’).⁹⁸⁶ The view

⁹⁷⁸ EU Directive (n 865) .

⁹⁷⁹ UTCCR (n 866).

⁹⁸⁰ Ibid s 5(1).

⁹⁸¹ CRA (n 653) at ss 62(5) and 62(7).

⁹⁸² *Financial Services Authority v Asset LI Inc* (2013) EWHC 178 (Ch).

⁹⁸³ Neil Andrews and RG Lawson *Exclusion clauses and unfair contract terms* 13ed (2023) 287.

⁹⁸⁴ CRA (n 653) at ss 64(1) and 64(6).

⁹⁸⁵ Andrews & Lawson (n 983) at 297; *Office of Fair Trading v Abbey National Plc* (2009) UKSC 6 para 31; *Office of Fair Trading v Ashbourne Management Services* (2011) EWHC 1237 (Ch) at 152–153.

⁹⁸⁶ Andrews & Lawson (n 983) at 270–271.

is that the exclusion must be interpreted narrowly to avoid casting the net wider than was initially intended.⁹⁸⁷ However, price variation clauses may be assessed.⁹⁸⁸

The CRA in Part 1 of Schedule 2 also includes an indicative non-exhaustive list of terms that may be regarded as unfair,⁹⁸⁹ and together with section 62(4) they are regarded by Whittaker as forming a composite test of unfairness.⁹⁹⁰ The grey-list is addressed in greater detail under section 6.4.4 below. Notably, the wording of the Act has created ‘a dual system of *ex casu* challenges and pre-emptive or collective challenges by appropriate bodies’ meaning that either the customer or the regulator can challenge fairness of contractual terms.⁹⁹¹ Courts can also assess fairness on their own initiative where there are factual and legal elements to enable the determination.⁹⁹² However, the test of unfairness ‘is not to be judged by personal concepts of inherent fairness apart from the requirements of the [relevant statutory prescripts]’.⁹⁹³

6.4.1 Contrary to good faith

Good faith was aptly explained by Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual*⁹⁹⁴ as referring to ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. Good faith is also said to involve fair and open dealing, preventing unfair surprise or absence of real choice.⁹⁹⁵

The legislature in the UK has included fairness control in the CRA. Section 62(4) of the CRA when defining unfair conduct, must be understood within the context of its European origin.⁹⁹⁶ The EU Unfair Contract Terms Directive which was introduced in 1993, thrust the civil law concept of good faith into English contract law.⁹⁹⁷ In *Director General of Fair Trading*

⁹⁸⁷ Ibid at 297.

⁹⁸⁸ Ibid at 293.

⁹⁸⁹ CRA (n 653) s 63(1) and Schedule 2. See also Whittaker (n 868) .

⁹⁹⁰ Whittaker (n 868) para 41-295.

⁹⁹¹ *Director General of Fair Trading v First National Bank Plc* (2002) 1 All ER 97 at 112C. *Abbey* (n 985) para 15.

⁹⁹² Mark Anderson & Victor Warner *McDonalds Exemption Clauses and Unfair Terms* 3ed (2022) at 262. Andrews & Lawson (n 983) at 316.

⁹⁹³ Ewan McKendrick *Contract Law: Text, Cases and Materials* 9ed (2020) 687.

⁹⁹⁴ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) QB 433 at 439.

⁹⁹⁵ *Director General of Fair Trading v First National Bank* (2000) 2 All ER 759 at 769D. See also Beatson, Burrows & Cartwright (n 949) at 293.

⁹⁹⁶ McKendrick (n 977) at 380381. On roots in German contract law see Meryll Dean ‘Defining Unfair Terms in Consumer Contracts - Crystal Ball Gazing - Director General of Fair Trading v. First National Bank Plc’ (2002) 65 *Modern Law Review* 773 at 775.

⁹⁹⁷ Teubner (n 21) at 11–32.

*v First National Bank*⁹⁹⁸ the court reaffirmed the view that good faith has its conceptual roots in civil law systems and the German Standard Contract Terms Act⁹⁹⁹ which provides for ‘the avoidance of a term which is unreasonably disadvantageous to a party contrary to the requirements of good faith’.¹⁰⁰⁰

Good faith within the context of the CRA forms part of the consideration of whether a term or a notice is unfair. It constitutes an overall evaluation of the interests of the parties to the contract, with due regard to their relative bargaining positions.¹⁰⁰¹ The question is whether there is significant imbalance in rights and obligations which causes detriment to the customer, contrary to the requirement of good faith.¹⁰⁰² The UTCCR required that regard must be had to the following factors in assessing good faith:¹⁰⁰³

- a. the strength of the parties’ bargaining positions;
- b. whether the consumer was induced to agree to the term;
- c. whether the goods or services were sold or supplied to the special order of the consumer; and
- d. the extent to which the supplier has dealt fairly and equitably with the consumer.¹⁰⁰⁴

However, the CRA does not include a list of factors to be considered in determining good faith because these are said to be aspects a court would consider in the ordinary course.¹⁰⁰⁵

Good faith considers how the contract was drafted, presented, negotiated and executed.¹⁰⁰⁶ It goes beyond technicalities and looks at ‘good standards of commercial morality and practice’¹⁰⁰⁷ Focus is placed on the distribution of rights and obligations of the parties at the time of contracting,¹⁰⁰⁸ and the term is not assessed in isolation but within the context of the whole contract.¹⁰⁰⁹ Therefore, good faith is assessed by reference to whether ‘...the seller or supplier, dealing fairly and equitably with the customer, could reasonably assume that the customer would

⁹⁹⁸ German Standard Contract Terms Act 1976.

⁹⁹⁹ *Director General v First National Bank* (n 960) at 768H-J.

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ Whittaker (n 868) paras 41-297 and 41-298.

¹⁰⁰² See *Constructora Principado SA v José Ignacio Menéndez Álvarez* EU:C (2014) C-226/12 para 21–23.

¹⁰⁰³ UTCCR (n 866) at Schedule 2.

¹⁰⁰⁴ *Director General v First National* ((n 991) at 105J.

¹⁰⁰⁵ *Andrews & Lawson* (n 983) at 289.

¹⁰⁰⁶ *Anderson & Warner* (n 992) at 361–362.

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ *McKendrick* (n 977) at 385–386.

¹⁰⁰⁹ Whittaker (n 868) para 41-299.

have agreed to such a term in contract negotiation’.¹⁰¹⁰ The question is whether the customer would have agreed to the same terms had they had the opportunity to individually negotiate the contract at the time it was concluded.¹⁰¹¹ Zimmermann and Whittaker point out that good faith ‘...suggests a standard of honest, loyal and considerate behaviour, acting with due regard for the interests of the other party, and it implies and comprises the protection of reasonable reliance’.¹⁰¹²

Notably good faith under the CRA is not considered a stand-alone requirement, but it is integrated into the broader test of fairness.¹⁰¹³

6.4.2 Relationship between good faith and transparency

Fairness and good faith in consumer contracts have a procedural and substantive element,¹⁰¹⁴ and can be analysed at pre-contracting, contracting phases and for the duration of the contract.¹⁰¹⁵

The procedural element relates to transparency in contracting for customers to make informed choices and for terms not to be applied to frustrate reasonable expectations of consumers. In *Director General of Fair Trading v First National Bank* Lord Bingham stated that¹⁰¹⁶

‘The requirement of good faith in this context [1994 UTCCR] is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly, and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or subconsciously, take advantage of a consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in [the indicative list of presumptively unfair terms]’

¹⁰¹⁰ *Profi Credit Polska Sa v QJ* EU:C C-84/19, C-222/19 and C-252/19 para 93. See also McKendrick (n 977) para 18.3.1.

¹⁰¹¹ *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa* (2013) 3 CMLR 5 at 89.

¹⁰¹² S Whittaker & R Zimmermann ‘Good Faith in European Contract Law: Surveying the Legal Landscape’ in R Zimmermann & S Whittaker (eds) *Good Faith in European Contract Law* (2000) 30–31.

¹⁰¹³ *Director General v First National* ((n 991) para 37.

¹⁰¹⁴ *Ibid* para 17. See Whittaker (n 868) para 41-303. See also Hans-W Micklitz ‘Case: House of Lords - Fair Trading v National Bank’ 2006 (2) *European Review of Contract Law* 471 at 471.

¹⁰¹⁵ Chris Willet *Fairness in Consumer Contracts: The Case of Unfair Terms* (2007) 2.

¹⁰¹⁶ *Director General v First National* ((n 991) at 108B.

The implication is that good faith should not be seen as an artificial or technical concept but based on ‘good standards of commercial morality and practice.’¹⁰¹⁷ Notably in *Profi Credit Polska Sa v QJ* the European Court of Justice in considering good faith under the EU Unfair Contract Terms Directive, also linked lack of transparency with the absence of good faith.¹⁰¹⁸

The Supreme Court in *Office of Fair Trading v Abbey National*¹⁰¹⁹ had the opportunity to consider the assessment of fairness in terms of the UTCCR, and to determine the fairness of bank charges on current accounts when payments are made from accounts with insufficient funds. The court also had to establish if the charges were exempt from assessment of fairness in terms of section 6(2) of the Unfair Terms in Consumer Contracts Regulations. Section 6(2) states that

‘[i]n so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate – (a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.’

The exclusion from the assessment of fairness only applies if the terms are transparent and prominent,¹⁰²⁰ such as to enable an ordinary average consumer to be aware of the term¹⁰²¹ and to understand its meaning and implication practically. Transparency and prominence are viewed as two sides of the same coin.¹⁰²² Therefore, a term will only be fair if the consumer is aware, based on clear intelligible criteria, of the economic consequences of the term and whether steps were in fact taken to bring the term to the attention of the consumer.¹⁰²³ The test applied is that of ‘an average consumer who is reasonably informed, observant and circumspect’.¹⁰²⁴

Upon consideration of the wording of the applicable legislation and facts, the court in *Office of Fair Trading v Abbey National* held that bank charges are excluded from assessment for

¹⁰¹⁷ *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361.

¹⁰¹⁸ *Ibid* para 96.

¹⁰¹⁹ *Abbey* (n 985).

¹⁰²⁰ CRA (n 653) at s 64(2)–(3) and s 1(3)(1) of the Unfair Contract Terms and Consumer Notices Regulation.

¹⁰²¹ CRA (n 653) at s 64(4).

¹⁰²² Paolo Siciliani, Christine Riefa & Harriet Gamper *Consumer Theories of Harm: an Economic Approach to Consumer Law Enforcement and Policy Making* (2019) 45.

¹⁰²³ McKendrick (n 977) at 393.

¹⁰²⁴ CRA (n 653) at s 64(5). See McKendrick (n 977) at 393, stating that the terms must be ‘such as to enable the typical consumer to have a proper understanding of the term for sensible and practical purposes’. See also Susan Bright ‘Unfairness and the consumer contract regulations’ in Andrews Burrows & Edward Peel (eds) *Contract Terms* (2007) 337.

fairness or challenge by the regulator. However, this ruling is highly controversial¹⁰²⁵ and was criticised¹⁰²⁶ for emphasising procedural fairness rather than substantive fairness. A view prevails that the ruling in *Office of Fair Trading v Abbey National* focused on the impact to the bank and failed to protect consumers against unfair surprises.¹⁰²⁷

In *O'Hare v Coutts & Co*¹⁰²⁸ the court adjudicated over a dispute around whether Coutts and Co owed a duty to exercise reasonable care and skill to Mr and Mrs O'Hare around investment advisory services provided. In that matter Kerr J observed that whilst Mr and Mrs O'Hare were wealthy and intelligent, they were not sophisticated or experienced investors but were influenced by persuasions by their private banker. Kerr J affirmed that

‘[T]here was nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker’s powers of persuasion, provided full information is disclosed, conflicts of interest are properly managed and the client is willing and can afford to take those risks.’¹⁰²⁹

Therefore, transparency is a precondition for informed consent. Willet argues that ‘if a term is not transparent this should strongly suggest that the term is unfair’.¹⁰³⁰ Therefore, good faith requires that terms must be expressed fully, clearly, and legibly without any hidden pitfalls.¹⁰³¹ However, breach of the transparency requirement does not automatically mean that the term is unfair.¹⁰³² Rather, if the wording limits the ability of the consumer to make an informed choice or if it is ambiguous or vague, it may point to the absence of good faith by the supplier or the existence of a significant imbalance in the bargaining power of the parties and in this context, the court may adopt an interpretation that benefits the customer.¹⁰³³ Interestingly, the ECJ in *Kasler v OTP*¹⁰³⁴ highlighted that

information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in

¹⁰²⁵ McMeel in Busch & Lehmann (n 999) at 579.

¹⁰²⁶ Mindy Chen-Wishart ‘Transparency and fairness in bank charges’ (2010) 126 *Law Quarterly Review* 157.

¹⁰²⁷ Siciliani, Riefa & Gamper (n 1022) at 45.

¹⁰²⁸ *O'Hare v Coutts & Co* (2016) EWHC 2224 (QB) at 30.

¹⁰²⁹ *Ibid* at 30.

¹⁰³⁰ Willet (n 1015 at 5).

¹⁰³¹ Anderson & Warner (n 992) at 356–357.

¹⁰³² Busch & Lehmann (n 970) at 640.

¹⁰³³ Anderson & Warner (n 992) at 326.

¹⁰³⁴ *Arpád Kasler and Hajnalka Káslerné. Rábai v OTP Jelzálogbank Zrt* European Court of Justice Case C-26/13 ECLI:EU:C: 2014:282.

particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.¹⁰³⁵

According to the ECJ, the requirement for transparency must be understood broadly and not be reduced to terms being formally and grammatically intelligible.¹⁰³⁶ The court in *Matei v SC Volksbank*¹⁰³⁷ followed a similar approach and held that transparency should not be reduced to formality but the consumer must be able to see and understand and foresee the economic consequences of the term.¹⁰³⁸ However, with the UK exiting the European Union, courts in the UK may come to a different conclusion.¹⁰³⁹

6.4.3 Relationship between good faith and fair dealing

Good faith goes beyond the supplier and the customer not deceiving one another,¹⁰⁴⁰ and it is not confined to procedural aspects in the negotiation of the contract or a duty of disclosure but extends to the conduct or behaviour of the parties for the duration of the contract.¹⁰⁴¹

Therefore, the concept of good faith can also serve as a tool to regulate not only contractual terms but it can also act as an overall procedural and conduct control of the behaviour of parties in the business relationship. Good faith places a restraint on self-interest and requires a supplier to consider the interests of the customer.¹⁰⁴² This means that a legal right or power conferred upon a person should not be wielded excessively or in such an oppressive or exploitative manner such that it far exceeds what is necessary to protect the party's legitimate interests.¹⁰⁴³ Therefore, the notion of good faith means that a supplier must act honestly with due regard to customer's interests without exploiting or taking undue advantage of the consumers necessity or lack, gaps in the level

¹⁰³⁵ Ibid para 70.

¹⁰³⁶ Ibid para 71–72.

¹⁰³⁷ *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA* European Court of Justice Case C-143/13 ECLI:EU:C:2015:127.

¹⁰³⁸ Ibid para 74. Anderson & Warner (n 992) at 328.

¹⁰³⁹ Anderson & Warner (n 992) at 357,

¹⁰⁴⁰ *Interfoto Picture* (n 994) at 433–439.

¹⁰⁴¹ See McKendrick (n 977) para 12.10.

¹⁰⁴² Elizabeth Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v. First National Bank' (2002) 65 *Modern Law Review* 763 at 769. See also McKendrick (n 977) at 266.

¹⁰⁴³ Beatson & Friedmann (n 677) at 400.

of customer's knowledge, understanding, skills, experience, expertise or bargaining power.¹⁰⁴⁴ Ultimately, fairness means 'paying attention to factors that may prevent the consumer from protecting his interests in the agreement process'.¹⁰⁴⁵ At its heart, the concept of good faith is intended to facilitate trust and cooperation.¹⁰⁴⁶

The basis of fairness standards cannot be decided upon by personal concepts of inherent fairness.¹⁰⁴⁷ Instead substantive fairness standards can be based on default rules or reasonable customer expectations.¹⁰⁴⁸

6.4.4 Significant imbalance in the rights and obligations of the parties

Under the CRA, there is an overlap between absence of good faith and the element of significant imbalance in the rights and obligations of the parties because a term giving a significant advantage to the supplier without a counterbalancing benefit for the consumer may fail to satisfy the fairness test.¹⁰⁴⁹ McKendrick makes the point that the test is cumulative i.e., there must be lack of good faith and significant imbalance in right and obligations of the parties before a term can be considered unfair.¹⁰⁵⁰ Beale observed that

'good faith has a double operation. First it has a procedural aspect as indicated above. However, a clause which might be unfair if it came as a surprise may be upheld if the organisation took steps to bring it to the customer's attention and to explain it. Secondly, it has a substantive content because some clauses may cause such an imbalance that they should always be treated as unfair'.¹⁰⁵¹

Therefore, good faith is not limited to procedural defects,¹⁰⁵² but also relates to substantive unfairness where terms are 'so onerous and out of proportion with a reasonable assessment of the parties' obligations'.¹⁰⁵³

¹⁰⁴⁴ *Director General of Fair Trading v First National Bank* ((n 991) at 108C.

¹⁰⁴⁵ Willet (n 1015 at 2.

¹⁰⁴⁶ Teubner (n 21) at 28.

¹⁰⁴⁷ *Director General of Fair Trading* (n 960) at 770B.

¹⁰⁴⁸ Willet (n 1015 at 3.

¹⁰⁴⁹ *Director General of Fair Trading* (n 960) at 769F; *Director General of Fair Trading* ((n 991) at 113G; McKendrick (n 977) at 360.

¹⁰⁵⁰ *Ibid* at 360. See also *UK Housing Alliance (North West) Ltd v Francis* (2010) 3 All ER 519.

¹⁰⁵¹ Hugh Beale 'Legislative control of fairness: The directive on unfair terms in consumer contracts' in Beatson & Friedmann (n 677) at 245.

¹⁰⁵² *Director General of Fair Trading* ((n 991) at 113F.

¹⁰⁵³ *Director General of Fair Trading* (n 960) at 767B-C. Also see Andrews & Lawson (n 983) para 8-041.

To determine whether there is a ‘significant imbalance’ requires an examination of the substantive content of the term more than an assessment of the procedure followed to arrive at the term or contract.¹⁰⁵⁴ However, it does not mean that the courts will ignore the procedural matters such as unfair surprise and the absence of real choice’ in the overall determination of whether a term is unfair.¹⁰⁵⁵

Therefore, the substantive fairness leg overlaps with the element around substantial imbalance in rights and obligations of the parties without the customer receiving any counterbalancing benefit.¹⁰⁵⁶ The court in *Director General of Fair Trading v First National Bank* opted to rather adopt a more ‘fluid approach’ in the interpretation of these interdependent concepts of good faith and significant imbalance.¹⁰⁵⁷

Anderson and Warner assert that the test actually has two basic elements i.e. first, a significant imbalance in the parties’ rights and obligations to the detriment of the consumer, and second the requirement of good faith.¹⁰⁵⁸ However, McKendrick supports the position adopted in *Director General of Fair Trading v First National Bank*¹⁰⁵⁹ and argues that the requirements of good faith and significant imbalance apply cumulatively rather than on an alternative basis.¹⁰⁶⁰ Interestingly, the Court of Appeal in *West v Ian Finlay & Associates*¹⁰⁶¹ noted that good faith and significant imbalance must be considered separately and then together in order to make the overall assessment.¹⁰⁶² Therefore, the approach requires the balancing of all the elements.¹⁰⁶³ In assessing for fairness, a term must not be looked at in isolation but rather with reference to the whole contract as contemplated by section 62(5) of the CRA.¹⁰⁶⁴

¹⁰⁵⁴ *OFT v Ashbourne* (n 985) at 174. McKendrick (n 977) at 361.

¹⁰⁵⁵ See *Director General of Fair Trading* ((n 991) at 767 and 769C. See also Beatson, Burrows & Cartwright (n 949) at 223.

¹⁰⁵⁶ *Director General of Fair Trading* ((n 991) at 769E.

¹⁰⁵⁷ McKendrick (n 977) at 448. In *Munkenbeck & Marshall v Harold* (2005) EWHC 356 (TCC) para 15 it appears as if the finding of unfairness was based primarily on significant imbalance. However, doubt was expressed in *Maple Leaf Macro Volatility Master Fund v Rouvroy* (2009) EWHC 257 (Comm) para 273. *Maple Leaf* referred to the Court of Appeal decision in *Bryen & Langley Ltd v Boston* (2005) EWCA Civ 973 para 44 where the court did not consider whether there was significant imbalance to the detriment of the customer, but rather focused on whether there was contravention of the requirement of good faith.

¹⁰⁵⁸ Anderson & Warner (n 992) para 4.171.

¹⁰⁵⁹ *Director General of Fair Trading* ((n 991) para 36 – 37.

¹⁰⁶⁰ McKendrick (n 977) at 359–360.

¹⁰⁶¹ *West v Ian Finlay & Associates* (2014) EWCA Civ 316.

¹⁰⁶² *Ibid* at para 46.

¹⁰⁶³ Whittaker (n 868) para 41-305.

¹⁰⁶⁴ Beatson, Burrows & Cartwright (n 949) at 223.

Significant imbalance arises where there is a ‘sufficiently serious impairment’ of rights and obligations of the customer available under national law.¹⁰⁶⁵ The word imbalance invokes a sense of ‘exploitation’ and Beatson and Friedman argue that it should be interpreted in a manner that balances ‘overall interests’ or ‘overall balance of advantage’ as opposed to adopting a narrow interpretation that focuses only on deviation from market price.¹⁰⁶⁶ For instance, a marginal reduction in fees whilst offloading more risk to retail financial customers which have a higher probability of materialising, could be considered a unfair imbalance.¹⁰⁶⁷ Conversely, a term which may seem prejudicial to the rights of the consumer may still be considered fair if it is counterbalanced by a corresponding term benefitting the consumer.¹⁰⁶⁸ An example is a term giving the supplier an upper hand counterbalanced by a price reduction.¹⁰⁶⁹

Anderson and Warner noted that ‘good faith is thus intended to go further than restraining advantage taking and actually requires sufficient account to be taken of the legitimate interests of the consumer’¹⁰⁷⁰

In instances where a customer is sophisticated and reasonably skilled in the specific area to understand the risk associated with the term¹⁰⁷¹ or where a term is recommended by their professional advisors with the knowledge of the customer, the term is less likely to be considered as unfair.¹⁰⁷² At the same time, traders should not outflank consumers by drafting contracts in a manner that enables to take advantage of a default position of a consumer.¹⁰⁷³

In *Plevin v Paragon*¹⁰⁷⁴ Lord Sumption opined that in those instances where the term itself is not intrinsically unfair, fairness issues may arise where ‘the relationship between the debtor and the creditor is so one-sided as substantially to limit the debtor’s ability to choose’.¹⁰⁷⁵ The section sets out a broader fairness test regarding the relationship.¹⁰⁷⁶ Although particular features of the transaction may operate harshly against the debtor, the court in *Plevin v Paragon* believed that this

¹⁰⁶⁵ *Constructora Principado SA v José Ignacio Menéndez Álvarez* (2014) EU:C C-226/12 at 23.

¹⁰⁶⁶ Beatson & Friedmann (n 677) at 242–243.

¹⁰⁶⁷ Beatson & Friedmann (n 677) at 243.

¹⁰⁶⁸ Whittaker (n 868) para 41-315.

¹⁰⁶⁹ *Ibid.* *Director General of Fair Trading* (n 960) at 769F. See also *Munkenbeck* (n 1071) para 15.

¹⁰⁷⁰ Anderson & Warner (n 992) at 361.

¹⁰⁷¹ *West* (n 1061) para 39.

¹⁰⁷² *Bryen* (n 1056). *West* (n 1061) para 39.

¹⁰⁷³ *Abbey* (n 985).

¹⁰⁷⁴ *Plevin v Paragon Personal Finance Limited* (2014) UKSC 61.

¹⁰⁷⁵ *Ibid* para 10.

¹⁰⁷⁶ *Carney v N M Rothschild & Sons Ltd* (2018) EWHC 958 (Comm) para 47.

does not automatically mean the relationship is unfair because the legitimate interests of the creditor also still warrant protection. The general nature of the relationship between commercial credit providers and retail lenders remains characterised by information asymmetry because of different skill sets and knowledge, therefore it cannot be said that '... the generality of such relationships should be liable to be reopened for that reason alone.'¹⁰⁷⁷ However, inequality in bargaining power in itself is not a reason to disregard ordinary contract law principles unless parliament has made the relative bargaining power a factor of consideration in terms of legislation, as was done under section 62(4).¹⁰⁷⁸

In assessing the fairness of the relationship, the standard of commercial conduct that can reasonably be expected of the creditor is 'legitimate influence'.¹⁰⁷⁹ Key characteristics that are relevant for purposes of the determination of fairness include 'the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.'¹⁰⁸⁰ Determining the significance of the imbalance requires consideration of the context of each case.¹⁰⁸¹

6.4.5 Consumer detriment

The element of consumer detriment is interlinked with the requirement for the term to cause significant imbalance.¹⁰⁸² Therefore, it is not enough to show an imbalance; it must be significant, and to the detriment of the consumer.¹⁰⁸³ The implication is that in the absence of significant imbalance resulting in actual or potential customer detriment, the term will not be considered as unfair.

Section 62(4) does not indicate the degree of detriment required but some form of detriments needs to exist.¹⁰⁸⁴ However, it has been said that reference to 'detriment of the

¹⁰⁷⁷ *Plevin* (n 1074) para 10.

¹⁰⁷⁸ *Uber BV v Aslam* (2021) UKSC 5 para 68.

¹⁰⁷⁹ *Ibid* para 17.

¹⁰⁸⁰ *Plevin* (n 1074) para 17.

¹⁰⁸¹ *Andrews & Lawson* (n 983) at 291.

¹⁰⁸² *Anderson & Warner* (n 992) at 834.

¹⁰⁸³ *Director General of Fair Trading* (n 919). *OFT v Ashbourne* (n 985). *Andrews & Lawson* (n 983) at 291. *Beatson & Friedmann* (n 677) at 242. See also Susan Bright 'Winning the battle against unfair terms' (2002) 20 *Legal Studies* 331 at 337.

¹⁰⁸⁴ *Andrews & Lawson* (n 983) at 291.

customer' does not add much,¹⁰⁸⁵ but it is rather a distinct status that merely clarifies that the focus is on significant imbalance against the customer and not supplier.¹⁰⁸⁶

Nevertheless, the fairness test is said to apply at two levels i.e. first at the level of the particular contract; and second at the level of preventive action.¹⁰⁸⁷ The latter considers how a term could be used and the potential for unfairness.¹⁰⁸⁸ Consequently, a term may be challenged if it is so widely drafted that it can be applied to the detriment to the customer.¹⁰⁸⁹

Section 2.10 of the guidance issued by the CMA¹⁰⁹⁰ states that an artificial tick box assessment of fairness, which is broken into separate parts, is undesirable. The guidance is correct in its statement that the elements of good faith, imbalance of right and customer detriment may overlap but ultimately the singular test is whether the term was unfair.

6.4.6 Indicative and non-exhaustive list of unfair terms

Part 1 of Schedule 2 of the CRA (and the UTCCR which applied to contracts concluded prior to October 2015), contain an indicative and non-exhaustive 'grey' list of types of terms that are not automatically unfair but may be regarded as unfair.¹⁰⁹¹ Schedule 2 was influenced by EC Directive on Unfair Terms 1993 and the 1999 Regulations.¹⁰⁹² The incorporation of a non-exhaustive list of unfair terms is similar in some respects to Regulation 44 of the CPA.¹⁰⁹³ Whilst this thesis does not address all grey-listed terms, both Regulation 44 of the CPA and Schedule 2 of the CRA for instance grey-list the following:

- a. Exclusions, waivers, indemnities, or limitation of liability clauses.¹⁰⁹⁴

¹⁰⁸⁵ *Director General of Fair Trading* ((n 991) at 113B.

¹⁰⁸⁶ Anderson & Warner (n 992) at 344.

¹⁰⁸⁷ *Ibid* at 342.

¹⁰⁸⁸ *Ibid* at 343 and 346.

¹⁰⁸⁹ *Ibid* at 343.

¹⁰⁹⁰ FCA 'Unfair contract terms' available at <https://www.fca.org.uk/firms/unfair-contract-terms>, accessed 06 June 2022.

¹⁰⁹¹ CRA (n 653) Schedule 2. See also McKendrick (n 977) at 386.

¹⁰⁹² EU Directive 1993/13 'Unfair terms in consumer contracts' art 3(3) and Annex. UTCCR Regulation 5(5) and Schedule 2.

¹⁰⁹³ See also Tjakie Naudé, 'The use of black and grey-lists in unfair contract terms legislation: A comparative perspective' (2007) 124 *SALJ* 128. See clause 4.3.2.1 above for a detailed discussion on the grey-list under Regulation 44 of the CPA.

¹⁰⁹⁴ CPA Regulations (n 501) at reg 44(3)(a)–(f). CRA (n 653) Schedule 2 para 1 – 2. CRA (n 653) s 62 (5) on exclusion and restriction of liability for negligence. COBS (n 693) para 1.1.6.

- b. Terms giving the supplier the right to increase the price without affording the consumer the right to terminate the contract if the price is too high.¹⁰⁹⁵
- c. Terms allowing a supplier to unilaterally alter the contract without a valid reason.¹⁰⁹⁶
- d. Terms giving the supplier the exclusive right to determine if products and services are in conformity with the agreement or to interpret any term of the contract.¹⁰⁹⁷
- e. Terms seeking to limit the liability of the supplier for actions of its agents (vicarious liability).¹⁰⁹⁸
- f. A term enabling the supplier to terminate an open-ended contract at will and without giving the consumer fair notice.¹⁰⁹⁹
- g. Terms permitting disproportionately high penalty fees i.e. where a customer fails to fulfil contractual obligations.¹¹⁰⁰
- h. Terms seeking to irrevocably bind a customer even if they have not had a fair and reasonable opportunity to consider the terms and implications before concluding the contract.¹¹⁰¹

Notably, the 'indicative and non-exhaustive' list does not render the term automatically unfair, nor does it create a rebuttable presumption that the term is unfair, but it is considered as a guideline around what terms may be considered unfair.¹¹⁰² The list however serves as an essential element on which a court may rely to base its assessment.¹¹⁰³ The CPA grey-list has 28 terms compared to 20 terms included in the CRA Schedule 2. However, in the UK a strict approach has been followed which discourages the use by businesses of such grey-listed terms.¹¹⁰⁴ As an illustration, even though limitation of vicarious liability is included in the grey-list, the Competition and Market Authority has adopted the position that 'no term should shield a business where its employees fail to provide as good a standard of service as they are reasonably able'.¹¹⁰⁵

¹⁰⁹⁵ CPA *ibid* reg 44(3)(h). CRA *ibid* Schedule 2 para 15.

¹⁰⁹⁶ CPA *ibid* reg 44(3)(i). CRA *ibid* Schedule 2 paras 11 and 13.

¹⁰⁹⁷ CPA *ibid* reg 44(3)(j). CRA *ibid* Schedule 2 para 16.

¹⁰⁹⁸ CPA *ibid* reg 44(3)(d). CRA *ibid* Schedule 2 para 17.

¹⁰⁹⁹ CPA *ibid* reg 44(3)(l). CRA *ibid* Schedule 2 para 8.

¹¹⁰⁰ CPA *ibid* reg 44(3)(r)–(s). CRA *ibid* Schedule 2 para 6.

¹¹⁰¹ CPA *ibid* reg 44(3)(v). CRA *ibid* Schedule 2 para 10. See also McKendrick (n 977) at 386. See also *ParkingEye Ltd v Beavis* (2015) UKSC 67.

¹¹⁰² McKendrick (n 977) at 452. See also Andrews & Lawson (n 983) at 292.

¹¹⁰³ Whittaker (n 868) para 41-338.

¹¹⁰⁴ Naudé (n 1093) at 142.

¹¹⁰⁵ Competition and Market Authority Unfair Contract Terms Guidance (2015) para 5.5.9 at 74

Learning from both the local CPA and the CRA, the Conduct Standard and financial sector law can benefit from the development of an appropriate grey-list and blacklist to improve effectiveness of fairness control and as a guide for financial institutions and customers to understand which terms are problematic.¹¹⁰⁶ In addition, the lists can help lawyers, consumer bodies and courts in evaluating whether terms are fair.¹¹⁰⁷

6.4.7 Interpretation of unfair contract terms

The contra proferentem rule forms part of English common law of contract. Notwithstanding, section 69 the CRA¹¹⁰⁸ has an interpretation control provision stipulating that if a term or notice ‘could have different meanings, the meaning most favourable to the consumer is to prevail’.¹¹⁰⁹ Therefore, when a contract to provide financial products or services is ambiguous or capable of differing interpretations, an interpretation that is most beneficial to the consumer will be adopted. This provision has a similar effect as section 4(4)(a) of the CPA. However, the CPA goes further and adds that the interpretation to the benefit of the consumer in the case of ambiguity should be such that any restriction, limitation, exclusion, or deprivation is limited to the extent that a reasonable person would contemplate having regard to the content of the document, how the document was prepared and the circumstances.¹¹¹⁰ As indicated in Chapter 3, the Conduct Standard and COFI should be amended to incorporate a provision similar to section 4(4)(a) that considers the inequality in bargaining powers between financial institutions and customers and adopts a purposive interpretation that promotes the fair treatment of customers.

6.4.8 Consequences of unfair contract terms

In those circumstances that a term or notice is found to be unfair, section 67 of the CRA provides that the unfair contract term which is not binding on a consumer under Part 2 is severable from the rest of the contract. Therefore, in terms of this provision, unfair contractual terms do not automatically render the contract void. It does not automatically follow that the entire contract is

¹¹⁰⁶ See Naudé (n 1093) at 139.

¹¹⁰⁷ Busch & Lehmann (n 970) at 635.

¹¹⁰⁸ CRA (n 653) at s 69.

¹¹⁰⁹ CRA (n 653) at s 69(2) states that s 69(1) does not apply to the construction of a term or a notice in proceedings on an application for an injunction or interdict under paragraph 3 of Schedule 3 in relation to terms offered by the supplier to the public.

¹¹¹⁰ CPA (n 16) at s 4(4)(b).

unfair and invalid, merely because the term is unfair.¹¹¹¹ The offending terms can be struck down and the rest of the contract continues to have effect to the extent that it is reasonably practicable. Finally, unfair consumer contract terms and notices are not binding on a consumer unless the consumer chooses to rely on them.¹¹¹²

6.4.9 The doctrine of unconscionability

The doctrine of unconscionability has been the subject of intense debate in the UK.¹¹¹³ The doctrine can be traced to the 1754 case of *Fry v Lane*¹¹¹⁴ and was later revived in *Cresswell v Potter*.¹¹¹⁵ The court in *Multiservice Bookbinding Ltd v Marden*¹¹¹⁶ made the point that unconscionable bargain requires one party to impose objectionable terms in a morally reprehensible manner that affects the conscience. In *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*¹¹¹⁷ Millett QC who was the acting judge outlined three elements necessary for conduct to be considered as unconscionable i.e. first there must be serious disadvantage to one party whether by poverty, lack of knowledge, ignorance or other factor; second there must be a weakness or vulnerability of one party that is being exploited by the other in a morally reprehensible or culpable manner; and third – the resultant contract should be overreaching, oppressive such as would shock the conscience. The three elements have been cited with approval in several cases including *Fineland Investments Ltd v Pritchard*.¹¹¹⁸

However, in *Lloyds Bank Ltd v Bundy*¹¹¹⁹ Lord Denning framed the concept of unconscionable dealings through the notion of inequality in bargaining power and stated that

‘English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair ... when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences

¹¹¹¹ McKendrick (n 977) para 18.6.

¹¹¹² CRA (n 653) at s 62 (1)–(3).

¹¹¹³ See Ying Khai Liew & Debbie Yu ‘The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?’ (2021) 45 *Melb U L Rev* 206.

¹¹¹⁴ *Fry v Lane* (1888) 40 Ch D 312 at 320.

¹¹¹⁵ *Cresswell v Potter* (1978) 1 WLR 255 at 257.

¹¹¹⁶ *Multiservice Bookbinding Ltd v Marden* (1979) 1 Ch 84 at 110.

¹¹¹⁷ *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1983) 1 WLR 87 para 94-5.

¹¹¹⁸ *Fineland Investments Ltd v Pritchard* (2011) EWHC 113 (Ch).

¹¹¹⁹ *Lloyds Bank Ltd v Bundy* (1975) 1 QB 326 at 339.

or pressures brought to bear on him by or for the benefit of the other.’ Nevertheless, this formulation by Lord Denning was rejected by the House of Lords in *National Westminster Bank Plc v Morgan*¹¹²⁰ because it threatened to undermine freedom of contract. The court also held that it is not sufficient that there is inequality in bargaining power but a party must have a serious disadvantage and the conduct of the stronger part must be oppressive or unconscionable.¹¹²¹

The Court of Appeal in *Portman Building Society v Dusangh*¹¹²² reconfirmed the ‘essential touchstones of an unconscionable bargain’ as the presence of serious disadvantage, exploitation of the party and morally reprehensible conduct by the other party that was ‘overreaching and oppressive’.¹¹²³ The essentials of unconscionable bargain were also cited with approval in *Libyan Investment Authority v Goldman Sachs International*.¹¹²⁴ Ward LJ confirmed that there must be some kind of impropriety in the terms of the transaction and the conduct of the stronger party.¹¹²⁵

Therefore, unconscionability as an equitable doctrine¹¹²⁶ has narrow application and offers an avenue to intervene in contractual arrangements in limited specified circumstances where one party who is in a stronger position exploits a particular special disadvantage or vulnerability of the other contracting party to their prejudice.¹¹²⁷ It is targeted at the morally reprehensible abuse of the relationship between the parties. Notwithstanding, the doctrine has been criticised in the UK as being imprecise, ambiguous and vague.¹¹²⁸

The next part discusses the FCA’s approach to TCF principles.

¹¹²⁰ *National Westminster Bank* (n 982).

¹¹²¹ *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) 1 W.L.R. 173. See also Vincent Ooi & Walter Yong ‘A reformulated test for unconscionability’ (2019) 135 *Law Quarterly Review* 400.

¹¹²² *Portman Building Society v Dusangh* (2000) 2 All ER (Comm) 221.

¹¹²³ *Ibid* at D21.

¹¹²⁴ *Libyan Investment Authority v Goldman Sachs International* (2016) EWHC 2530 (Ch) paras 159–161.

¹¹²⁵ *Ibid* para 161.

¹¹²⁶ *Mortgage Express v Lambert* (2016) EWCA Civ 555.

¹¹²⁷ See Charles YC Chew ‘Common law and equitable aspects of unjust banking contracts: a legal analysis’ (2014) 29 *Journal of International Banking Law and Regulation* 248.

¹¹²⁸ See *National Westminster Bank* (n 982) at 709.

6.5 THE FCA'S APPROACH TO TREATING CUSTOMER'S FAIRLY (TCF) PRINCIPLES

According to the FCA's website, its aim is 'to make financial markets work well so that consumers get a fair deal'.¹¹²⁹ One of the FCA's stated objectives is to ensure an appropriate degree of protection for all customers falling within their jurisdiction.¹¹³⁰ Central to the delivery of its mandate is the need for financial markets to be 'honest, fair and effective'. Therefore, according to the FCA,¹¹³¹ regulatory instruments and standards that they issue are intended to ensure:

- a. customers are treated fairly;
- b. products and services are appropriate; and
- c. customer protection is placed above own profits and income.

6.5.1 FCA's Principles for Businesses

The FCA Handbook sets out the following Principles for Businesses which impose specific obligations on firms and apply in whole or in part to every firm:¹¹³²

Principle 1: Integrity	Conduct business with integrity.
Principle 2: Skill, care, and diligence	Conduct business with due skill, care, and diligence.
Principle 3: Management and control	Take reasonable care to organise and control own affairs responsibly and effectively, with adequate risk management systems.
Principle 4: Financial prudence	Maintain adequate financial resources.
Principle 5: Market conduct	Observe proper standards of market conduct.
Principle 6: Customers' interests	Pay due regard to the interests of customers and treat them fairly.

¹¹²⁹ FCA 'About the FCA' available at <https://www.fca.org.uk/about>, accessed on 16 December 2021.

¹¹³⁰ Ibid.

¹¹³¹ Ibid.

¹¹³² FCA Handbook (n 884) at prin 1.1 and prin 2.1.

Principle 7: Communications with clients	Pay due regard to the information needs of clients and communicate information to them in a way which is clear, fair, and not misleading.
Principle 8: Conflicts of interest	Manage conflicts of interest fairly, both between the firm and its customers and between a customer and another client.
Principle 9: Customers: relationships of trust	Take reasonable care to ensure the suitability of advice and discretionary decisions for any customer who is entitled to rely upon the firm's judgment.
Principle 10: Clients' assets	Arrange adequate protection for clients' assets when a firm is responsible for them.
Principle 11: Relations with regulators	Deal with regulators in an open and cooperative way and disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.
Principle 12: Consumer Duty ¹¹³³	Act to deliver good outcomes for retail customers

Principles 6-10 expressly cater for fundamental elements necessary for the protection of the consumer and the delivery of fair customer outcomes, whilst this is implied in Principles 1 and 2. Reference to 'due regard' in Principles 6 and 7; 'fairly' in Principles 6 and 8; 'clear, fair and not misleading' in Principle 7; 'reasonable care' in Principle 9 and 'adequate' in Principle 10 point to the centrality of proportionality and appropriateness in customer protection measures applied. It mitigates against adopting a 'one size fits all' approach to fairness. The nature of the customer, their relative knowledge and skill, the product or service type, and the nature of the risk have to influence the application of the requirements.¹¹³⁴

The Conduct of Business Source Book (COBS) also incorporates a fairness conduct control mechanism under section 2.1 and provides that 'a firm must act honestly, fairly and professionally in accordance with the best interests of its client in relation to designated investment business carried on for a retail client.'¹¹³⁵

¹¹³³ See detailed discussion under section 5.4.5 above.

¹¹³⁴ FCA Handbook (n 884) at prin 1.2.

¹¹³⁵ COBS (n 693).

6.5.2 TCF Outcomes

Similar to section 5(2) of the South African Conduct Standard,¹¹³⁶ the FCA Handbook goes on to set out the following six outcomes for the Fair Treatment of Customers:¹¹³⁷

- a. ‘Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- b. Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- c. Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- d. Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- e. Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
- f. Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.’

Save for some grammar and stylistic changes, the above TCF Outcomes outlined by the FCA are identical to the outcomes outlined in section 2(5) of the South African Conduct Standard.¹¹³⁸ Ultimately, firms are required to demonstrate consistently across the business lifecycle that ‘fair treatment of customers is at the heart of their business model’.

The FCA Handbook goes beyond imposing specific obligations on firms. Also, it imposes obligations on key individuals in firms to ensure the delivery of fair customer outcomes through the Individual Conduct Rules.¹¹³⁹ Rule 1 imposes a duty on designated individuals to act with integrity. Rule 2 requires that the said individuals act with skill, care, and diligence, and Rule 4

¹¹³⁶ See clause 4.3.3.2 above of the six TCF Outcomes under the Conduct Standard.

¹¹³⁷ FCA ‘Fair treatment of customers’ available at <https://www.fca.org.uk/firms/fair-treatment-customers>, accessed on 16 December 2021. See also FCA ‘Guidance for firms on treatment of vulnerable customers’ available at <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>, accessed on 11 January 2022.

¹¹³⁸ Schmulow (n 753) at 30.

¹¹³⁹ FCA Handbook (n 884) at cocon 2.1. See also FCA FG 18/7 (n 652) para 4 on the statement of responsibility under the senior manager regime.

imposes an obligation on those designated individuals to pay due regard to customers' interests and treat them fairly. The effect of the Individual Conduct Rules is that the duty to treat customers fairly is not only the responsibility of the firm but also the personal responsibility of the designated individuals within the firm. The detailed conduct of business regulations reflect a working of the TCF principles.¹¹⁴⁰

By contrast, the Conduct Standard in South Africa does not impose direct individual conduct rules – although this is implicit in section 3(b)(i) of the Conduct Standard which imposes a duty on the bank to implement appropriate policies and procedures for key persons, and in section 4(2) which imposes a duty to ensure personnel responsible for product design have appropriate skills, knowledge, and expertise. Section 24 –25 of the COFI Bill also introduces the fitness and propriety requirement for key persons and enforcement mechanisms for non-compliance by key persons.

In *Palmer v Financial Conduct Authority*,¹¹⁴¹ the court had the opportunity to adjudicate a referral against a decision taken by the FCA that Palmer, as a director of the firm and head of a controlled function, had failed to take necessary and adequate action to ensure that the firm's underlying business customers were treated fairly.¹¹⁴² Despite being aware of the increased risk of customer detriment associated with their model, Palmer and the firm failed to ensure that oversight, governance and risk control frameworks and systems were adequate to manage unfair customer outcomes effectively.¹¹⁴³ It was also held that Palmer failed to comply with Statement of Principle 6 of the FCA Handbook in carrying out his controlled function and failed 'to exercise due skill, care and diligence in managing the business of the firms for which he was responsible in his controlled function'.¹¹⁴⁴ The expectation was for Palmer to take reasonable steps and not 'to meet an absolute standard'.¹¹⁴⁵ This case illustrates that the Individual Conduct Rules are far reaching,

¹¹⁴⁰ *Commercial Union Life Assurance Co Ltd, Re* (2009) EWHC 2521 (Ch).

¹¹⁴¹ *Charles Anthony Llewellyn Palmer v The Financial Conduct Authority* (2017) UKUT 0313 (TCC).

¹¹⁴² *Ibid* para 2–3.

¹¹⁴³ *Ibid* para 227.

¹¹⁴⁴ *Ibid* para 229.

¹¹⁴⁵ *Ibid* para 54.

providing the FCA with powers to hold designated individuals personally accountable for failures in the fair treatment of customers.

The court in the UK also had the opportunity to enforce TCF principles in *Alistair Rae Burns v The Financial Conduct Authority*¹¹⁴⁶ in a case where the advice model resulted in a customer becoming overly reliant on high risk returns to maintain a decent pension. The court held the view that the financial advisor had to question himself as to whether the customer was being treated unfairly. Furthermore, there ought to be formal mechanisms to ensure that the board can identify, measure, and control the risk that customers were treated unfairly.¹¹⁴⁷

In promoting TCF, the FCA encourages firms to focus on the following five key elements:¹¹⁴⁸

- a. consider the legitimate interests of consumers in relation to contracts.
- b. fairness is a part of the prudent management of a business, and it is not contrary to it.
- c. focusing on narrow technical arguments to justify a contract term that, in fact, may be unfair, introduces the risk of future challenge.
- d. the mere fact that a term does not resemble any of the indicative but non-exhaustive unfair terms listed in Schedule 2 of the CRA may not in itself remove the risk of unfairness. Firms must assess whether a term is fair under the CRA as a whole and in the context of the particular product or service.
- e. firms should take into account developments in legislation and relevant case law concerning the fairness and transparency of terms in consumer contracts. This is important considering evolving market and conduct expectations.

The above controls introduced by the FCA as part of the FCA Handbook including the Principles of Business and the six TCF Outcomes are conduct controls intended to drive the right organisational behaviour and individual responsibility for delivery of fair customer outcomes. Although the Conduct Standard and COFI Bill reflect certain individual conduct control elements,

¹¹⁴⁶ *Alistair Rae Burns v The Financial Conduct Authority* (2018) UKUT 246 (TCC).

¹¹⁴⁷ *Ibid* at 63–64.

¹¹⁴⁸ FCA Unfair Contract Terms (n 881).

embedding detailed individual conduct and accountability rules in primary conduct regulation – similar to UK – may support delivery of fair customer outcomes.

6.5.3 Is TCF as a doctrine of equity capable of giving rise to a cause of action on its own?

A key question is whether failure to meet the TCF principles – without significant imbalance in the relationship between the parties and customer detriment – is a sufficient cause of action. In *R (on the application of British Bankers Association) v Financial Services Authority*,¹¹⁴⁹ the court held that in deciding what is fair and reasonable, it would be a breach of a statutory duty if the ombudsman did not consider the high level principles issued by the FSA under section 150(1) of the FSMA.¹¹⁵⁰ The court specifically pointed out that ‘actionable’ in this respect meant ‘capable of giving rise to a cause of action’,¹¹⁵¹ meaning that TCF principles can give rise to cause where there is evidence of breach of a statutory duty. In *Options UK Personal Pensions Llp v Financial Ombudsman Service*¹¹⁵² it was also held that the principles are part of relevant law and regulations and must be taken into account in determining what is fair and reasonable.¹¹⁵³ In South Africa, prior to implementation of the Conduct Standard, TCF principles did not introduce a separate legal duty and enforcement against misconduct terms related to breach of specific laws such as FAIS and not per se for TCF failures.

However, in *Riley v Belmont Green Finance Ltd*,¹¹⁵⁴ the court held that the respondent had failed to demonstrate how a breach of the FCA's TCF principles amounts to a breach of a legal obligation, as opposed to ‘being undesirable or a breach of guidance’.¹¹⁵⁵

In the financial mis-selling claim in *Carney v NM Rothschilds*,¹¹⁵⁶ the court considered the unfairness of the relationship with the claimants under section 140A of the CCA 1974.¹¹⁵⁷ Informed by the wording of the FCA’s publications on TCF published in 2004 and 2005 respectively, the court found that ‘it is simply a misnomer to suggest that these publications are in

¹¹⁴⁹ *R (on the application of British Bankers Association) v Financial Services Authority* (2011) EWHC 999.

¹¹⁵⁰ *Ibid* para 71.

¹¹⁵¹ *Ibid*.

¹¹⁵² *Options UK Personal Pensions Llp v Financial Ombudsman Service Ltd* (2024) EWCA Civ 541.

¹¹⁵³ *Ibid* paras 74 75.

¹¹⁵⁴ *Riley v Belmont Green Finance Ltd ta Vida Homeloans*: UKEAT/0133/19/BA.

¹¹⁵⁵ *Ibid* para 31.

¹¹⁵⁶ *Carney v N M Rothschild & Sons Ltd* (2018) EWHC 958 (Comm).

¹¹⁵⁷ CCA 1974 (n 871).

any sense part of a ‘regulatory regime’ whether or not breach would lead to a separate claim’.¹¹⁵⁸ Therefore, there has been limited case law to support TCF as a doctrine of equity capable of independent action or giving rise to a cause of action on its own, without reference to the underlying contract or breach of a specific regulatory provision.

Despite TCF principles not being standalone principles that can give rise to a cause of action independent of the underlying contract or specific regulatory requirements, on an ongoing basis, the FCA publishes enforcement undertakings and orders made regarding particular terms or conduct considered unfair. Published undertakings and orders include specific recommendations for firms to take an outcome-focused approach to assess whether concerns identified by the FCA apply to their financial institutions.¹¹⁵⁹

Recently in the test case of *Marcus Gervase Johnson v Firstrand Bank Limited*¹¹⁶⁰ (pending appeal), the court considered commissions paid by the financial institution to motor dealers in their capacity as credit broker. Some commissions were secret side arrangements which were not disclosed to the customer.¹¹⁶¹ The court held that there was a fiduciary relationship and the dealers as credit brokers owed the customers ‘a duty to provide information, advice or recommendation on an impartial or disinterested basis’.¹¹⁶² The secret nature of the commissions rendered the lender liable for offering and facilitating a breach of the fiduciary duty by the broker.¹¹⁶³ The court noted that non-disclosure was not sufficient to render the transaction unfair.¹¹⁶⁴ However, the court made a ruling against the lender on the basis of a common law fiduciary duty and not under the FCA’s rules, TCF principles or fairness controls under the CRA.¹¹⁶⁵

¹¹⁵⁸ *Carney v Rothschild* (n 1076) para 367.

¹¹⁵⁹ FCA Unfair Contract Terms (n 881).

¹¹⁶⁰ *Johnson v Firstrand Bank Limited (London Branch) t/a Motonovo Finance* (2024) EWCA Civ 1282.

¹¹⁶¹ *Ibid* para 3.

¹¹⁶² *Ibid* para 18. See also *Wood v Commercial First Business Ltd* (2021) EWCA Civ 471.

¹¹⁶³ *Johnson v Firstrand* (n 1160) paras 80; 91 and 104–105.

¹¹⁶⁴ *Ibid* para 20.

¹¹⁶⁵ *Ibid*. See also FCA ‘FCA statement on Court of Appeal judgment in Hopcraft, Johnson and Wrench’ 29 October 2024 available at <https://www.fca.org.uk/news/statements/court-appeal-judgment-hopcraft-johnson-wrench>, accessed 04 November 2024.

6.5.4 Regulatory lessons from previous lapses in proper regulation and supervision

Numerous scandals in the UK raised an important question around why it has been difficult to break the cycle of poor consumer outcomes, product mis-selling, extensive consumer detriment and complaints.¹¹⁶⁶ Although the regulators have responded with significant penalties and further regulatory changes have been introduced to curb these failings, there are important lessons to be learned.

Below are some of the crucial lessons for South Africa to reflect upon:

- a. Whilst TCF principles should be given legal force and effect and be capable of enforcement, the application of TCF principles as a set of inflexible prescriptive rules results in a tick box approach that ultimately fails to deliver fair customer outcomes.¹¹⁶⁷ The application and enforcement of TCF principles should consider the context, be risk-based and proportional whilst paying due attention to the outcome.
- b. Principles-based and outcomes focused regulation does not mean the absence of rules. Rather, principles must play a dominant part accompanied by appropriate rules, guidance, and written explanations.¹¹⁶⁸ Therefore, implementing a grey-list does not negate a principles-based approach as long as the principles are central in the interpretation and implementation of such lists.
- c. Principles-based regulation gives entities greater discretion but comes with greater responsibility for what must be done to ensure fairness and how.¹¹⁶⁹ The blacklist of prohibited terms flowing from fairness principles flags terms that are per se prohibited, limiting the need for unnecessary regulatory action.
- d. Complex and poor standard setting contributes to uncertainty, creating the opportunity for regulatory arbitrage.¹¹⁷⁰ Reducing unnecessary complexity is critical for financial institutions and customers to know what is expected.

¹¹⁶⁶ Ferran (note 63).

¹¹⁶⁷ Georgosouli (n 242).

¹¹⁶⁸ Black (n 226) at 8.

¹¹⁶⁹ Baldwin & Black (n 229) at 189.

¹¹⁷⁰ Pollman (n 20) at 571.

- e. A responsive system of regulation is necessary for the credibility of the financial system, regulators, and financial institutions.¹¹⁷¹ Although TCF in the UK was sophisticated, it proved ineffective in its early days, and the resulting scandals seriously damaged the industry's reputation.¹¹⁷² Deputy Governor of the Bank of England, Minouche Shafiq, in a 2014 speech at the London Stock Exchange, questioned whether the financial system was a 'rotten barrel'. For instance, it was reported that for the period 2006-2008, the selling practices of financial firms around PPI revealed widespread failures in suitability checks, inadequate training, ineffective systems and controls, and inadequate disclosure of information. Large scale redress only started in 2011 with slight improvement, and as of 2019, the Financial Ombuds Service was still addressing PPI mis-selling cases.¹¹⁷³ Whilst the issue is complex, cuts across multiple dimensions and significant redress amounts have been paid, the extended period it took to address all redress cases adds to the trust deficit that the industry continues to experience.¹¹⁷⁴
- f. Appropriate collection of good quality data, processing and intelligent analysis of this data is a crucial preventative measure to identify emerging risks, anomalies, and exceptions.¹¹⁷⁵ In South Africa, where multiple regulators have interest in consumer protection to varying degrees, it is essential to mitigate against the risk of data fragmentation, manage delays in data sharing, guard against information turf battles, and build the capacity to assess and process the priority information and to create a capability to connect the dots to avoid significant risk build-up.

¹¹⁷¹ Black (n 226) at 9 –11.

¹¹⁷² Ibid 5–6.

¹¹⁷³ Financial Ombudsman Service 'PPI' available at <https://www.financial-ombudsman.org.uk/businesses/complaints-deal/ppi>, accessed 14 January 2022.

¹¹⁷⁴ See FCA 'PPI Claims' 20 March 2023 available at <https://www.fca.org.uk/consumers/ppi-complaints#:~:text=We%20set%20a%20deadline%20of,2019%20deadline%20had%20been%20handled>, accessed 04 November 2024.

¹¹⁷⁵ FCA 'Management information' available at <https://www.fca.org.uk/firms/fair-treatment-customers/management-information>, accessed 14 January 2022.

- g. There must be a deliberate and proactive drive to promote fair customer outcomes through ethical business practices and a change in culture within financial institutions.¹¹⁷⁶
- h. There is a limitation to individual regulatory action through regulators or ombuds outside the formal court process in that a term found to be unfair may be declared invalid only concerning that individual customer. This decision may not be binding in relation to similar terms with other customers not party to the proceedings. Unfortunately, due to the time-consuming nature of private action, many customers resort to addressing matters informally through complaint handling processes rather than following a formal process. This sometimes has the effect of some organisations continuing with such terms where they have not been declared unfair for a broader class of customers.¹¹⁷⁷
- i. A coherent and credible system must be established to promote the right behaviours to deter misconduct.¹¹⁷⁸ Enforcement action that is applied objectively, reasonably, consistently, and proportionally serves as a lever to prevent misconduct.

6.6 A NEW CONSUMER DUTY

The CRA introduced a narrow application of good faith although no general duty of good faith was recognised. Historically, in considering banking relationships, English courts have not implied a positive general duty of good faith, which would impose an obligation on institutions to put the interests of customers above their own interests or to ‘subordinate or override its own legitimate commercial interests and consider interests of the [customer]...’¹¹⁷⁹ However, some scholars have argued for the introduction of a concept of ‘fairness by design’ and proposed the imposition of a positive duty to trade fairly.¹¹⁸⁰

¹¹⁷⁶ FCA ‘Cultural evolution: how culture must change to meet expectations’ 26 June 2023 available at <https://www.fca.org.uk/news/speeches/cultural-evolution-how-culture-must-change-meet-expectations>, accessed 04 November 2024. See also FCA ‘Culture and non-financial misconduct survey – findings’ 25 October 2024 available at <https://www.fca.org.uk/data/culture-non-financial-misconduct-survey-findings>, accessed 04 November 2024.

¹¹⁷⁷ Bright (note 1015) at 333–338.

¹¹⁷⁸ Georgosouli (n 242) at 264 and 270.

¹¹⁷⁹ Siciliani, Riefa & Gamper (n 1022) at 190.

¹¹⁸⁰ Ibid at 179. However, see also *Standish & Ors v The Royal Bank of Scotland plc & Anor* (2018) EWHC 1829 (Ch) para 49 where the court questioned whether developments in the principle that mortgagee owes duties of good faith and a duty to act fairly, has been taken forward in a meaningful way.

Interestingly, the Office of Fair Trading previously proposed a general duty to trade fairly akin to good faith.¹¹⁸¹ The FCA subsequently adopted a ‘New Consumer Duty’ aimed at setting a higher standard of consumer protection and putting the needs of the customer first.¹¹⁸² The paper was informed by the 2020 Financial Lives survey¹¹⁸³ conducted by the FCA, which revealed that only ten percent (10%) of consumers ‘strongly agreed’ that they had confidence in the financial services sector in the UK and thirty two percent (32%) ‘slightly agreeing’. According to the survey, only thirty five percent (35%) of respondents agreed that firms are honest and transparent in their dealings with customers.

The principles in the proposed new Consumer Duty are based on the need to address areas where customers find it difficult to make informed decisions in a timely manner; to receive satisfactory support from firms due to poor customer service, delays, IT system failures or service disruptions; and being provided with products that are either inappropriate or harmful.¹¹⁸⁴ The consumer duty is targeted at four primary outcomes:¹¹⁸⁵

- a. Fair value: The price of financial products and services represents a fair value of the products and service, and poor quality products are removed.
- b. Suitability and treatment: Consumers must receive suitable products and services that are designed to meet their needs, characteristics, and objectives. Furthermore, consumers must receive good service and treatment.
- c. Confidence: Consumers should have strong levels of confidence to participate in the financial services market and be empowered with the right information to make effective, timely and properly informed decisions.
- d. Access: Needs of diverse customers must be met.

¹¹⁸¹ Siciliani, Riefa & Gamper (n 1022) at 187.

¹¹⁸² FCA ‘A new consumer duty: Feedback to CP21/36 and final rules’ Policy Statement PS 22/9 available at <https://www.fca.org.uk/publication/policy/ps22-9.pdf>, accessed 02 July 2024. See also FCA ‘Finalised guidance: FG22/5 Final Handbook Guidance for firms on the consumer duty’ available at <https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf>, accessed 02 July 2024.

¹¹⁸³ FCA ‘Financial Lives 2020 survey: the impact of coronavirus’ available at <https://www.fca.org.uk/publications/financial-lives/financial-lives-2020-survey-impact-coronavirus>, accessed on 02 July 2024.

¹¹⁸⁴ FCA ‘A new Consumer Duty: Feedback to CP21/13 and further consultation’ December 2021 available at <https://www.fca.org.uk/publication/consultation/cp21-36.pdf>, accessed on 02 July 2024.

¹¹⁸⁵ FCA PS22/9 (n 1182) paras 1.19 and 1.23.

The conduct of institutions will be assessed against what can reasonably be expected of a prudent firm carrying out same activities in relation to same products and services.¹¹⁸⁶ Factors to be considered in making this determination include the nature of the product and service, characteristics of the customer and the institution's role in relation to the product and service including the distribution channel.¹¹⁸⁷

However, the Consumer Duty does not replace the general principle that consumers should take responsibility for their decisions, nor does it impose an open-ended duty.¹¹⁸⁸ A new Consumer Principle (Principle 12) has replaced Business Principles 6 and 7 in the FCA Handbook for in-scope entities and requires 'firms to act to deliver good outcomes for retail customers'.¹¹⁸⁹ Cross-cutting rules require firms to act in good faith, avoid foreseeable harm, and enable and support retail customers to pursue their financial objectives.¹¹⁹⁰

There is an argument that imposing a positive duty could make the interests of the institution subservient to the interests of the customer. This argument is addressed to some extent in *v International Trade Corporation* where it was confirmed that the objective which has moulded the English law of contract over time is that 'the reasonable expectation of an honest man must be protected.'¹¹⁹¹ It does not mean that a party must not act in their own interest but rather that they should not conduct themselves in a manner '... that would be regarded as commercially unacceptable by reasonable and honest people'.¹¹⁹²

In summary, although there is no implied general duty of good faith imputed into general contract law in England, legislative intervention in the form of section 62(4) of the CRA entrenched the consideration of good faith in the determination of fairness of consumer terms and conditions. Furthermore, the FCA has statutorily introduced the consumer duty which imposes a higher standard of conduct through the duty of care imposed on financial institutions. However,

¹¹⁸⁶ Ibid paras 4.18–4.19

¹¹⁸⁷ Ibid para 4.

¹¹⁸⁸ FCA CP21/13 (n 1184) para 1.41.

¹¹⁸⁹ FCA PS22/9 (n 1182) paras 4.7 and 4.15.

¹¹⁹⁰ FCA CP21/13 (n 1184) paras 1.47 and 5.21 and FCA PS22/9 (n 1182). See also FCA 'Consumer Duty implementation: good practice and areas for improvement' available at <https://www.fca.org.uk/publications/good-and-poor-practice/consumer-duty-implementation-good-practice-and-areas-improvement>, accessed 21 February 2024.

¹¹⁹¹ Siciliani, Riefa & Gamper (n 1022) at 195. *Yam Seng* (n 960).

¹¹⁹² *Yam Seng* (n 960) para 145.

this is not without criticism.¹¹⁹³ Ultimately, a question remains whether the current remedies available to customers still allow parties to behave in bad faith.¹¹⁹⁴

By contrast, neither the COFI Bill, the Conduct Standard or the CPA in South Africa expressly refers to good faith in the determination of fairness in a similar way as section 62(4) of the CRA. Furthermore, the COFI Bill and the Conduct Standard do not have a positive duty of care akin in nature to the new consumer duty introduced by the FCA.¹¹⁹⁵ It is submitted that there is merit and value in legislative inclusion of a duty of good faith in the financial sector in South Africa in the test for fairness of terms, conduct or requirements. The financial consumer protection regulation in South Africa should consider the legislative framing of the concept of good faith and duty of care adopted in the UK.¹¹⁹⁶

The regulatory framework and wording must be structured such that contractual terms introduced by financial institutions cannot trump legislation or statutory rules.¹¹⁹⁷

6.7 CONCLUSION

The UK regulatory framework and architecture are less complex because the primary consumer protection legislation, the CRA, applies to general and retail financial consumers. This can be contrasted to the South African regulatory architecture, where the FSRA¹¹⁹⁸ excludes financial products and financial services and activities that go through the national payments system from the application of the CPA. However, at the same time, section 1 of the CPA still defines services falling within the ambit of the Act to include banking services. Therefore, it is necessary to address this inconsistent wording between the FSRA and the CPA.

¹¹⁹³ Shazia Khan Afghan ‘Should banks owe a statutory duty of care to their customers in the UK?’ (2017) 32 *Journal of International Banking Law and Regulation* 494 at clause 5. The article argues that the duty of care is misconceived because the requirement to act honestly, fairly and professionally is already included in COBS 2.1. Furthermore, it is said that it is questionable whether the duty of care confers the right to bring a claim for damages.

¹¹⁹⁴ Daniel Friedman ‘Good Faith and Remedies for Breach of Contract’ in Beatson & Friedmann (n 677) at 399. See Sheldon Mills ‘Consumer Duty: the art of the possible in a year’ *FCA* 20 February 2024, available at <https://www.fca.org.uk/news/speeches/consumer-duty-art-possible-year>, accessed 21 February 2024. See also FCA Consumer Duty implementation (n 1231).

¹¹⁹⁵ See Chapter 3 and 4 above for a detailed discussion on the South African position. See Conduct Standard (n 17) at s 3(1)(b), s 4(2), s 4(4) and s 5(2). See also CPA (n 16) at s 40 (2).

¹¹⁹⁶ See detailed discussion under clause 5.3.3 and 5.3.4 above.

¹¹⁹⁷ *First Tower Trustees Ltd v CDS (Superstores International) Ltd* (2018) EWCA Civ 1396 para 95. See *Adams v Options UK Personal Pensions LLP* (2021) EWCA Civ 474 at 109.

¹¹⁹⁸ FSRA (n 80) at s 10.

The South African principles outlined in the Conduct Standard and different financial sector laws regulate the fair treatment of customers through a complex arrangement that cuts across multiple pieces of legislation, regulatory bodies, and coordination agencies.¹¹⁹⁹ Whilst COFI is intended to simplify the regulatory architecture, as indicated in Chapters 3, 4 and 5 there are still gaps in the current draft of the COFI Bill, which would hamper the effective implementation of the TCF Principles.

Furthermore, the fairness control provisions under the CRA are distinguishable from the South African provisions under the FSRA, the Conduct Standard, the current draft of the COFI Bill and the CPA in the following respects:

- a. Under the CRA and the new Consumer Duty, good faith is expressly referred to as an element for consideration in assessing the fairness of contract terms. In South Africa, neither the FSRA, the Conduct Standard, the COFI Bill, nor the CPA expressly reference the duty of good faith concerning contractual terms and the fair treatment of customers. Section 37 of the COFI Bill only refers to the requirement to observe utmost good faith in relation to trust property and assets of the financial institution. The CPA talks about good faith only regarding a person who assumes control of a supplier's property as an estate administrator, executor, or liquidator.¹²⁰⁰ However, it addresses unconscionable conduct that exploits a customer's vulnerability. Under the current South African regulatory regime, good faith appears to be implied in principles of transparency and reasonableness of contractual terms.¹²⁰¹
- b. As discussed in Chapter 4 – considering the complexity of retail financial services, the glaring information asymmetry, and the inherent power asymmetries in the South African economic context the concept of good faith should be incorporated into future amendments of the Conduct Standard and the COFI Bill.
- c. The UK's regulatory regime has comprehensive requirements to protect customers and reduce harm. Still, it also incorporates the principle that consumers should take

¹¹⁹⁹ See clause 6.2.3 above for a detailed discussion.

¹²⁰⁰ CPA (n 16) at s 65(3).

¹²⁰¹ Conduct Standard (n 17) at ss 2(5) and 5(2).

responsibility for their decisions. This is an important principle that promotes consumer responsibility. It mitigates against the perception that financial institutions bear all the responsibility for fair customer outcomes and that the customer will be protected from all harm. In the South African context with relatively low financial literacy and numeracy skills, incorporating such a principle to encourage consumer responsibility will need to be carefully counterbalanced with provisions to promote effective customer education and protect customers with vulnerability characteristics.

- d. The UK comprehensively addresses fairness controls under the CRA as the primary consumer protection legislation, supplemented by more sector specific rules and guidance issued by the FCA. The review of the fairness controls in the UK supports the position that COFI should address the provisions regulating unfair terms more comprehensively.

Finally, to preserve the independence of the FCA, the revised MoU between the FCA and PRA in the UK has deleted reference to the PRA's veto powers and instead replaced it with structured mechanisms for consultation between the regulators. South Africa should consider the lessons from the UK to ensure that the requirement of concurrence granted to the PA is exercised with due regard to the interest of customers and in a manner that preserves the mandate and independence of the FSCA.

CHAPTER 7: TREATING RETAIL FINANCIAL CUSTOMERS FAIRLY UNDER THE AUSTRALIAN REGULATORY FRAMEWORK

7.1 INTRODUCTION

The Twin Peaks regulatory model was first adopted in 1998 by Australia and was subsequently embraced by other countries. The Australian model is envied by many other countries and emulated across several jurisdictions.¹²⁰²

Therefore, Australia was selected for the comparative study on the fair treatment of retail financial customers as a baseline to analyse the development in the protection of retail financial customers under the Twin Peaks model of supervision. Australia, as a mature jurisdiction with the most extensive experience in adopting twin peaks,¹²⁰³ also offers an opportunity to compare similarities and differences with the approach adopted in South Africa. Accordingly, this chapter discusses and analyses the following key themes:

- a. The laws and regulations for the protection of retail financial consumers in Australia, including the role of the twin peaks supervision model in promoting fair treatment of retail financial customers.
- b. Specific fairness control mechanisms in Australia with particular attention to:
 - i. Specific provisions dealing with unfair contract terms.
 - ii. Application of the statutory doctrine of unconscionability and the role of good faith in the determination of unconscionable conduct.
- c. Applicability of TCF principles to the financial services sector in Australia.

¹²⁰² Alex Erskine ‘Regulating the Australian financial system’ *Australian Centre for Financial Studies* July 2014 at 43, available at https://erskinomics.files.wordpress.com/2014/09/regulating_the_australian_financial_system.pdf, accessed 17 May 2023. See also Jennifer G Hill ‘Why did Australia fare so well in the global financial crisis?’ in Ellis Ferran, Niamh Moloney & Jennifer G Hill (eds) *The Regulatory Aftermath of the Global Financial Crisis* (2012) 203–300.

¹²⁰³ Andrew D Schmulow ‘Twin Peaks: An analysis of the Australian architecture’ in HJ Jung (ed) *Proceedings of the 2016 Global Forum for Financial Consumers International Academy of Financial Consumers* (2016) 3–4.

d. Lessons from lapses in proper regulation and supervision in Australia.

The conclusion will summarise observations on strengths, shortcomings and potential stumbling blocks in the current Australian legislative framework, regulatory architecture, and supervisory approach to ensure the fair treatment of retail financial customers. The review undertaken in this chapter will inform the evaluation of advantages, disadvantages and best practices from Australia for consideration in South Africa under the COFI Bill and the Conduct Standard for Banks.

7.2 LAWS AND REGULATIONS IN AUSTRALIA FOR THE PROTECTION OF RETAIL FINANCIAL CUSTOMERS

7.2.1 The role of the twin peaks model of supervision in promoting fair treatment of customers

a. The Twin Peaks architecture

The financial supervisory architecture adopted by Australia follows the Twin Peaks supervision model,¹²⁰⁴ which anticipates a single regulator for conduct and a prudential regulator for financial safety regulation.¹²⁰⁵ Previously – following a period of deregulation – market conduct and disclosure regulation in Australia was governed and executed by various agencies, and this historical arrangement was criticised for inefficiency, inconsistencies and regulatory gaps.¹²⁰⁶ The Wallis Inquiry correctly argued that it is not appropriate to use the general consumer protection agency to protect interests of retail financial consumers due to the complexity of financial products and consequences.¹²⁰⁷ It recommended a specialised protection regime for retail financial consumers on terms comparable to the Trade Practices Act.¹²⁰⁸ This led to the establishment of the Australian Securities and Investments Commission ‘ASIC’, as the overarching primary

¹²⁰⁴ The Treasury ‘Financial System Inquiry Final Report – Wallis Inquiry’ *Australian Government* 1 March 1997 at 13–23, available at <https://treasury.gov.au/publication/p1996-fsi-fr>, accessed 14 July 2022. Recommendation 1 and Recommendation 31 accessed 16 May 2023. See also Pamela F Hanrahan ‘Twin peaks after Hayne: Tensions and tradeoffs in regulatory architecture’ (2019) 13 *Law and Financial Markets Review* 124 at 124.

¹²⁰⁵ Wallis Inquiry (n 1245) at 17–23.

¹²⁰⁶ *Ibid* at 17.

¹²⁰⁷ *Ibid* at 188 and 241.

¹²⁰⁸ Trade Practices Act 1974 ‘TP Act’ 1315. ASIC Act (n 677) at ss 12A(2) and 12A(3). See also Productivity Commission (n 716) at 63.

regulatory body and supervisor for protecting retail financial consumers concerning financial products and services.¹²⁰⁹

ASIC holds the mandate to monitor and promote market integrity and consumer protection whilst the Australian Prudential Regulation Authority ‘APRA’ assumed the mandate for prudential oversight regarding safety and soundness of the financial system. The Productivity Commission recommended that regulatory responsibility for providing consumer credit and related advice should also vest in the ASIC as the conduct regulator.¹²¹⁰

Despite recommendation of the Twin Peaks supervision model, ASIC was criticised for adopting a non-interventionist outlook in its supervisory stance,¹²¹¹ and the 2020 Australian Law Commission Report noted underenforcement by the ASIC.¹²¹²

Although the Twin Peaks model has clear benefits in regulating the financial system and protecting consumer interests, it remains imperfect in preventing market abuse or misconduct and ‘is susceptible to failures’.¹²¹³ As illustration, following a series of complaints around misconduct in the financial services sector, the Hayne Commission of Enquiry¹²¹⁴ ‘Hayne Commission’ was established to review misconduct in the banking, superannuation, and financial services sectors and to also consider the appropriateness of the supervisory model to address emerging market conduct risks. The final Hayne Commission report published in 2019 recommended retaining and strengthening the twin peaks supervision model.¹²¹⁵

Even though the conduct regulator was theoretically intended to serve as a ‘one-stop shop’ for consumer complaints against regulated financial institutions, in practice, the Hayne Commission observed muted and delayed responses from the Australian Securities and

¹²⁰⁹ ASIC Act (n 677) at s 12A(2) and s 12A(3). See also Productivity Commission (n 716) at 63.

¹²¹⁰ Productivity Commission (n 716) at 2.

¹²¹¹ Hanrahan (n 1245) at 125.

¹²¹² George Gilligan & Ian Ramsay ‘Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions Under the ASIC Act and Corporations Act: 2009–2018’ (2021) 38 *Company and Securities Law Journal* 435 at 436.

¹²¹³ Schmulow (n 252) at 3. See also Erskine (n 1243) at 43.

¹²¹⁴ Hayne Commission (n 48).

¹²¹⁵ *Ibid* at 37.

Misconduct Commission to misconduct reported in the financial sector over several years.¹²¹⁶ For instance, the Hayne Commission found evidence of large banks charging customer fees in circumstances where no services were rendered and lamented the time it took for the conduct regulator to respond to this serious issue.¹²¹⁷ In another instance the ASIC was said to be ‘a timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC’s concerns or intervention.’¹²¹⁸ Therefore the Australian Financial Regulator Assessment Authority was established.¹²¹⁹

b. Co-operation and coordination arrangement under Twin Peaks

The Australian regulators’ coordination approach consists of informal bilateral arrangements between the regulators.¹²²⁰ It seeks to foster a culture of coordination, collegiality and informal controls instead of relying heavily on a mandated legislative requirement.¹²²¹ Unlike South Africa and the UK, the underlying legislation does not prescribe the conclusion of an MoU between regulators.¹²²² A list of regulators that the APRA must cooperate with is provided without greater detail or clarity on how the cooperation should be facilitated.¹²²³ However, the MoU between the APRA and the ASIC,¹²²⁴ signed on 28 November 2019, refers to a ‘framework for engagement,

¹²¹⁶ Hayne (n 55) at 433. The Commission observed that often material breaches were met with infringement notices instead of persuasive and commensurate enforcement action. See Regina Finn & Simon Less ‘Letters and notes on regulation: Capture of independent sectoral regulators’ *Regulatory Policy Institute* June 2013, available at https://www.regulation.org.uk/library/2013_regulatory_capture.pdf, accessed 23 April 2024.

¹²¹⁷ Australia Royal Commission ‘Misconduct in the Banking, Superannuation and Financial Services Industry: Final report volume 2’ Royal Commissions 4 February 2019 at 11, available at <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-2-final-report.pdf>, accessed 14 May 2023.

¹²¹⁸ Andy Schmulow, Karen Fairweather & John Tarrant ‘Twin Peaks 2.0: Reforming Australia’s financial regulatory regime in light of failings exposed by the Banking Royal Commission’ (2018) 12 *Law and Financial Markets Review* 193 at 195.

¹²¹⁹ Financial Regulator Assessment Authority Act 2021. See also Australian Government -Financial Regulator Assessment Authority website available at <https://fraa.gov.au/>, accessed 27 December 2024.

¹²²⁰ Australian Prudential Regulation Authority Act 1998 at s 10A.

¹²²¹ Commonwealth of Australia ‘Financial System Inquiry Interim Report’ available at <https://treasury.gov.au/consultation/c2014-fsi-interim-report>, accessed on 18 July 2022. See also Andrew Godwin & Andrew D Schmulow ‘The Financial Sector Regulation Bill in South Africa Second Draft: Lessons from Australia’ (2015) 132 *SALJ* 756 at 762.

¹²²² ASIC Act (n 677) at s 10A places an obligation on the APRA to cooperate with other regulatory agencies.

¹²²³ APRA Regulations 2018 at s 6.

¹²²⁴ ASIC ‘Memorandum of Understanding between the Australian Prudential Regulatory Authority and the Australian Securities and Investment Commission’ *APRA* 28 November 2019 paras 2 and 12, available at <https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf>, accessed 17 May 2023.

including coordination, cooperation and information sharing’, placing emphasis on proactive provision of information and documents between the agencies.¹²²⁵

The Australian experience since the implementation of Twin Peaks in 1998 shows ongoing challenges in coordination and cooperation between regulators. The Wallis Royal Commission,¹²²⁶ the HIH Royal Commission,¹²²⁷ Inquiry into the Collapse of Trio Capital,¹²²⁸ the Murray Inquiry¹²²⁹ and the Hayne Commission all identified several persisting regulatory oversight gaps resulting from ineffective cooperation and coordination between the regulators and recommended strengthening existing mechanisms.

Although the Australian Twin Peaks model successfully withstood the 2008 GFC, the Hayne Commission in 2019 raised the following material concerns:

- a. significant gaps in regulatory coverage between APRA and the ASIC;
- b. difficulty in determining which regulatory agency has 'first mover' responsibility in instances where identified misconduct has a market conduct and prudential favour;¹²³⁰
- c. overlapping mandates between APRA and other enforcement agencies remained a concern,¹²³¹ and

¹²²⁵ Godwin (n 182) at 185. See also Andrew Godwin, Ian Ramsay & Andrew Schmulow ‘Twin Peaks in Australia: The never-ending trek?’ in Andrew Godwin, and Andrew Schmulow (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (2021) 78.

¹²²⁶ See Colm Kearney ‘The Wallis Inquiry: An Assessment’ (1997) 8 *The Economic and Labour Relations Review* 308 – 317. The Wallis Inquiry was established to look into financial deregulation in Australia and propose changes to the regulatory arrangement.

¹²²⁷ The HIH Royal Commission *The failure of HIH Insurance* (2003) Volume 1 available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F19869%22>, accessed on 18 July 2022.

¹²²⁸ Parliamentary Joint Committee on Corporations and Financial Services ‘Inquiry into the Collapse of Trio Capital’ available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/trio/report/index, accessed 17 May 2023.

¹²²⁹ Australian Government ‘Financial System Inquiry Final Report’ (2014) at 236, available at <https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf>, accessed 17 May 2023. Commonly referred to as the Murray Inquiry.

¹²³⁰ Hayne (n 55) at 86.

¹²³¹ Pamela Hanrahan ‘Legal framework governing aspects of the Australian superannuation system – Background paper 25’ *Analysis & Policy Observatory* July 2018 at 24, available at <https://apo.org.au/organisation/132221>, accessed 17 May 2023.

- d. questions whether in practice, there is equality between APRA and ASIC because ASIC appears to have assumed the *de facto* leading role.¹²³²

In 2014, the Murray Inquiry had recommended establishment of a financial regulator assessment board to exercise objective and independent oversight over the activities of APRA, the ASIC and other financial regulators.¹²³³ In addition, it recommended introduction of performance indicators to assess performance of regulators,¹²³⁴ but this recommendation was not accepted.¹²³⁵ Instead, the Council of Financial Regulators was established as a high-level forum for co-operation and coordinating body for the relevant regulatory agencies, albeit without a statutory mandate or legal powers.¹²³⁶

To close identified gaps, the Hayne Commission advocated for effective unsolicited information sharing at an operational level between APRA and ASIC. It also recommended that cooperation and coordination of functions between the regulators be supplemented with a system of early warning signs, to ensure that issues that arise within regulated entities are addressed timeously and effectively.¹²³⁷

Overall, there is criticism of the slow pace of implementing regulatory reforms that were agreed upon after the Hayne Commission.¹²³⁸ Apprehension also remains about the risk of regulator capture on the back of by intense lobbying from corporations.¹²³⁹ Internationally, there is a rising sentiment that heavy reliance by regulators on the industry for information and expertise

¹²³² Schmulow (n 252) at 20. Hanrahan (n 1272) at 24 identified that the PRA's purview of responsibility was steadily expanding into areas of non-financial risks, which often intersects with conduct regulation.

¹²³³ Schmulow, Fairweather & Tarrant (n 1259) at 196.

¹²³⁴ Murray Inquiry (n 1270) at 235.

¹²³⁵ Australian Government 'Improving Australia's financial system: Government response to the Financial System Inquiry' available at https://treasury.gov.au/sites/default/files/2019-03/Government_response_to_FSI_2015.pdf, accessed 17 May 2023. See also Hayne Commission (n 48) at 416.

¹²³⁶ Schmulow, Fairweather & Tarrant (n 1259) at 194.

¹²³⁷ Godwin (n 182) at 186.

¹²³⁸ *Ibid.*

¹²³⁹ Andrew Schmulow, Paul Mazzola & Daniel de Zilva 'Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority' (2021) 49 *Federal Law Review* 505 at 508. See also Hayne Commission at 495 stating that 'Lobbying for prescription, detail and tailoring has been a significant contributor to the current state of the law'.

may cause cognitive regulatory capture where regulators adopt the ‘worldview of the industry they regulate, as opposed to prioritising the interest of the public they are charged to protect’.¹²⁴⁰

Despite Australia's status as a developed economy and a prosperous nation, the country is plagued by predatory pricing, over-indebtedness, under-insurance, underfunded retirement savings and financial exclusion.¹²⁴¹ It is reported that over fifty four percent (54%) of Australians were negatively impacted by the widespread misconduct of financial service providers.¹²⁴² The combined cost of misconduct to Australian households are estimated to be \$201 billion, and remediation costs are estimated at \$10 billion.¹²⁴³ Financial stress and vulnerability are evident in almost two thirds of the population.¹²⁴⁴ These figures combined with previously reported widespread misconduct raise questions about the adequacy of financial consumer protection mechanisms in Australia. One in three Australians cited lack of trust in financial institutions and lack of skills as an area of concern.¹²⁴⁵

In order to address the financial stress and mistrust evident in a large portion of the population, the FinFuture White Paper proposed a Financial Wellbeing Framework that outlines key elements necessary to achieve financial well-being and measurable outcomes.¹²⁴⁶ It also proposed the Financial Wellbeing Agency to be 'responsible for whole-of-system coordination and guiding of actions on financial wellbeing in Australia'.¹²⁴⁷

Notwithstanding the introduction of Twin Peaks, the top sources of financial sector litigation in Australia relate to customer action arising from express and implied contract terms, misleading, deceptive, or unconscionable conduct, and breach of fiduciary duty by financial

¹²⁴⁰ Hilary J Allen ‘Putting the “Financial Stability” in Financial Stability Oversight Council’ (2015) 76 *Ohio State Law Journal* 1087 at 1102.

¹²⁴¹ C Breidbach et al ‘FinFuture: The future of personal finance in Australia’ 2019 *The University of Melbourne* available at https://www.unimelb.edu.au/data/assets/pdf_file/0004/3145612/FinFuture_White_Paper.pdf, accessed 14 May 2023.

¹²⁴² *Ibid* at 5.

¹²⁴³ *Ibid* at 18.

¹²⁴⁴ *Ibid* at 5.

¹²⁴⁵ *Ibid* at 5.

¹²⁴⁶ *Ibid* at 22.

¹²⁴⁷ *Ibid* at 5.

advisors.¹²⁴⁸ Hanrahan has proposed establishing a 'three peaks' model with a specialist consumer protection regulatory agency as the third pillar of the regulatory model.¹²⁴⁹ The proposed specialist consumer protection regulatory agency is intended to drive a consumer-focused culture and assume responsibility for administration and enforcement of financial consumer protection laws.¹²⁵⁰

Although findings from the various commissions of enquiry in Australia over the past decade point to persisting gaps in the regulatory framework, creating a third agency or a financial wellbeing agency is likely to add more complexity to the regulatory architecture, especially considering the establishment of the Australian Financial Complaints Authority 'AFCA' in 2018.¹²⁵¹ The AFCA took over as ombudsman to consider complaints historically falling under 'the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal'.¹²⁵²

Therefore, establishing an effective financial regulatory oversight mechanism provides a more credible platform to drive regulator accountability.¹²⁵³ Furthermore, to promote better customer outcomes, the conduct regulator should also strengthen capabilities for proactive and predictive monitoring using statistical and risk analysis methodologies similar to techniques applied by the PA.¹²⁵⁴ The pilot on measuring customer outcomes and the developed list of indicators and conduct of business statistical returns provide a useful starting point to support effective monitoring.¹²⁵⁵

¹²⁴⁸ Elaina Bailes, Tom Otter & Aleks Valkor 'Financial Services Litigation – 2021' *Law Business Research* July 2021 at 6–8, available at <https://www.lexology.com/library/detail.aspx?g=f9491ad6-46d9-4c1d-8d3c-08254d06d0c4>, accessed on 09 May 2023.

¹²⁴⁹ Hanrahan (n 1245) at 124–130.

¹²⁵⁰ *Ibid.*

¹²⁵¹ Australian Financial Complaints Authority 'Rules and guidelines' available at <https://www.afca.org.au/about-afca/rules-and-guidelines>, accessed 11 May 2023. The rules and guidelines were approved by the Australian Securities and Exchange Commission in terms of the Corporations Act 2001 at s 1055.

¹²⁵² *Ibid.*

¹²⁵³ Murray Inquiry (n 1270) at 235. Schmulow, Fairweather & Tarrant (n 1259).

¹²⁵⁴ Toronto Centre 'Supervisory responses to retail misconduct' (2020) at 10 available at https://www.torontocentre.org/index.php?option=com_content&view=article&id=95&Itemid=99, accessed on 17 December 2024.

¹²⁵⁵ Koning, Izaguirre & Singh (n 712) at 6.

Interestingly, although consumer protection is one of the primary objectives of the ASIC as the conduct regulator, the published organisation structure of ASIC does not overtly reflect a specialist targeted focus on financial consumer protection.¹²⁵⁶ It is therefore, suggested that a competent, adequately skilled, and resourced specialist consumer protection unit be established within the existing conduct regulatory body and work closely with the AFCA. A senior, skilled, and experienced leader in financial consumer protection must head the unit. The incumbent must serve in an executive or senior position within the conduct regulator to lift the consumer protection profile.

7.2.2 Relevant retail consumer protection laws and obligation to ‘trading fairly’

In 2008 the Australian Productivity Commission reviewed Australia's consumer policy framework.¹²⁵⁷ The Commission raised concern with organisations loosely using the term ‘trading fairly’, without properly applying their minds about consumer regulation and consumer impact.¹²⁵⁸ Therefore, the notion of fair trading informed the recommendation to render void unfair contract terms that have caused consumer detriment.¹²⁵⁹ Trading fairly as a valued ethical social norm¹²⁶⁰ informed development of the six consumer policy framework objectives:¹²⁶¹

- a. Ensuring sufficiently well-informed consumers who can benefit from and stimulate effective competition.¹²⁶²

¹²⁵⁶ ASIC ‘Organisation Chart 2024’ 18 November 2024 available at <https://download.asic.gov.au/media/qfedk5uh/asic-organisation-chart-18-november-2024.pdf>, accessed 27 December 2024. The ASIC structure was streamlined, but dedicated focus on consumer protection at commissioner or executive level is not immediately evident. However, there is a dedicated resource for market conduct under the markets portfolio.

¹²⁵⁷ Productivity Commission (n 716).

¹²⁵⁸ *Ibid* at 349.

¹²⁵⁹ *Ibid* at 2.

¹²⁶⁰ *Ibid* at 413. See also *Planet Securities Unit Trust v Dalrymple* (1999) QSC 204 demonstrating that established common law equity principles provide redress in cases of unconscionable conduct and gross unfairness.

¹²⁶¹ Council of Australian Governments ‘Intergovernmental agreement for the Australian consumer law’ *Australian Consumer Law* 30 August 2019 at 3, available at https://consumer.gov.au/sites/consumer/files/2015/06/acl_iga.pdf, accessed 17 May 2023. Referred to as ‘CAG’

¹²⁶² *Ibid* para F(1).

- b. Ensuring goods and services that are 'safe and fit for the purposes for which they were sold'.¹²⁶³
- c. Preventing unfair practices or activities that are contrary to good faith.¹²⁶⁴
- d. Meeting needs of vulnerable customers and those at the most significant disadvantage.¹²⁶⁵
- e. Providing accessible and timely redress in the event of consumer detriment.¹²⁶⁶
- f. Promoting 'proportionate, risk-based enforcement'.¹²⁶⁷

The Productivity Commission's recommendation¹²⁶⁸ served as the basis for an overarching 'single generic consumer law'¹²⁶⁹ to promote competition, fair trade, and consumer protection under the auspices of the Competition and Consumer Act¹²⁷⁰ 'CCA' effective 1 January 2011.

Notwithstanding promulgation of the CCA, Australia's financial consumer protection regulatory framework incorporates both a self-regulation and co-regulation approach.¹²⁷¹ The voluntary and self-regulatory nature of consumer protection is embedded in the Code of Banking Practice adopted by the Australian Banking Association as amended in 2021 and 2022.¹²⁷²

¹²⁶³ Ibid para F(2). See also Australian Consumer Law 'Compliance and enforcement – How regulators enforce the Australian consumer law' available at https://consumer.gov.au/sites/consumer/files/2019/01/ACL_Compliance_and_enforcement_guide.pdf, accessed 16 May 2023.

¹²⁶⁴ Productivity Commission (n 716) at 63. CAG (n 1302) para F(3). Interestingly the agreement by the Council of Australian Governments reinforced the six objectives outlined by the Productivity Commission and incorporated some modest changes but omitted reference to 'good faith.'

¹²⁶⁵ See CAG (n 1302) para F(4), para F(5) and para F(6).

¹²⁶⁶ Ibid para F(5).

¹²⁶⁷ Ibid para F(6).

¹²⁶⁸ Productivity Commission (n 716) at 64.

¹²⁶⁹ Ibid at 63. See Fair Trading Act 1986 at s 3. See also Jeanne Marie Paterson & Nicola Howell 'Everyday consumer credit overview of Australian law regulating consumer home loans, credit cards and car loans: Background paper 4' (2018) *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Australia* at 5 available at <https://apo.org.au/sites/default/files/resource-files/2018-03/apo-nid136491.pdf>, accessed 14 July 2022.

¹²⁷⁰ Competition and Consumer Act of 2010 referred to as the 'CCA'.

¹²⁷¹ Nicola J Howell 'Revisiting the Australian Code of Banking Practice: Is self-regulation still relevant for improving Consumer Protection Standards?' (2015) 19 *University of New South Wales LJ* 544 at 548. See Andy Schmulow & James O'Hara 'Protection of financial consumers in Australia' in Tsai-Jyh Chen (ed) *An International Comparison of Financial Consumer Protection* (2018) 16. Also see ALRC 'Report A: Summary Financial Services Legislation' *Australian Government* November 2021 at 7, available at <https://www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-A-Summary-Report.pdf>, accessed 17 May 2023.

¹²⁷² Australian Banking Association 'The Banking Code' available at <https://www.ausbanking.org.au/banking-code/#:~:text=The%20Banking%20Code%20is%20a,higher%20standards%20than%20the%20law>, accessed 16 May 2023. See also CCA (n 1311) at s 51AE.

Notably, section 51AE of the CCA distinguishes voluntary codes from mandatory codes. The voluntary code refers to fair and responsible dealing with customers but gives no guidance on interpreting fairness.¹²⁷³

The current research focuses on the category of general protections afforded to retail financial customers in terms of Australian legislation, with specific emphasis on the Corporations Act,¹²⁷⁴ Schedule 2 of the CCA commonly referred to as the Australian Consumer Law ‘ACL’,¹²⁷⁵ and the ASIC Act.¹²⁷⁶

The Corporations Act¹²⁷⁷ is one of the overarching pieces of legislation for licensing financial service providers.¹²⁷⁸ It states that a financial services license holder must ‘do all that is necessary’ to ensure that financial services subject to the license are provided ‘efficiently, honestly and fairly’.¹²⁷⁹ The National Consumer Credit Protection ‘NCCP’ Act¹²⁸⁰ also makes use of the same wording.¹²⁸¹ Safe harbour provisions apply against civil penalties where a financial service provider can demonstrate that they acted honestly and ought fairly to be excused.¹²⁸²

Foster J in *Australian Securities and Investments Commission v Camelot Derivatives*¹²⁸³ confirmed that the words ‘efficiently, honestly and fairly’:

... must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to

¹²⁷³ The Banking Code Compliance ‘BCCC Guidance Note No. 2 Clause 10 – fair, reasonable and ethical behaviour’ at 9 available at <https://bankingcode.org.au/app/uploads/2019/11/BCCC-Guidance-Note-Clause-10-Fair-reasonable-and-ethical-behaviour.pdf>, accessed 30 December 2024, which states that elements of the requirement to act in a ‘fair, reasonable and ethical’ manner’ will be considered both collectively and separately. But the guidance note is silent on the test for fairness.

¹²⁷⁴ Corporations Act 2001.

¹²⁷⁵ CCA Schedule 2 referred to as the Australian Consumer Law ‘ACL’.

¹²⁷⁶ ASIC Act (n 677).

¹²⁷⁷ Corporations Act (n 1315).

¹²⁷⁸ Ibid at chap 7 s 7.6.

¹²⁷⁹ Ibid at s 912A. See also ALRC ‘Financial services legislation: Interim Report B’ *Australian Government* September 2022 at 85, available at <https://www.alrc.gov.au/wp-content/uploads/2022/09/ALRC-FSL-Interim-Report-B-139.pdf>, accessed 12 September 2023.

¹²⁸⁰ National Consumer Credit Protection Act 2009.

¹²⁸¹ Ibid at s 47(1)(a).

¹²⁸² Corporations Act (n 1315) at s 1317S.

¹²⁸³ *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) FCA 414 at 69.

the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty...¹²⁸⁴

The obligation denotes competence in providing financial services, adequacy in performing the service¹²⁸⁵ and ‘sound ethical values and judgment’ in dealing with a client's affairs.¹²⁸⁶ The phrase also includes assessing reasonable expectations of performance against reasonable standards of performance.¹²⁸⁷

In *Australian Securities and Investments Commission v Westpac*,¹²⁸⁸ the Federal Court of Australia considered whether Westpac Securities Administration and BT Funds Management, as subsidiaries of Westpac, breached the obligation to act efficiently, honestly and fairly. The brief facts are that Westpac ran a sales calling campaign and recommended that customers rollover their superannuation funds into a Westpac related account. The strategy was to increase Westpac's assets under management.¹²⁸⁹ However, Westpac failed to consider the personal circumstances of the relevant customers, risks were not sufficiently explained to customers, and there was no proper consideration of what was in the customer's best interest.¹²⁹⁰

O'Bryan J made the statement that:

the concepts of efficiently, honestly, and fairly are not inherently in conflict with each other and that the ordinary meaning of the words ... is to impose three concurrent obligations on the financial services licensee: to ensure that the financial services are provided efficiently, and are provided honestly, and are provided fairly."¹²⁹¹

¹²⁸⁴ Ibid para 69. See *Australian Securities and Investments Commission v Membo Finance Pty Limited (No 2)* (2023) FCA 126. See also *Australian Securities and Investments Commission v Australian and New Zealand Banking Group Limited* (2023) FCA 1150 para 52.

¹²⁸⁵ *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672.

¹²⁸⁶ *ASIC v Membo* (n 1198) at 37. See *ASIC v Camelot* (n 1197) at 69. Also see *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124 at 237.

¹²⁸⁷ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) FCA 1023 para 673–674.

¹²⁸⁸ *Australian Securities and Investments Commission v Westpac Securities Administration Limited* (2019) FCAFC 187.

¹²⁸⁹ Ibid para 415.

¹²⁹⁰ Ibid para 421.

¹²⁹¹ Ibid para 426.

Allsop GJ put forward an *obiter* view that the obligation to act efficiently, reasonably, and fairly reflects three standalone principles,¹²⁹² implying the recognition of fairness as a standalone principle. However, since this argument was not made before the court, no ruling was made to this effect.¹²⁹³ Nevertheless, Young J, who first referred to the composite approach in *Story v National Companies and Securities Commission* observed that it does not make a difference if the words are read 'cumulatively or disjunctively' because a license can be revoked if a license holder does not meet a separate attribute or all three composite attributes.¹²⁹⁴

Although the term 'fair' under s 912A(1)(a) has not received detailed judicial consideration,¹²⁹⁵ *Australian Securities and Investments Commission v Westpac* was cited with approval in *Paciocco v Australia and New Zealand Banking Group*¹²⁹⁶ which recommended that:

The word 'fair' should be given its ordinary meaning 'which includes an absence of injustice, even-handedness and reasonableness'. As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation as unfair is evaluative and must be done with close attention to the applicable statutory provision.¹²⁹⁷

Finally *Australian Securities and Investments Commission v AGM Markets*¹²⁹⁸ clarified that the requirement to act 'efficiently, honestly and fairly' is compendious and the phrase must be taken together. The court cautioned against isolating 'fairness' or any other word from a composite phrase and placing disproportionate emphasis on the term.¹²⁹⁹ Beach J specifically made the point that fairness requires consideration of the interests of both parties without disproportionately emphasising the third element of the composite norm in a manner that creates bias and 'unsatisfactory asymmetry' in favour of customers of licensed institutions.¹³⁰⁰ *Australian*

¹²⁹² *Ibid* para 426.

¹²⁹³ *Australian Securities and Investments Commission v Commonwealth Securities Limited* (2022) FCA 1253 at 34. Michael Vrisakis, Tamanna Islam & Shan-Verne Liew 'The fairness doctrine: A return to the status quo?' *Herbert Smith Freehills* 26 March 2020, available at <https://hsfnotes.com/fsraustralia/2020/03/26/the-fairness-doctrine-a-return-to-the-status-quo/>, accessed 11 May 2023.

¹²⁹⁴ *Story* (n 1326) at 672.

¹²⁹⁵ *Westpac* (n 1329) para 426.

¹²⁹⁶ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) FCAFC 50 at 199.

¹²⁹⁷ *Ibid* at 364.

¹²⁹⁸ *Australian Securities and Investments Commission v AGM Markets (in liq) (No 3)* (2020) 380 ALR 27.

¹²⁹⁹ *Ibid* at 520–521.

¹³⁰⁰ *Ibid*.

Securities and Investments Commission v Ferratum ¹³⁰¹ reaffirmed that efficiency, honesty and fairness are interconnected or interlinked because inefficiency or system deficiencies can introduce unfairness and lack of honesty in dealings with customers.¹³⁰²

Nonetheless, judicial decisions around application of section 912A(1)(a) of the Corporations Act indicate fluctuating views but overall Australian courts have been reluctant to elevate fairness as a separate principle above the principles of honesty and efficiency. Interestingly, the Australian Law Reform Commission ‘ALRC’ has subsequently proposed that section 912A be amended to clarify that the constituent terms are standalone obligations,¹³⁰³ and that a note be inserted with examples of the type of conduct that would fail to satisfy the ‘fairly’ principle.¹³⁰⁴

7.2.3 Applicability of the Australian Consumer Law and ASIC Act to financial products and financial services

The CCA administered by the Australian Competition and Consumer Commissioner is applicable to all consumer transactions (subject to specified exclusions) ¹³⁰⁵ and replaced the Trade Practices Act.¹³⁰⁶ Chapter 2 of the Australian Consumer Law ‘ACL’ has general protections against misleading or deceptive conduct,¹³⁰⁷ unconscionable conduct,¹³⁰⁸ and unfair terms.¹³⁰⁹ The ACL also has specific protections covering amongst others:

¹³⁰¹ *Australian Securities and Investments Commission v Ferratum Australia Pty Limited* (in liq) [2023] FCA 1043.

¹³⁰² *Ibid* para 55. *AGM Markets* (n 1212) confirmed that the statutory standard of acting “‘efficiently, honestly and fairly” itself is the source of the obligation and does not require a contravention of a ‘separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise’.

See also *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* (2022) FCA para 30.

¹³⁰³ ALRC Report 140 *Interim Report C: Financial Services Legislation* (2023) available at <https://www.alrc.gov.au/wp-content/uploads/2023/06/ALRC-FSL-Interim-Report-C-140.pdf>, accessed 27 December 2024. Paras 5.15–5.46 address proposed changes to s 912A.

¹³⁰⁴ See *ibid* paras 2.20,; 5.36 and 5.37. CCA (n 1311) s 131(1).

¹³⁰⁵ CCA (n 1311) s 131(1) The ACL states that the Act applies to contracts to provide ‘goods and services’. ACL s 28 gives a list of services that are excluded from application of the CCA but financial products and services are not included in the list.

¹³⁰⁶ TP Act (n 1122). See at Katy Eloise Barnett, Kenneth Yin, & Martin Allcock *Remedies Cases and Materials in Australian Private Law* (2023) 298.

¹³⁰⁷ CCA (n 1311) Part 2-1.

¹³⁰⁸ ACL (n 1316) Part 2-2.

¹³⁰⁹ ACL (n 1316) Part 2-3.

- a. Unfair practices (including false and misleading representations, unsolicited supplies, pyramid schemes, pricing, referral selling, harassment and coercion),¹³¹⁰
- b. Consumer transactions (including consumer guarantees, unsolicited consumer agreements, lay-by agreements, gift cards).¹³¹¹
- c. Product safety and recall .¹³¹²
- d. Information standards¹³¹³
- e. Liability for goods with safety defects.¹³¹⁴

Notably, section 131A of the CCA excludes application of the Act to financial products and financial services, except for specific provisions of Schedule 2 ‘as they apply as a law of the Commonwealth, to the supply, or possible supply’ of financial services or financial products as defined.¹³¹⁵ However, section 131A(2)(b) specifically provides that Part 2-1 of the ACL (misleading and deceptive conduct), section 34 and section 156 (misleading conduct as to the nature of services) , do not apply to contracts regarding financial products or financial services.¹³¹⁶ Notably, Part 2–3 defines the term ‘unfair’, provides examples of unfair terms, as well as terms and contracts excluded from fairness assessment.

Nevertheless, the ASIC Act, which is administered by ASIC, largely reflects similar provisions to the ACL.¹³¹⁷ For instance section 25 of the ACL on the meaning of unfair (in the context of unfair terms) is mirrored in section 12BG of the ASIC Act. Similarly, section 12BH sets out examples of unfair terms in a similar fashion to section 25 of the ACL.

¹³¹⁰ ACL (n 1316) Part 3-1.

¹³¹¹ ACL (n 1316) Part 3-2.

¹³¹² ACL (n 1316) Part 3-3.

¹³¹³ Ibid at Part 3-4.

¹³¹⁴ Ibid at Part 3-5.

¹³¹⁵ Trade Practices Amendment (Australian Consumer Law) Act 2 of 2010. See also Dairmaid Harkin, Monique Mann & Ian Warren ‘Consumer IoT and its under-regulation: Findings from an Australian study’ 2022 (14) *P&I Policy and Internet* 96 at 98. A financial product is defined under s 12BAA of the ASIC Act as a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments. Financial service is defined under s 12BAB.

¹³¹⁶ CCA (n 1311) at s 131A(2)(b).

¹³¹⁷ ACL (n 1316).

The ASIC Act explicitly promotes confident and informed participation of consumers in the financial system.¹³¹⁸ Key provisions cover:

- a. False and misleading representations or deceptive conduct.¹³¹⁹
- b. Unfair terms in consumer contracts.¹³²⁰
- c. Unconscionable conduct.¹³²¹
- d. Cash price to be stated in set circumstances.¹³²²
- e. Offering rebates, gifts, and prizes.¹³²³
- f. Bait advertising,¹³²⁴ referral selling¹³²⁵, unsolicited financial services, credit, and debit cards.¹³²⁶
- g. Accepting payment without intending or being able to supply as ordered.¹³²⁷
- h. Harassment and coercion.¹³²⁸
- i. Pyramid selling.¹³²⁹

Excising financial products and services in terms of section 131A of the CCA has proven problematic in certain instances, resulting in some uncertainty and complexity around the extent of applicability of the ACL to financial products and services.¹³³⁰ For instance, it is unclear whether innovative fintech products and services such as crypto assets or mobile money service fall within the scope of the definition of a financial product¹³³¹ and therefore are subject to consumer

¹³¹⁸ ASIC Act (n 677) at s 2(b).

¹³¹⁹ *Ibid* at s 12BB.

¹³²⁰ *Ibid* at s 12BF and s 12DA.

¹³²¹ *Ibid* at s 12CA. Note 7 covers unconscionable conduct under unwritten law.

¹³²² *Ibid* at s 12DD.

¹³²³ *Ibid* at s 12DE.

¹³²⁴ *Ibid* at s 12DG.

¹³²⁵ *Ibid* at s 12DH.

¹³²⁶ *Ibid* at s 12DL and s 12DM.

¹³²⁷ *Ibid* at s 12DI.

¹³²⁸ *Ibid* at s 12DJ.

¹³²⁹ *Ibid* at s 12DK note 7.

¹³³⁰ Philip H Clark 'Curbing the abuse of a dominant position through unfair contract terms' in Luca Siliquini-Cinelli & Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law: A comparative Perspective* (2017) 197. See Nicola Howell & Catherine Brown 'Submission to ALRC Financial Services Inquiry Interim Report A' available at https://eprints.qut.edu.au/238704/1/SubmissionALRCInterimReportA_Final_20220308.pdf, accessed 30 August 2023.

¹³³¹ ACL s Chapter 1 s 2 and ASIC Act s 12BAA.

protection under the ACL.¹³³² In *Australian Competition and Consumer Commission v CLA Trading*¹³³³ the court noted that different conduct arising in the context of the same contract (such as a car rental contract) may, depending upon the constituent facts, attract the jurisdiction conferred under the ASIC Act or it may not due to the scope of definition of financial product and financial services and related exclusionary provisions under section 12BA.¹³³⁴ For instance section 12DA of the ASIC Act on misleading and deceptive conduct and section 12DB on false and misleading representations apply only in relation to financial services but are silent on financial products, although their equivalent in section 18 and section 29 of the ACL applies to both goods and services.¹³³⁵ Likewise, section 25(g) of the ACL lists as an example of unfair terms, a provision that permits one party to unilaterally to vary the characteristics of the goods or services but the equivalent section in the ASIC Act only applies to financial services.¹³³⁶

Howell and Brown argue that the excision of financial products and financial services from the ACL has also resulted in certain difficulties in practical application and different consumer protection mechanisms between retail financial customers and general consumers.¹³³⁷ For example, under the ASIC Act there are implied warranties that financial services will be provided with due care and skill, and that services will be reasonably fit for the purpose or result desired by the customer or of such a nature and quality that they might reasonably be expected to achieve that result.¹³³⁸ The ASIC Act has no guarantees or implied warranties for financial products.¹³³⁹ By contrast, the ACL has detailed guarantees as to the acceptable quality of goods supplied to general consumers i.e. goods are fit for purpose, acceptable in appearance and finish, free from defects,

¹³³² Howell & Brown (n 1371) at 2. See also The Treasury 'Unfair trading practices Consultation on the design of proposed general and specific prohibitions' November 2024 at 4 available at

<https://treasury.gov.au/sites/default/files/2024-11/c2024-602157-cp.pdf>, accessed 26 December 2024

¹³³³ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* (2016) FCA 377.

¹³³⁴ *Ibid* para 23 and para 31.

¹³³⁵ *Ibid* para 23.

¹³³⁶ ASIC Act (n 677) at s 12BH(g).

¹³³⁷ Howell & Brown (n 1371) at 3.

¹³³⁸ ASIC Act (n 677) at s 12ED.

¹³³⁹ Jeannie Marie Paterson 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 *Melbourne University Law Review* 252 at 261.

safe, and durable ‘as a reasonable consumer acquitted with the conditions of the goods would regard as acceptable.’¹³⁴⁰

The following section addresses fairness controls under Australian law.

7.3 FAIRNES CONTROL MECHANISMS UNDER AUSTRALIAN LAW

Fairness has its roots in principles of justice and equity¹³⁴¹ and has found expression in common law, legislation, and case law. Paterson makes the argument that:

In an effective and comprehensive consumer protection regime, prohibitions based on generalised standards of fairness or conscience provide an important "safety net" response to predatory and other offensive market practices not caught in some other way by more specific forms of regulation.¹³⁴²

It follows that the approach and test applied to assess fairness is central to an effective retail financial consumer protection regime.

7.3.1 Control of unfair terms

Interestingly, Part 2–3 of the ACL which specifically addresses unfair contracts terms was modelled on the EC Council Directive on Unfair Terms and the UTCCR in the UK.¹³⁴³ Similar provisions modelled on the ACL and dealing with unfair contract terms are incorporated under Division 2 Subdivision BA of the ASIC Act. In determining whether a term is unfair, both Australia and the UK follow similar approaches, which involve (1) a definition of what is unfair, (2) a requirement for the court to consider certain factors in determining whether a term is unfair and (3) setting out a non-exhaustive list of terms that may be considered as unfair.¹³⁴⁴

¹³⁴⁰ Howell & Brown (n 1371) at 3. See also ASIC Act (n 677) at part 2 division 2 s 12ED. CCA (n 1311) at Schedule 2 part 3-2 s 54.

¹³⁴¹ Steve Worthington & James Devlin ‘Fairness and financial services in Australia and the United Kingdom’ (2013) 31 *International Journal of Bank Marketing* 289.

¹³⁴² Paterson & Brody (n 740) at 332. See also Felstead (n 742) at 305 .

¹³⁴³ Jeannie Marie Paterson ‘Consumer Protection Law in Australia - Emerging Law from a Rise in Class Actions’ *Journal of European Consumer and Market Law* (2024) 13 157 at 159.

¹³⁴⁴ Jeannie Marie Paterson ‘The Australian Unfair Contract Terms Law: the Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts (2009) 33 *Melbourne University Law Review* 934 at 946.

The legislative protection against unfair contract terms is targeted at standard form contracts, which are not individually negotiated with the customer and are offered on a 'take it or leave it' basis.¹³⁴⁵ This approach is distinguishable from the UK and the CPA in South Africa, where protections against unfair contract terms apply whether the contract was individually negotiated or not.¹³⁴⁶ It is argued that the high transaction costs of reading contract terms, trying to understand them and negotiating them is high and thus all consumers dealing with standard terms – whether individually negotiated or not– should be protected against substantively unfair terms.¹³⁴⁷

a. Meaning of unfair

Section 12BF of the ASIC Act provides that a term is void if it is unfair and it is part of a standard form contract concerning a financial product or financial service.¹³⁴⁸ However, where the contract can operate without the unfair term, the agreement continues to be binding on the parties. An aggrieved party can approach the court to declare an unfair term void and request redress for loss suffered due to the unfair term. A term will be considered to be unfair¹³⁴⁹ if:

- a. It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- b. It is not reasonably necessary to protect the legitimate interests of the party who the term would advantage; and

¹³⁴⁵ ASIC Act (n 677) s 12BF(1)(b). Paul Latimer 'Protecting consumers from unfair contract terms: Australian comparisons' (2016) 44 *Australian Business LR* 1 at 2. See also Commonwealth of Australia 'Unfair Contract Terms – A guide for businesses and legal practitioners' March 2016 at 7, available at <https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>, accessed 15 May 2023.

¹³⁴⁶ See CRA (n 653) ss 61 and 62. See also House of Commons Library 'CRA 2015 – Research Briefing' 17 May 2022 at 20 available at <https://researchbriefings.files.parliament.uk/documents/SN06588/SN06588.pdf>, accessed 10 November 2024.

¹³⁴⁷ See Kenneth Yin et al *Contract Law: Cases and Materials*. (2020) 87–88.

¹³⁴⁸ ASIC Act (n 677) at s 12BF states that the law relating to unfair contract terms applies to financial products and financial services. Stephen G Corones & Philip H Clarke *Australian Consumer Law: Commentary and Materials* 4 ed (2011) 619.

¹³⁴⁹ ASIC Act (n 677) at s 12BG (1).

- c. It would cause a party detriment – whether financial or otherwise – if it were to be applied or relied on.

The ASIC Act, similar to the Conduct Standard and the CPA,¹³⁵⁰ does not refer to the requirement of good faith in the definition of an unfair term.¹³⁵¹ This is distinguishable from section 62(4) of the CRA in the UK, which states that a term is unfair if '...contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.

In determining whether a contract is unfair, Australian courts will consider the contract as a whole and the extent to which it is transparent. Transparent refers to 'reasonably plain language, legible, presented clearly; and readily available to any party affected by the term'.¹³⁵² Therefore, the process followed to conclude consumer contracts and procedural fairness considerations are at the heart of requirements for disclosure and access to honest and adequate information.

One of the criticisms of the ACL which would also be applicable to the ASIC Act is that it offers limited protections against unfair terms, for instance in relation to the 'internet of things' based on virtual interoperable customer information.¹³⁵³ By illustration, despite the current wording of the ACL, research has indicated that these provisions may be insufficient and outdated to address the risk associated with novel financial products and services and online practices that subtly distort customer choice without being obviously misleading.¹³⁵⁴ For instance, where there is inadequate disclosure, and the consumer suffers significant detriment, it is unclear whether the supplier can still be liable if there was no blatant misrepresentation, deceptive, misleading or, unconscionable conduct, or other prohibited conduct prohibited by the ACL.¹³⁵⁵ Such grey areas

¹³⁵⁰ See CCA (n 1311) at s 24 and ASIC Act (n 677) at s.12BG. See In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (2015) FCA 1204 para 42 which confirms that good faith was removed from the Australian definition given its 'uncertainty'. See Naudé & Eiselen (n 404) at Introduction 3-4 which indicates that although good faith is not expressly mentioned in the CPA definition, it is at the 'heart of the definition of Chapter 2, Part F & G.

¹³⁵¹ ASIC Act (n 677) at s 12BG. See In *ASIC v Chrisco Hampers* (n 1391) paras 49, 53–56 and 69. Edelman J indicated that in assessing significant imbalance as the first element, it is relevant to consider the contract as a whole and to assess whether 'any burden that the contract imposes on the consumer is matched by a corresponding right or (as a correlative) a corresponding duty on the supplier'.

¹³⁵² *Ibid* at s 12BG(3).

¹³⁵³ Harkin, Mann & Warren (n 1356) at 99.

¹³⁵⁴ *Ibid* at 104.

¹³⁵⁵ *Ibid* at 99.

can result in a ‘race to the bottom’ where industry participants exploit loopholes in coverage with unfair outcomes for customers.¹³⁵⁶ Furthermore, for a term to be considered unfair, it presupposes that such a term must be incorporated in contract. Therefore, absence of a term (like a privacy and cyber risk related term) in a contract may theoretically exclude such practice from determination under the fairness test.¹³⁵⁷

Indeed, procedural fairness measures around transparency and disclosure have proven inadequate to protect consumer interests when dealing with complex financial products and services.¹³⁵⁸ Therefore, law has evolved to also ensure substantive fairness. For instance, the inclusion of mandatory standards of quality on the supply of financial products and financial services; the prohibition of unfair contract terms;¹³⁵⁹ retail product design and distribution regulation;¹³⁶⁰ and ‘prescriptive bright line rules’ targeted at particular practices such as payday lending or unsolicited day-to-day lending,¹³⁶¹ are all features to ensure substantive fairness.

Similar to the CRA in the UK, the Australian legislation incorporates a list of examples of terms that may be unfair,¹³⁶² that offer guidance and ‘do not create a legal presumption that they are unfair’.¹³⁶³ Although the list is indicative and non-exhaustive, it does not create a presumption of unfairness and thus provides flexibility to consider the context in each case. The list assists regulators, financial institutions, and customers in identifying the types of terms that may be problematic and must be treated cautiously.¹³⁶⁴

In determining whether a term must be included in the list under section 12BH, the Governor-General must evaluate the potential consumer detriment arising from the term and

¹³⁵⁶ Ibid 4–5.

¹³⁵⁷ Damian Clifford & Jeannie Marie Paterson ‘Consumer privacy and consent: Reform in the light of Contract and Consumer Protection Law (2020) 94 *Australian Law Journal* 741–751 at 750.

¹³⁵⁸ Paterson (n 1384) at 934.

¹³⁵⁹ Paterson & Howell (n 1310) at 8.

¹³⁶⁰ Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

¹³⁶¹ Paterson & Brody (n 740) at 340. In *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* (2014) FCA 926, the sale of consumer credit insurance to customers of a payday loan business was found to be unconscionable because the terms of the credit insurance were self-evidently unsuitable and unlikely ever to confer a benefit to the target customers.

¹³⁶² ASIC Act (n 677) at s 12BH.

¹³⁶³ Australia Unfair Contract Terms (n 1259) at 13.

¹³⁶⁴ Clark (n 1330) at 205.

general impact on business and public interest.¹³⁶⁵ The list of terms that may be considered unfair includes:

- a. a term permitting one party (but not another party) to avoid, limit performance, terminate or vary, to renew or not renew the contract;¹³⁶⁶
- b. a term penalising one party (but not another party) for a breach or termination of the contract;¹³⁶⁷
- c. terms permitting one party to unilaterally vary financial services to be supplied under the contract,¹³⁶⁸ or the upfront price payable under the contract without the right of another party to terminate the contract,¹³⁶⁹ or to unilaterally determine whether the contract has been breached or to interpret its meaning;¹³⁷⁰
- d. a term permitting one party to assign the contract to the detriment of another party without that other party's consent.¹³⁷¹
- e. terms limiting one party's vicarious liability for its agents,¹³⁷² or right to sue another party¹³⁷³ or the evidence one party can adduce in proceedings relating to the contract;¹³⁷⁴ and
- f. terms imposing the evidentiary burden on a party in proceedings relating to the contract.¹³⁷⁵

*Australian Competition and Consumer Commission v Valve Corporation*¹³⁷⁶ demonstrated that the court will strike down terms where it is unfair in terms of the ACL.

¹³⁶⁵ ASIC Act (n 677) at s 12BH(2).

¹³⁶⁶ *Ibid* s 12BH(a).

¹³⁶⁷ *Ibid* s 12BH(b).

¹³⁶⁸ *Ibid* s 12BH(g).

¹³⁶⁹ *Ibid* s 12BH(f).

¹³⁷⁰ *Ibid* s 12BH(h).

¹³⁷¹ *Ibid* s 12BH(j).

¹³⁷² *Ibid* s 12BH(i). See also UNCTAD (n 13) at 21.

¹³⁷³ *Ibid* s 12BH(k).

¹³⁷⁴ *Ibid* s 12BH(l).

¹³⁷⁵ *Ibid* s 12BH(m).

¹³⁷⁶ *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) FCA 196.

7.3.2 Terms excluded from assessment for fairness

The following core terms are excluded from the assessment for fairness:¹³⁷⁷

- a. Term(s) defining the primary subject matter of the contract.
- b. Term(s) setting out the upfront price payable under the contract.
- c. Term(s) required, or expressly permitted, by a law of the Commonwealth, a state or territory.
- d. Transparent term(s) in an insurance contract under the Insurance Contracts Act that is disclosed at or before the agreement is entered into and sets an amount of excess or deductible under the contract.

The exclusion – in both the UK and Australia – of the subject matter of the contract and price in the assessment of fairness is controversial. Some argue that these elements should be driven by competitive forces and contracting parties should be left free to contract on the subject matter and price, provided the language is clear or transparent.¹³⁷⁸ At the same time, as was evidenced in *Director General of Fair Trading v First National Bank* the extent and scope of such exclusion of subject matter and price have proven challenging to delineate.¹³⁷⁹ For instance, the measure of the price relative to the quality of goods or services sold has been considered in the assessment of incidental or ancillary terms that do not define the main subject matter or price of the contract.¹³⁸⁰ Notably, in Australia, a more restrictive interpretation is adopted in delineating basic price, fees, and additional charges to avoid fees or charges being made to appear as though they are part of the basic price and to evade scrutiny under the unfair terms provisions.¹³⁸¹

¹³⁷⁷ ASIC Act (n 677) at s 12BI(2)–(3).

¹³⁷⁸ Clark (n 1330) at 209. See also Phillip Morgan ‘Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999: The End of the Road for Consumers?’ 2010 *Lloyd’s Maritime and Commercial Law Quarterly* 208 at 208

¹³⁷⁹ *Director General of Fair Trading* ((n 991) para 12. Philip Santucci ‘Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience’ (2011) 11 *Oxford University Commonwealth Law Journal* 171 at 171, states that the ACL was influenced, among others, by the UTCCR and ‘decisions of UK courts ... provide a counterpoint for understanding the operation of the test of unfairness...’. See also Yesim M Atamer ‘Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics’ (2017) 80 *The Modern Law Review* 624 at 626.

¹³⁸⁰ *Director General of Fair Trading* ((n 991) para 49. See also Whittaker (n 868) para 41-329.

¹³⁸¹ Alexandra Sims ‘Unfair Contract Terms: A New Dawn in Australia and New Zealand’ (2013) 39 *Monash University Law Review* 739 at 762.

7.3.3 The doctrine of unconscionability

Business models and practices designed to take advantage of customer vulnerabilities subtly and systemically have been a source of contention for consumer advocates and regulators.¹³⁸² A specific problem arises where the consumer has a ‘reduced ability’ to protect their interests, and their right to be treated with dignity is ignored.¹³⁸³

There are cases where unusually complex contract structures are adopted, or the risk associated with a financial product is underplayed.¹³⁸⁴ Case studies include instances of high fees charged to low income households for leasing low value vehicles without the option to purchase the car and without adequately explaining the model to customers.¹³⁸⁵ Another example relates to payday lending practices where high fees are charged to vulnerable persons for short term loans, trapping individuals in a vicious cycle of dependency on such loans.¹³⁸⁶

One of the notable provisions to address such predatory conduct and practices is the prohibition of unconscionable conduct.¹³⁸⁷ Over and above statutory provisions dealing with misleading and deceptive conduct,¹³⁸⁸ and false and misleading representations, the prohibition of unconscionable conduct can apply to conduct or a pattern of behaviour, ‘whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour’.¹³⁸⁹ This means that it is not necessary to demonstrate vulnerability in order to found an action for unconscionable conduct although this is often the case.¹³⁹⁰

¹³⁸² Paterson & Brody (n 740) at 331–32.

¹³⁸³ Ibid at 337.

¹³⁸⁴ Paul Harrison, Marta Massi & Kathryn Chalmers ‘Beyond door-to-door: The implications of invited in-home selling’ (2014) 48 *Journal of Consumer Affairs* 195. Paterson & Brody (n 740) at 333–34. *Australian Competition and Consumer Commission v Keshow* (2005) FCA 989.

¹³⁸⁵ Consumers Federation of Australia ‘Mass complaint made against Motor Finance Wizard’ *Consumer Action Law Centre* 16 August 2012 available at <http://consumeraction.org.au/media-release-bulk-complaint-made-against-motor-finance-wizard-to-the-credit-ombudsman-service/>, accessed 17 May 2023.

¹³⁸⁶ Paul Ali, Cosima Hay McRae & Ian Ramsay ‘The politics of payday lending regulation in Australia’ (2013) 39 *Monash University LR* 411.

¹³⁸⁷ CCA (n 1311) at Schedule 2, ss 20 and 21. See also ASIC Act (n 677) at ss 12BF, 2CA, 12CB and 12CC.

¹³⁸⁸ ASIC Act (n 677) at s 12DA.

¹³⁸⁹ Ibid at s 12DB. See also Jeannie Marie Paterson *Corones’ Australian Consumer Law* 5 ed (2023) chap 4 and 5.

¹³⁹⁰ *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) FCAFC 40 para 4.

The prohibition against unconscionable conduct under the ASIC Act is rooted in the meaning assigned under sections 21 and 22 of the ACL. Historically the prohibition under unwritten law was aimed at protecting the poor, uneducated and ignorant from unconscionable bargains where there was a risk of losing property due to the stronger party taking advantage of the situation.¹³⁹¹

However, due to the fact that the term ‘unconscionable’ is not defined, over time the courts have struggled to interpret this normative concept, resulting in some confusion in the application of the term.¹³⁹² Therefore, in determining whether conduct is unconscionable, the court is required not to have regard to any circumstances ‘that were not reasonably foreseeable at the time of the alleged contravention’.¹³⁹³ However, the court may have regard to the following factors:¹³⁹⁴

- a. the wording of the contract and circumstances around its formation;
- b. the manner and extent to which the contract is executed;
- c. the relative bargaining power of the parties;
- d. whether the customer was compelled by the supplier to adhere to conditions that were not reasonably necessary to protect the legitimate interests of the supplier;
- e. whether the customer understood the documents relating to the supply of financial services;
- f. whether undue influence, unfair tactics or pressure was exerted on the customer;
- g. the amount or cost of comparable or equivalent services;
- h. whether the conduct of the supplier is consistent for similar type transactions and customers;
- i. the extent to which the supplier acted unreasonably and failed to disclose foreseeable risks to the customer, or their intended conduct might affect the interests of the customer;

¹³⁹¹ *O’Rorke v Bolingbroke* (1877) 2 App Cas 814 at 822. Malcolm Cole ‘The Review of Unconscionable Conduct Bargains in Equity’ (1983) 57 *The Australian Law Journal* 260 at 279. David Harland ‘Unconscionable and unfair contracts: An Australian perspective’ in Roger Brownsword, Norma J Hird & Geraint G Howells (eds) *Good Faith in Contract: Concepts and Context* (1999).

¹³⁹² Felstead (n 742) at 289–290.

¹³⁹³ ASIC Act (n 677) at s 12CB(3).

¹³⁹⁴ *Ibid* at ss 12CB (4)(c) and 12CC.

- j. whether terms and condition of contract were open to negotiation and the conduct of the supply during and post contracting;
- k. whether the supplier reserved the right to unilaterally vary terms and conditions;
- l. the extent to which the supplier and customer acting in good faith; and
- m. applicable industry codes.

It is argued that unconscionability requires the kind of moral tainting that elicits condemnation due to misalignment with community values.¹³⁹⁵ Anchoring the doctrine on community morals enables conscionability to serve as a ‘safety net’ against systemic predatory models.¹³⁹⁶

Both procedural and substantive factors are included in the assessment to determine if conduct is unconscionable and the court weighs the combined effect of the different factors.¹³⁹⁷ It will not be adequate to put forward inequality in bargaining power to secure a remedy. In *Australian Securities and Investments Commission v Kobelt*,¹³⁹⁸ Kiefel CJ held that the doctrine of statutory unconscionability ‘requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage’.¹³⁹⁹ This case required an element of exploitation to distinguish unconscionable conduct from terms such as ‘unjust’, ‘unfair’ or ‘unreasonable’.¹⁴⁰⁰ However, questions remained around how far the doctrine of unconscionably extends beyond the doctrine of equity.¹⁴⁰¹

The narrow application of the ‘special disadvantage’ requirement to require innate or intrinsic weakness or disability without considering situational vulnerability, has been criticised.¹⁴⁰² Circumstances may arise ‘where statutory unconscionability arises without any pre-

¹³⁹⁵ *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) NSWCA 389. See also *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR 442 – 447.

¹³⁹⁶ Paterson & Brody (n 740) at 344.

¹³⁹⁷ *Ibid* at 342 and 352.

¹³⁹⁸ *Australian Securities and Investments Commission v Kobelt* (2019) HCA 18.

¹³⁹⁹ *Ibid* at 17–18.

¹⁴⁰⁰ *Ibid* at 48–9. See also Schmulow & O’Hara (n 1312) at 16.

¹⁴⁰¹ Jeannie Marie Paterson, Elise Bant & Matthew Clare ‘Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: ASIC v Kobelt’ (2019) 13 *Journal of Equity* 81 at 92.

¹⁴⁰² Pelma Jacinth Rajapakse & Jodi Gardner ‘The unconscionable conduct and subprime lending in Australia’ (2014) 29 *Banking & Finance Law Review* 485 at 487 and 504.

existing vulnerability or disadvantage'.¹⁴⁰³ Otherwise, victims of exploitative practices would not have had redress if they did not possess an inherent weakness.¹⁴⁰⁴ Similarly, if a narrow application of 'special disadvantage' was applied, customers that did not suffer special inherent disadvantages but became vulnerable and disadvantaged by Covid-19 lockdowns in 2020-2021,¹⁴⁰⁵ would not have redress for unconscionable conduct in providing inappropriate products or services.

Paterson & Brody argue that vulnerability is not a 'fixed category of existence', but it is situational and influenced by the changing context and circumstances of the customer and the prevailing market conditions.¹⁴⁰⁶ Therefore, remedies should be available against 'unconscientious use of power by stronger parties whether due to circumstance or condition'.¹⁴⁰⁷ The position was finally confirmed in *Australian Competition and Consumer Commission v Quantum Housing*¹⁴⁰⁸ where the court took the view that it is no longer necessary to prove special disadvantage. Rather the approach is to assess whether the conduct complained of constitutes 'a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience'.¹⁴⁰⁹ The approach in Australia differs somewhat to the UK where the equitable principle of unconscionable bargains is applied narrowly.¹⁴¹⁰

In the final analysis, the doctrine of unconscionability imposes a higher standard than the test of unfairness. The court in Australia has pointed out that if the bar for succeeding in a statutory unconscionability claim is lowered...it may 'only be possible if "unconscionable" is replaced with "unjust" or "unfair"'.¹⁴¹¹ Therefore, according to Australian courts, the doctrine is not an

¹⁴⁰³ *Pitt v Commissioner for Consumer Affairs* (2021) SASCA 24 para 161.

¹⁴⁰⁴ Rajapakse & Gardner (n 1443) at 506.

¹⁴⁰⁵ Lucinda O'Brien et al 'An Impending 'Avalanche': Debt Collection and Consumer Harm after COVID-19' (2021) 49 *Australian Business Law Review* 84 at 22

¹⁴⁰⁶ Paterson & Brody (n 740) at 338.

¹⁴⁰⁷ Ibid. See also *Aylesford v Morris* (1873) LR 8 Ch App 484 at 490. See also Garry A. Muir 'Stipulations for the Payment of Agreed Sums' (1985) 10 *Sydney Law Review* 503 at 514–515.

¹⁴⁰⁸ *ACCC v Quantum* (n 1431) at 596.

¹⁴⁰⁹ Ibid para 92. See also Mark Giancaspro 'It's Just Business' Or Is It? When an Efficient Breach of Contract Becomes Unconscionable Conduct under the Australian Consumer Law' *Monash University Law Review* (2022) 48 272 at 287–289.

¹⁴¹⁰ See section 6.4.9 above for a detailed discussion on the UK position.

¹⁴¹¹ *Paciocco* (n 1296) at 363. Allsop J in *Paciocco* noted that 'unjustness and unfairness are of a lower moral or ethical standard than unconscionability'.

unconstrained free-floating instrument of fairness but operates within a particular factual context.¹⁴¹²

Notwithstanding, there are still concerns that the prohibition of unconscionable conduct does not adequately address the promotion of fair trading and consumer protection because the standard to prove unconscionable conduct is higher.¹⁴¹³ The infusion of conscience-based doctrines and moral based reasoning can minimise the risk of unconscionable conduct arising in transactional settings.¹⁴¹⁴

7.3.4 Role of good faith in the determination of unconscionable conduct

Good faith is not directly included in the criteria to determine fairness of financial services under the ACL and similar provisions under the ASIC Act.¹⁴¹⁵ However, in determining whether conduct of a financial institution is unconscionable, the court may consider to what extent the supplier and the service recipient acted in good faith.¹⁴¹⁶ Within this context, good faith is not a standalone principle but it is included as one of the elements that a court may take into consideration in assessing whether conduct is unconscionable under section 122CC.¹⁴¹⁷ In *Australian Competition and Consumer Commission v Quantum* the court found the conduct of the suppliers to be unconscionable due to dishonest lack of good faith even though consumers had no special vulnerability.¹⁴¹⁸

The courts have confirmed that ‘there is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances.’¹⁴¹⁹ Although the legal position remains

¹⁴¹² *Bridge* (n 741) at 626.

¹⁴¹³ Felstead (n 742) at 286; Paterson & Brody (n 740) ; Gerard Brody & Katherine Temple ‘Unfair but not illegal: Are Australia’s consumer protection laws allowing predatory businesses to flourish?’ (2016) 41 *Alternative LJ* 169. Australian Government ‘Australian Consumer Law Review: Issues paper’ March 2016 available at https://consumer.gov.au/sites/consumer/files/2016/03/ACLreview_issues_paper.pdf, accessed 14 May 2023.

¹⁴¹⁴ Chris Maxwell & Matthew Harding ‘Private Law, Conscience and Moral Reasoning: The Role of the Judge’ (2022) 46 *Melbourne University Law Review* 123 at 152 –154.

¹⁴¹⁵ ASIC Act (n 677) at s 12BG.

¹⁴¹⁶ *Ibid* at s 12CC(1)(l).

¹⁴¹⁷ ASIC Act (n 677) at s 122CC(1)(l).

¹⁴¹⁸ *ACCC v Quantum* (n 1431) para 4.

¹⁴¹⁹ *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) NSWCA 187. *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) NSWCA 268.

unsettled and Australia is at a crossroad,¹⁴²⁰ moves are underway towards good faith playing a greater role in the performance of contracts.¹⁴²¹

While Australian courts have shown that they are more likely to implement the contract terms, Priestly JA in *Renard Construction (ME) Pty Ltd v Minister of Public Works*¹⁴²² noted that the concept of good faith in contract performance and fair dealing are aligned with prevailing community expectations and standards. Generally, the judiciary and legal profession are now accustomed to the courts applying standards of fairness to contracts which is ‘wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance’.¹⁴²³ However, a criticism against the principle of good faith is that ‘[it] does not offer a parameter for where a legal system should position itself on the spectrum between the poles of individualism and ‘altruism, or certainty and fairness, for the simple reason that the concept is too vague to offer any meaningful guidelines.’¹⁴²⁴

Importantly, *Overlook v Foxtel*¹⁴²⁵ clarified that

a party subject to good faith is not required to subordinate [their] own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes or could become “nugatory, worthless or, perhaps, seriously undermined”.¹⁴²⁶

Therefore, good faith referred to under section 12CC(1) of the ASIC Act and in contract performance, does not require a party to subordinate his interests to that of another¹⁴²⁷ but rather requires consideration of the legitimate interest of the other contracting party to benefit from the contract.¹⁴²⁸

¹⁴²⁰ Jessica Viven-Wilksch ‘Good faith in contracts: Australia at the crossroads’ (2019) 1 *Journal of Commonwealth Law* 273 at 276.

¹⁴²¹ *Ibid* at 283.

¹⁴²² *Renard Construction (ME) Pty Ltd v Minister of Public Works* (1992) 26 NSWLR 234.

¹⁴²³ *Ibid* at 112-13.

¹⁴²⁴ JP Schmidt ‘Art1:201: Good Faith and Fair Dealing’ in N Jansen & R Zimmermann (eds) *Commentaries on European Contract Law* (2018) at 144.

¹⁴²⁵ *Overlook Management BV v Foxtel Management Pty Ltd* (2002) NSWSC 17.

¹⁴²⁶ *Ibid* at 65. The court cited with approval McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

¹⁴²⁷ *Burger King* (n 1419) at 187.

¹⁴²⁸ Elisabeth Peden ‘Incorporating of terms of good faith in contract law in Australia’ (2001) 23 *Sydney LR* 222. A F Mason ‘Contract, good faith and equitable standards in fair dealing’ (2000) 116 *Law Quarterly Review* 66 at 69.

According to Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Limited*¹⁴²⁹ the obligation of good faith requires parties to:

- a. act honestly and ‘with fidelity to the bargain’;
- b. not act dishonestly and undermine the agreement or ‘the substance of the contractual benefit that was negotiated’; and
- c. act reasonably and with fair dealing, paying due regard to the interests of the other parties.

The position under the ASIC Act is distinguishable from the duty of utmost good faith that applies to life insurance contracts.¹⁴³⁰ Interestingly, the Australian Consumer Law Review noted that inclusion of a stricter duty of utmost good faith failed to show that it produces equal or better consumer protections.¹⁴³¹ Utmost good faith in insurance has been criticised for failing to stem reported misconduct in insurance due to ‘its legal imprecision, limited applicability and lack of consumer understanding’.¹⁴³² Therefore, the legislative definition of good faith will be crucial if the concept is to be included in financial sector law.

7.3.5 Proposal to introduce concept of ‘unfair trading’

Although there are ‘principles-based’ prohibitions on misleading and unconscionable conduct,¹⁴³³ there are calls in Australia to introduce a general prohibition on ‘unfair conduct’ as opposed to the current prohibition on unconscionable conduct.¹⁴³⁴ One of the criticisms against the unconscionability concept is the lack of community understanding of the concept.¹⁴³⁵ The

¹⁴²⁹ *Paciocco* (n 1296) para 288. See also Damien Clarke et al ‘The doctrine of good faith: The good the bad and the uncertain’ *Mondaq* 13 December 2017, available at <https://www.mondaq.com/australia/contracts-and-commercial-law/655274/the-doctrine-of-good-faith-the-good-the-bad-and-the-uncertain>, accessed 17 May 2023.

¹⁴³⁰ Insurance Contracts Act 1984 at s 13.

¹⁴³¹ Consumer Affairs Australia and New Zealand ‘Australian Consumer Law Review Final report’ March 2017 at 52–53, available at https://consumer.gov.au/sites/consumer/files/2017/04/ACL_Review_Final_Report.pdf, accessed 12 September 2023. See also Marilyn Warren ‘Good faith: where are we at?’ (2010) 34 *Melbourne University LR* 344 at 344.

¹⁴³² Andrew Schmulow, Baladev Dayaram & Sian Mullen ‘Consumer Protection in Insurance Contracts: The Need for a ‘Treating Customers Fairly’ Regime’ (2023) 8 *The International Review of Financial Consumers* 47 at 58.

¹⁴³³ Jeannie M Paterson & Elise Bant ‘Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online’ (2021) 44 *Journal of Consumer Policy* 1 at 1–2.

¹⁴³⁴ Felstead (n 742) at 286; Paterson & Brody (n 740); Brody & Temple (n 1454); Australian Consumer Law Issues Paper (n 1454).

¹⁴³⁵ Felstead (n 742) at 286.

suggestion is to prohibit ‘unfair trading’ similar to the European Union’s Directive on Unfair Commercial Practices in order to respond more broadly to predatory practices associated with new technologies.¹⁴³⁶

Therefore, in November 2024, the Treasury issued a consultation paper regarding the proposed introduction of a principles-based general prohibition and specific prohibitions aimed at unfair trading practices that actually or are likely to distort or manipulate the behaviour or economic decision-making of consumers and cause detriment to consumers.¹⁴³⁷ The proposed general prohibition has a non-exhaustive ‘grey-list’ of conduct to be considered unfair trading practices which also includes omission or inadequate i.e. unclear, unintelligible, ambiguous or untimely disclosure of material information.¹⁴³⁸

However, the Treasury consultation paper on prohibited practices does not include an express requirement of ‘professional diligence or good faith’ on the basis that the proposed test prohibits unreasonable conduct and good faith is an established concept under Australian law, requires parties to a contract ‘to exercise powers reasonably and not arbitrarily or for some irrelevant purpose’.¹⁴³⁹

7.4 APPLICABILITY OF THE TCF PRINCIPLES IN AUSTRALIA

Australia does not have a TCF framework to support delivery of fair customer outcomes similar to the UK and South Africa. Following the systemic financial sector misconduct reported in the Hayne Commission report, some academic scholars such as Howell, Wilson and Schmulow have proposed that Australia should adopt a TCF framework similar to South Africa and the UK.¹⁴⁴⁰ This is amplified by survey results from 2022 highlighting persisting perceptions of customers that fairness is still lacking.¹⁴⁴¹

¹⁴³⁶ Paterson & Bant (n 1474) at 2.

¹⁴³⁷ The Treasury (n 1373).

¹⁴³⁸ Ibid at 15.

¹⁴³⁹ The Treasury (n 1373) at 14.

¹⁴⁴⁰ Nicola Howell et al ‘The case for a “Treating Customers Fairly” regime in Australia: evidence from other jurisdictions and a consumer survey’(2023) 30 *Competition and Consumer Law Journal* 183-208 at 2. See also Andrew Schmulow et al ‘Treating Customers Fairly. A concept. A framework. An alternative? Australian Law Reform Commission Review of the Legislative Framework for Corporations and Financial Services Regulation’ (2021) *ALRC Review* 1 at 16.

¹⁴⁴¹ Howell et al (n 1440) at 2–3.

Fairness lies close to ‘the heart of community standards and expectations about dealings with consumers’,¹⁴⁴² therefore the Hayne Commission outlined the following six fundamental norms of conduct¹⁴⁴³, which incapsulate TCF:¹⁴⁴⁴

- a. Obey the law.
- b. Do not mislead or deceive.
- c. Act fairly.
- d. Provide services that are fit for purpose.
- e. Deliver services with reasonable care and skill.
- f. When acting for another, act in the best interests of that other party.

Notably, a Fairness Jurisdiction Project Outcomes¹⁴⁴⁵ guide has been published by AFCA to assist the ombudsman in addressing customer complaints. The guide does not define fairness, nor does it establish a test for fairness in assessing complaints.¹⁴⁴⁶ However several tools are introduced, including a fairness navigation tool illustrated below:¹⁴⁴⁷

¹⁴⁴² Financial Services Royal Commission ‘Public Hearing’ 12 February 2018 at 8, available at <https://financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/12-february-2018-initial-public-hearing.pdf>, accessed 15 May 2023. James Shipton ‘The fairness imperative’ *Australian Securities & Investments Commission* 27 March 2019, available at <https://asic.gov.au/about-asic/news-centre/speeches/the-fairness-imperative/>, accessed 16 May 2023.

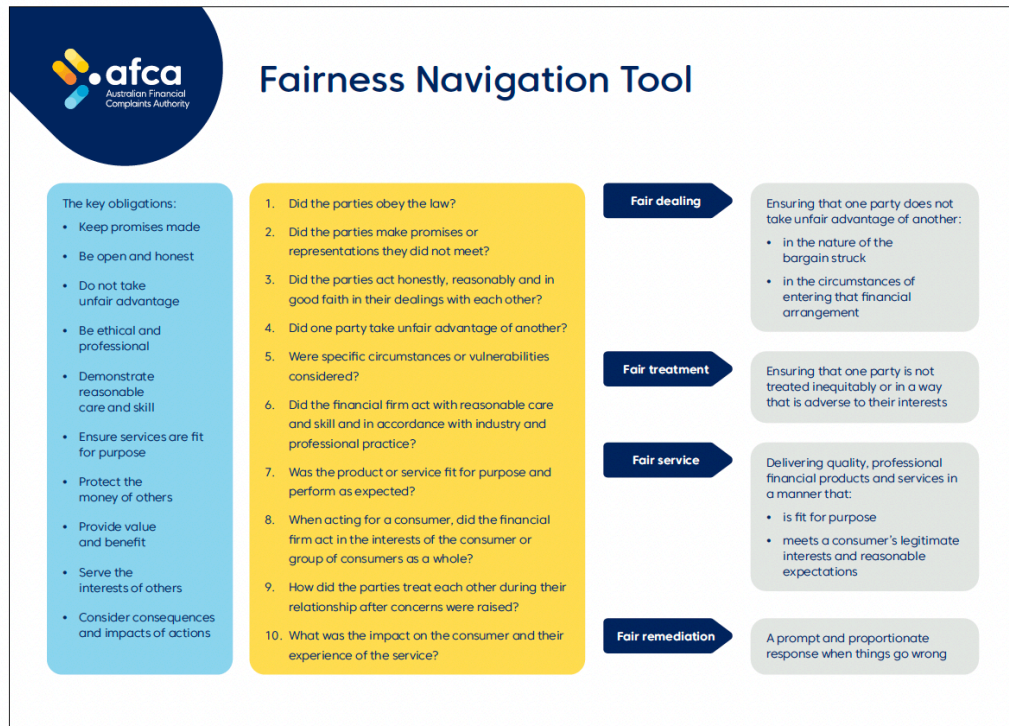
¹⁴⁴³ Hayne (n 55) at 8.

¹⁴⁴⁴ Daniel Crennan ‘The future of the corporation: The regulator’s perspective’ *Australian Securities & Investments Commission* 29 October 2019, available at <https://asic.gov.au/about-asic/news-centre/speeches/the-future-of-the-corporation-the-regulator-s-perspective/>, accessed 15 May 2023.

¹⁴⁴⁵ AFCA ‘Report on outcomes: Fairness Jurisdiction Project’ (2022) available at <https://www.afca.org.au/about-afca/fairness/fairness-project>, accessed on 15 May 2023.

¹⁴⁴⁶ *Ibid* at 10.

¹⁴⁴⁷ *Ibid* at 13.



13

Fairness Jurisdiction Project

Ensuring consistency of experience

Adoption of TCF in the South African banking industry is farther than their Australian counterparts but gaps still remain.¹⁴⁴⁸ Therefore, with the review of the financial services regulatory framework by the ALRC, there is an opportunity for Australia to learn from the principles-based and outcomes-focused TCF principles,¹⁴⁴⁹ and require firms to demonstrate how TCF is being implemented in their organisations.¹⁴⁵⁰ Furthermore, there is an opportunity to develop a more coherent regulatory framework that is sensitive to the growing need for a more effective regime to address the purpose of delivering fair outcomes for customers.¹⁴⁵¹ This thesis concurs with the view that ‘if a principles-based [TCF] regime is supported by an appropriate supervision and enforcement regime, the risk of firms setting, and maintaining, inappropriate standards is low’.

¹⁴⁴⁸ Schmulow (n 753) at 35.

¹⁴⁴⁹ Howell et al (n 1440) at 2.

¹⁴⁵⁰ Howell et al (n 1440) at 7. Schmulow et al (n 1440) at 16.

¹⁴⁵¹ Crennan (n 1485).

7.5 CONCLUSION

Despite the uncertainty around the extent of applicability of the ACL to financial product and financial services, the protections afforded to retail financial customers in Australia under the ASIC Act are overall equivalent to protections to general consumers under the Australian Consumer Law. However, developments in Australia over a period of 25 years since adoption of Twin Peaks show persisting structural, process and outcomes gaps in the country's financial sector regulatory framework to deliver fair customer outcomes for retail financial customers. Material gaps that persisted over the years have resulted in recommendations to reform and simplify the law.¹⁴⁵² Consequently, the ALRC¹⁴⁵³ in its report in 2021, recommended reforming and supporting the development of financial services legislation that enables 'compliance with the substance and intent of the law, and laying the foundations for an adaptive, efficient, and navigable regulatory framework'.¹⁴⁵⁴ Industry participants also support a better mechanism to 'integrate and balance' principles and norms with 'more detailed and prescriptive rules'.¹⁴⁵⁵

The final report of the ALRC was tabled in January 2024 with an overall finding that the current regime is overly complex.¹⁴⁵⁶ Over 58 recommendations were made to streamline the legislative framework. The report advocates, among others, the use of consistent terminology to reflect similar concepts and a single powerful, broad prohibition of unfair practices and disclosure aimed at promoting understanding.¹⁴⁵⁷

The accompanying background paper on unconscionable, deceiving and misleading conduct¹⁴⁵⁸ highlighted that having several statutory provisions aimed at the same issues increases the risk of litigation and legal costs whilst making it more difficult for users to understand and

¹⁴⁵² Australian Government 'Restoring trust in Australia's financial system: Financial Services Royal Commission implementation roadmap' August 2019, available at https://treasury.gov.au/sites/default/files/2019-08/399667_Implementation_Roadmap_final.pdf, accessed 16 May 2023.

¹⁴⁵³ ALRC (n 1312).

¹⁴⁵⁴ Ibid at 5.

¹⁴⁵⁵ Ibid at 8.

¹⁴⁵⁶ ALRC Report 141 *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (2024) available at <https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf>, accessed 27 December 2024.

¹⁴⁵⁷ Ibid at FSL 9–4 . See also Recommendation 35; 36 and 37.

¹⁴⁵⁸ ALRC Background Paper 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law (FSL9) - FS19 Legislative Framework for Corporations and Financial Services Regulation' December 2022 available at <https://www.alrc.gov.au/wp-content/uploads/2022/12/FSL9-All-roads-lead-to-Rome.pdf>, accessed 27 December 2024.

apply the ‘telephone directory-sized’ rule book,¹⁴⁵⁹ and thus reducing the likelihood of proper compliance.¹⁴⁶⁰ Recommendation 24 of the final report provides that financial sector legislation should be structured and framed to enhance navigation, comprehension, and communication of the fundamental norms of behaviour underpinning the Legislation. The recommendation provides the following useful principles:

- a. ‘Provisions should have thematic and conceptual coherence (coherence).
- b. Related provisions should be proximate to one another (grouping).
- c. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (intuitive flow).
- d. The most significant provisions should precede less significant provisions or more technical detail (prioritisation).
- e. Legislation should be as succinct as practicable (succinctness).
- f. Provisions should be designed in a way that avoids duplication and minimises overlap (consolidation).
- g. Legislation should be structured and framed to help users develop and maintain mental models that enhance navigability and comprehensibility (mental models).¹⁴⁶¹

Lessons from Australia are instructive to South Africa, and it will be prudent for both the legislature and the FSCA to adopt targeted strategies to mitigate the risk of South Africa stumbling over the same obstacles that Australia experienced. South Africa can take the following lessons from Australia:

- a. Heed the recommendations from the Hayne Commission including the need to ensure information sharing and coordination that is not ‘discretionary [or at a high level] but built into the operating procedures of both agencies’.¹⁴⁶²
- b. Establish an effective regulatory oversight mechanism, promote regulator accountability and mitigate against perceptions on undue influence from the sector

¹⁴⁵⁹ Ibid at FSL 9–28.

¹⁴⁶⁰ Ibid.

¹⁴⁶¹ ALRC ‘Final Report Confronting Complexity: Reforming Corporations and Financial Services Legislation ALRC Report 141’ November 2023 at 18 available at <https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf>, accessed 27 December 2024.

¹⁴⁶² Godwin, Ramsay & Schmulow (n 1266) at 76–8.

to the detriment of consumers. South Africa must manage this risk of ‘regulator capture’ which was identified as a potential risk in Australia.

- c. Establish a competent, adequately skilled, and resourced specialist consumer protection unit within the conduct regulator to ensure that customer interests are embedded and incorporated throughout the value chain of the conduct regulator. The unit must be headed by a skilled, experienced, and senior leader in financial consumer protection. In order to elevate the profile of the portfolio, the incumbent must serve in an executive or senior position within the conduct regulator.
- d. Strengthen capabilities for proactive and predictive monitoring using statistical and risk analysis methodologies similar to techniques applied by the PA.
- e. Develop (1) a definition of what is unfair, (2) introduce an indicative and exhaustive grey-list of terms that may be considered unfair and (3) outline factors that a court should consider in determining whether a term is unfair such as the extent of transparency of the term and the contract as a whole.¹⁴⁶³
 - i. The definition of fairness in the CPA should be amended to incorporate the duty of good faith. In turn, good faith must be defined to incorporate the elements outlined above by Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Limited*.¹⁴⁶⁴
 - ii. Similarly, the COFI Bill and the Conduct Standard should be amended to incorporate the definition of fairness which includes the element of a duty of good faith. In turn, good faith must be defined to incorporate the elements outlined above by Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Limited*.¹⁴⁶⁵
- f. Insert an indicative non-exhaustive grey-list of the types of conduct that would presumptively be considered as unfair – similar to Regulation 44 of the CPA, section 12BH of the ASIC Act and Part 1 Schedule 2 of the CRA.¹⁴⁶⁶

¹⁴⁶³ ASIC Act (n 677) at s 12BG.

¹⁴⁶⁴ *Paciocco* (n 1296) para 288.

¹⁴⁶⁵ *Ibid* para 288.

¹⁴⁶⁶ *Clark* (n 1330) at 197.

- g. Consider appropriate terms that should be prohibited outright similar to section 52 of the CPA.
- h. The CPA in South Africa incorporates the doctrine of unconscionability,¹⁴⁶⁷ although it is omitted in financial sector law. To address the very narrow scope of the doctrine and the lack of general community understanding of the concept which is neither plain nor easily understandable the amendments below should be considered:
 - i. The prohibition of ‘unfair conduct’ must be incorporated in COFI and defined in a manner that is easy to understand.¹⁴⁶⁸
 - ii. The wording of the CPA and COFI should be aligned, and the word ‘unconscionable conduct’ can be replaced with a more universal word such as ‘prohibited unfair conduct’ or ‘prohibited unfair trading’.
 - iii. The test for unfair conduct proposed in Chapter 6 of this thesis must be considered.¹⁴⁶⁹

Finally, it is critical that South Africa actively manages the risk of legislative inattention which can result in ‘ill-conceived and poorly crafted legislation’¹⁴⁷⁰ It is said that conduct regulation serves an ‘expressive function’ of the law through legal expressions which identify norms and influence social action about appropriate behaviour’.¹⁴⁷¹ An unnecessarily complex regulatory framework and supervisory architecture frustrates this function and limits its ability to be accessible, understood and consequently to be acted upon.¹⁴⁷²

¹⁴⁶⁷ CPA (n 16) at s 40.

¹⁴⁶⁸ Paterson & Bant (n 1474) at 2.

¹⁴⁶⁹ See criterion proposed in section 5.4 above.

¹⁴⁷⁰ Elise Bant & Jeannie Marie Paterson ‘Misleading Conduct Before the Federal Court: Achievements and Challenges’ in Pauline Ridge and James Stellios (eds) (2018) *The Federal Court’s Contribution to Australian Law: Past, Present and Future* 165 at 178. See also ALRC Background Paper (n 1371) at FSL 9–29.

¹⁴⁷¹ Andrew Godwin, Vivienne Brand and Rosemary Teele Langford ‘Legislative Design — Clarifying the Legislative Porridge’ (2021) 38 *Company and Securities Law Journal* 280 at 287.

¹⁴⁷² See William Isdale & Christopher Ash ‘Undue Complexity in Australia’s Corporations and Financial Services Legislation’ 30 November 2021 *Australian Law Reform Commission News* available at <https://www.alrc.gov.au/news/undue-complexity/>, accessed 27 December 2024.

CHAPTER 8: SUMMARY OF EVALUATION, RECOMMENDATIONS AND CONCLUSION

8.1 INTRODUCTION

This chapter summarises key observations from previous chapters. It makes recommendations to (i) strengthen the overarching regulatory framework, (ii) enhance the regulatory oversight structures to support the delivery of fair customer outcomes for retail financial consumers, and (iii) to develop further and deepen understanding of the notion of fairness within a principles-based, outcomes-focused regulatory approach in financial service. It ends with a summary of recommendations and some brief closing remarks.

8.2 ADOPTING SYSTEMS THINKING TO REGULATION, SUPERVISION, OVERSIGHT, MANAGEMENT, MONITORING, AND APPLICATION OF TCF

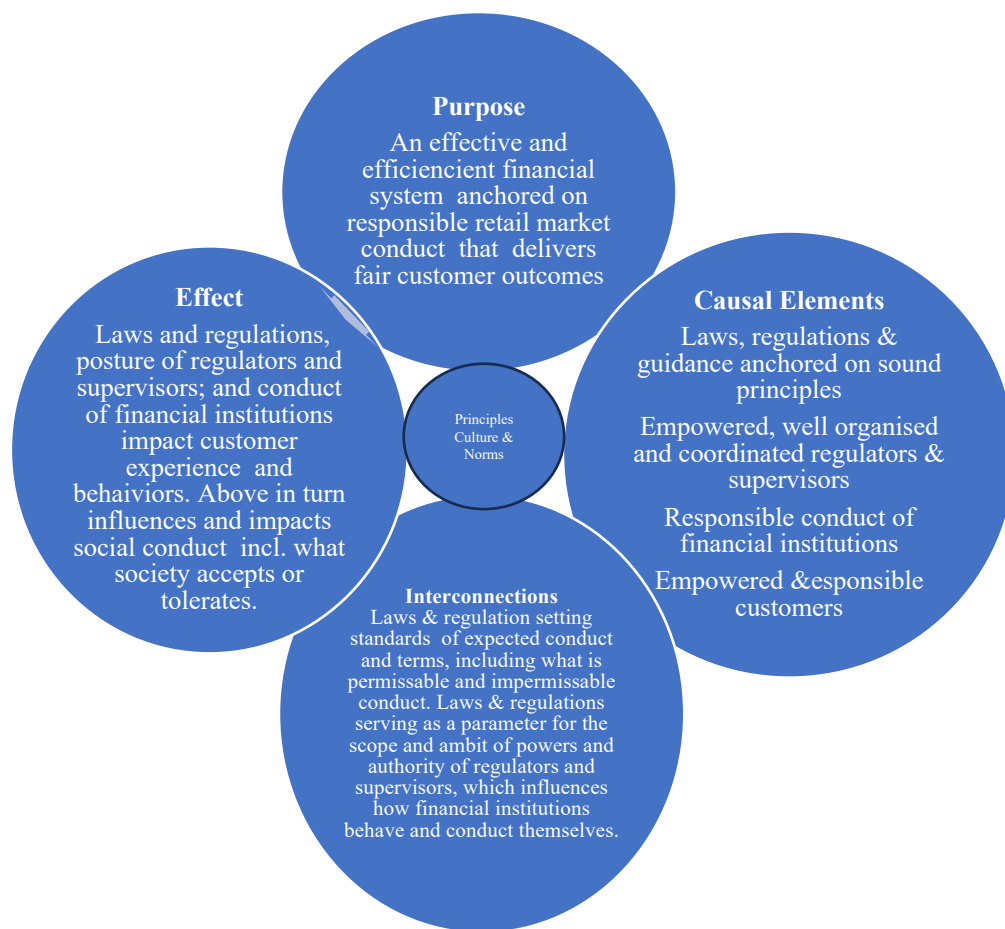
The relationships in the financial system are dynamic, multidimensional, complex and non-linear and therefore require adopting a holistic systems thinking approach that considers the interconnectedness.¹⁴⁷³ When looking at retail financial consumer protection, it is thus necessary to consider the system in which it is embedded, its component parts, their interactions, causality (cause and effect feedback loops to understand what actions or behaviours cause what outcomes), and to address the root causes of poor customer outcomes, not just symptoms.¹⁴⁷⁴

Simplifying the regulatory architecture, enhancing supervisor cooperation, coordination, and accountability measures, closing gaps, and reducing ambiguity and inconsistencies in the fairness control mechanisms applicable to retail banking are key components of retail financial consumer protection. The retail consumer protection regulatory architecture and fairness controls operate like an interconnected ecosystem to deliver fair customer outcomes, enabled by a principle-based and outcomes-focused regulatory approach supported by an appropriate risk-based set of rules.

¹⁴⁷³ Jaaron & Backhouse (n 87) at 1076–1077.

¹⁴⁷⁴ Arnold & Wade (n 88) at 674–675.

Therefore, an effective system to manage conduct risk must be more than a collection of its parts. It should be characterised by an appreciation of the dynamic complexity¹⁴⁷⁵ of interrelated components and elements that sometimes operate non-linearly.¹⁴⁷⁶ Systems thinking requires an analysis to identify and understand the retail market conduct ecosystem, its components or elements, players, dependencies, interconnections, and behaviours so that retail consumer protection mechanisms adopted can produce desired outcomes.¹⁴⁷⁷ Below is a systems illustration of the interconnected purpose, and elements operating together as one ecosystem to deliver fair customer outcomes.



¹⁴⁷⁵ Grenville (n 12).

¹⁴⁷⁶ Arnold & Wade (n 88) at 670–672.

¹⁴⁷⁷ Ibid at 675.

8.3 COMPARISON OF THE UK, AUSTRALIAN, AND SOUTH AFRICAN REGULATORY AND SUPERVISORY OVERSIGHT STRUCTURE FOR RETAIL FINANCIAL CONSUMER PROTECTION

South Africa, the UK, and Australia have adopted the twin peaks model of regulation and supervision, which has advanced the establishment of two peak regulators for financial services.¹⁴⁷⁸ Under the twin peaks model, the focus of the prudential regulator is on safety, soundness, and stability, and it is aimed at managing the risk of bank failure.¹⁴⁷⁹ Through its mandate to maintain the financial system's integrity, the prudential regulator is also tasked with introducing mechanisms to manage systemic risk, loss absorption and risk taking.¹⁴⁸⁰ The market conduct regulator is intended to address market abuse and malpractice whilst promoting confidence in the financial system.¹⁴⁸¹ Prudential regulation requires the regulator to think 'like a banker' whilst market conduct regulation requires 'thinking like a customer', and therefore the cultures of both institutions may differ.¹⁴⁸² Therefore, a comparative analysis of the retail consumer protection regulatory framework, supervisory architecture and fairness controls in the UK, Australia and South Africa (as twin peaks jurisdictions) offers an opportunity to borrow relevant best practices across jurisdictions to enhance COFI, the Conduct Standard for Banks and overall fair treatment of customers in South Africa as a developing nation.

8.3.1 Multiple peaks, the risk of overlapping mandates and operational complexity

As part of the twin peaks model, the FSRA in South Africa,¹⁴⁸³ the FSMA in the UK¹⁴⁸⁴ and the ASIC Act in Australia¹⁴⁸⁵ all instituted a financial regulation system with the fair treatment and protection of financial customers as one of the key objectives.¹⁴⁸⁶ Consequently, the FSCA, the FCA and the ASIC respectively hold the regulatory and supervisory responsibility for market conduct oversight and financial consumer protection in South Africa, the UK and Australia.

¹⁴⁷⁸ Calvo et al (n 178) at 36. Schmulow (n 182) at 163.

¹⁴⁷⁹ See also Van Niekerk & Van Heerden (n 38) at 109.

¹⁴⁸⁰ De Jager (n 173) at 507–508.

¹⁴⁸¹ *Ibid* at 508.

¹⁴⁸² National Treasury (n 108) at 29.

¹⁴⁸³ FSRA (n 80) at s 7(1)(C).

¹⁴⁸⁴ FSMA (n 258) at s 1C.

¹⁴⁸⁵ ASIC Act (n 677) at ss 12A(2) and 12A (3).

¹⁴⁸⁶ FSRA (n 80) at s 7(1)(C). FSMA (n 258) at s 1C.

In South Africa, even though the regulatory model is referred to as twin peaks, the model reflects a multidimensional interconnected supervisory structure due to other standalone regulators with considerable statutory powers and capacity.¹⁴⁸⁷ For instance, the NCR is considered a financial regulator and continues to oversee the provision of credit under the auspices of the NCA,¹⁴⁸⁸ although the FSCA holds the supervisory mandate for fair customer outcomes.¹⁴⁸⁹ However, the FSRA allows the FSCA to regulate financial institutions that are credit providers subject to the regulatory ambit of the NCR.¹⁴⁹⁰ The extent of the FSCA's oversight over credit agreements is limited only to those matters referred to in section 108 of the FSRA dealing with conduct standards; fit and proper requirements; governance; risk management and internal controls; record keeping and data management; and reporting and management of conflicts of interests.¹⁴⁹¹

In an institutional arrangement with two market conduct regulators with overlapping mandates,¹⁴⁹² there remains the risk of some ambiguity amongst regulated entities and customers about the boundary of responsibility. This is especially the case considering the wide scope of the Conduct Standard issued by the FSCA¹⁴⁹³ and the ambit of section 108 of the FSRA read with section 58(2). For instance, operational requirements of financial institutions,¹⁴⁹⁴ internal control requirements¹⁴⁹⁵ and record keeping,¹⁴⁹⁶ which fall within the ambit of section 108, also directly affect compliance with the provisions of the NCA. In comparison, the FCA's mandate in the UK applies across product types, services and distribution channels. The FCA serves as the nodal point for the policy setting and regulatory oversight for financial consumer protection. Notably, the FCA and ASIC regulate the provision of credit in their jurisdictions.

¹⁴⁸⁷ Van Niekerk & Van Heerden (n 38) at 113.

¹⁴⁸⁸ FSCA (n 228) at 16. NCA (n 238).

¹⁴⁸⁹ NCA (n 238) at s 4. FSRA (n 80) at s 58(2).

¹⁴⁹⁰ FSRA (n 80) at s 58(2).

¹⁴⁹¹ See section 3.3 above for detailed discussion; FSCA (n 228) at 42–54.

¹⁴⁹² Godwin (n 182) at 184.

¹⁴⁹³ See section 4.4 above for a detailed discussion on scope and fairness controls under the Conduct Standard (n 17).

¹⁴⁹⁴ FSRA (n 80) at s 108(2)(e).

¹⁴⁹⁵ *Ibid* at s 108(2)(g).

¹⁴⁹⁶ *Ibid* at s 108(2)(i).

Another area of possible operational complexity in South Africa during the transition phase pending full implementation of COFI, is the structure of conduct regulation under FAIS which adopts a detailed, rules-based approach driven from a sectoral, industry and entity licensing perspective instead of a functional activity and outcomes-based view.¹⁴⁹⁷ In addition, not all conduct of financial service providers is regulated under FAIS¹⁴⁹⁸ and some products are exempted from the application of the Act.¹⁴⁹⁹ Therefore, there are regulatory blind spots associated with innovative digital solutions and organisational changes in a 21st-century multidimensional and multifunctional financial services industry.¹⁵⁰⁰ Furthermore, the exclusion of certain activities¹⁵⁰¹ from the statutory protection under FAIS has introduced an undesirable 'statutory dichotomy'¹⁵⁰² complicated by the fact that a bank has no general duty in common law to advise current or prospective clients.¹⁵⁰³

The prevailing complexity of the architecture in South Africa does not appear to support the laudable objectives of simplifying the administrative and regulatory architecture and doing away with the need to deal with multiple regulators with oversight around market conduct risk. In comparison, the regulatory architecture and regulatory oversight structure in the UK and Australia is more streamlined, less complex and has far fewer overlapping mandates than the current position in South Africa.

Ultimately, institutional arrangements that facilitate the implementation and enforcement of consumer protection laws and regulations should apply across all bank and nonbank providers in a consistent, thorough, and timely manner.¹⁵⁰⁴ Therefore, regulatory instruments (Conduct Standard, COFI, and related financial sector laws) must be streamlined and anchored on principles which are supplemented by guiding rules so that retail users can understand their rights, obligations, and recourse options. The legislative framework must 'pull the golden thread' to

¹⁴⁹⁷ Millard & Hattingh (n 368) at 119.

¹⁴⁹⁸ See section 3.4 above for a detailed discussion on transitional complexity related to financial sector law such as FAIS.

¹⁴⁹⁹ FAIS (n 363) at s 1(2).

¹⁵⁰⁰ Schulze & Mokobi (n 353) at 424.

¹⁵⁰¹ See section 3.4 above for a detailed discussion.

¹⁵⁰² Schulze & Mokobi (n 353) at 421. See also World Bank (n 106) at 83.

¹⁵⁰³ See section 3.4 above for a detailed discussion. *McCann* (n 349). See also Schulze & Mokobi (n 353) at 421.

¹⁵⁰⁴ World Bank (n 68) at 12.

ensure coherence across regulatory instruments, use of consistent terminology to reflect similar concepts, drive consolidation by avoiding duplication and minimising overlap, and be structured and framed in a way that helps users develop and maintain mental models that enhance navigability and comprehension¹⁵⁰⁵

Furthermore, complex and poor standard setting contributes to uncertainty, creating the opportunity for regulatory arbitrage.¹⁵⁰⁶ Reducing unnecessary complexity is critical for financial institutions and customers to know what is expected.

8.3.2 Challenges with cooperation and coordination mechanisms

Although the Twin Peaks model has clear benefits in regulating the financial system and protecting consumer interests,¹⁵⁰⁷ it was demonstrated in Australia that it remains imperfect in preventing market abuse or misconduct and 'is susceptible to failures'.¹⁵⁰⁸ The material concerns identified include:¹⁵⁰⁹

- Significant gaps in regulatory coverage between prudential and the conduct regulator.
- Difficulty in determining which regulatory agency has 'first mover' responsibility in instances where identified misconduct has a market conduct and prudential flavour.¹⁵¹⁰
- Overlapping mandates between the prudential regulator and other enforcement agencies remained a concern.¹⁵¹¹
- Questions whether there is equality between the prudential regulator and market conduct regulator in practice because the prudential regulator appears to have assumed the *de facto* leading role.¹⁵¹²

¹⁵⁰⁵ ALRC (n 1493) at 18.

¹⁵⁰⁶ Pollman (n 20) at 571.

¹⁵⁰⁷ Schmulow, Fairweather & Tarrant (n 1259) at 195.

¹⁵⁰⁸ Schmulow (n 252) at 3. Erskine (n 1243) at 43. See Hayne (n 55) at 433. Also see detailed discussion in section 7.3 above.

¹⁵⁰⁹ Hayne (n 55).

¹⁵¹⁰ *Ibid* at 86.

¹⁵¹¹ Hanrahan (n 1272) at 24.

¹⁵¹² Schmulow (n 252) at 20; Hanrahan (n 1272) at 24.

Consequently, to give effect to the requirement to collaborate and cooperate – across all three reviewed jurisdictions – there are non-binding MoUs between the prudential regulator and the market conduct regulator. However, the scope and ambit of the MoUs vary from country to country.¹⁵¹³ At a practical and operational level, they significantly affect how regulators with overlapping mandates interact and exercise oversight on consumer protection matters. Notwithstanding, material concerns about the risk of poor collaboration, coordination, and information fragmentation limit the ability to have a holistic and integrated risk view.¹⁵¹⁴

The FSRA addresses this potential gap by requiring cooperation, collaboration, coordination, information sharing and alignment of supervisory strategies between regulators, including the FSCA and the NCR.¹⁵¹⁵ However criticism remains about lack of power for coordinating agencies, the risk of operational inefficiency and political interference.¹⁵¹⁶ Therefore, the MoUs should be complemented by a more detailed coordination and measurement framework which incorporates practical details around policy and standard setting or rule-making; single view of approved persons and supervision of entities subject to regulation by these regulators; coordination of information requests; returns and related tools; reporting obligations for non-compliance and conduct failures; and the approach to industry engagement on market conduct risk issues.¹⁵¹⁷

Furthermore, implementation of performance accountability measures will be a key step to drive execution of the terms of the MoUs concluded between regulators. Accountability includes openness and public disclosure of the terms of such MoUs similar to what is done by the FCA in relation to their memorandum with the CMA.¹⁵¹⁸ Establishing an effective financial regulatory oversight mechanism, similar to the Australian Financial Regulator Assessment Authority,¹⁵¹⁹ will provide a more credible platform to drive regulator accountability.¹⁵²⁰

¹⁵¹³ See section 6.2. and 7.2 above on cooperation and coordination mechanisms in the UK and Australia respectively.

¹⁵¹⁴ Georgosouli (n 242) at 278.

¹⁵¹⁵ FSRA (n 80) s 76.

¹⁵¹⁶ IMF (n 82) at 7.

¹⁵¹⁷ Allen (n 75) at 2–3; Godwin, Kourabas & Ramsay (n 330) at 286–291; Biber et al (n 344) at 1565.

¹⁵¹⁸ FCA ‘Principles of good regulation’ available at <https://www.fca.org.uk/about/principles-good-regulation>, accessed 11 January 2022.

¹⁵¹⁹ Financial Regulator Assessment Authority Act 2021 and Australian Government -Financial Regulator Assessment Authority website available at <https://fraa.gov.au/>, accessed 27 December 2024.

¹⁵²⁰ Murray Inquiry (n 1270) at 235. Schmulow, Fairweather & Tarrant (n 1259).

8.3.3 Regulatory arbitrage and blind spots

The FSRA significantly widened the purview of the FSCA beyond that of its predecessor to include the conduct of retail banks and credit providers. The extended scope was achieved through a broader definition of 'financial institution',¹⁵²¹ a 'financial product',¹⁵²² and 'financial services'.¹⁵²³ The FSRA also creates scope for regulations to designate any facility or arrangement as a financial product if it serves as the means through which lending, investment, or financial risk management is conducted.¹⁵²⁴ A key benefit of widening the scope to cover both bank and nonbank activities, is narrowing the scope for regulatory arbitrage, thus extending the reach of consumer protection mechanisms.

However, developments over the past two decades indicate that under-resourced policymakers have lagged behind rapid financial innovation, and this has opened the gap for regulatory arbitrage where some private sector actors exploit regulatory loopholes and blind spot areas.¹⁵²⁵ Therefore, the extent of coverage and impact will depend on the FSCA's ability to proactively identify new emerging risks and supervise evolving regulatory blind spots arising from innovation. The ability to timeously manage risks associated with novel and opaque business models (that customers are not familiar with) will minimise customer detriment instead of playing catch-up years after a practice has become embedded.¹⁵²⁶

Therefore, appropriate collection of good quality data, processing and intelligent analysis of this data is a crucial preventative measure to identify emerging risks, anomalies, and exceptions.¹⁵²⁷ In South Africa, where multiple regulators have interest in consumer protection to varying degrees, it is essential to mitigate against the risk of data fragmentation, manage delays in

¹⁵²¹ FSRA (n 80) at s 1.

¹⁵²² *Ibid* at s 2(1)(e). Banks Act (n 5) 5at ss 1(1), 2(1)(g), 2(2) and 2(3).

¹⁵²³ *Ibid* at s 3.

¹⁵²⁴ *Ibid* at s 2(1)(e).

¹⁵²⁵ Allen (n 75) at 3. See also Trautman & Foster (n 76). Allison Morrow 'Customers who trusted crypto giant FTX may be left with nothing' *CNN Business* 15 November 2022, available at <https://edition.cnn.com/2022/11/14/business/ftx-customer-money-bankruptcy/index.html>, accessed on 4 December 2023.

¹⁵²⁶ Foreign Affairs Netherlands (n 224) at 2–3.

¹⁵²⁷ FCA (n 1216).

data sharing, guard against information turf battles, and build the capacity to assess and process the priority information and to create a capability to connect the dots to avoid significant risk build-up. A system of early warning signs should be implemented between regulators, to ensure that issues that arise within regulated entities are addressed timeously and effectively.¹⁵²⁸ Additionally, to promote better customer outcomes, the conduct regulator should also strengthen capabilities for proactive and predictive monitoring using statistical and risk analysis methodologies similar to techniques applied by the PA.¹⁵²⁹ The pilot on measuring customer outcomes and the developed list of indicators and conduct of business statistical returns provide a useful starting point to support effective monitoring.¹⁵³⁰

Fragmentation of information across multiple regulatory systems and platforms can limit the ability to connect the dots and to have a holistic risk view.¹⁵³¹

8.3.4 'First mover' responsibility and coordination in instances of systemic risk

In theory the prudential and market regulator have equal importance without one regulator assuming a predominant role over the other. Nonetheless, it remains critical to determine which regulatory agency has 'first mover' responsibility in instances where misconduct is identified, and it has both a market conduct and prudential flavour.¹⁵³² For instance, in South Africa, under section 144(6) of the current MoU between the FSCA and the PA, the concurrence of the PA is required if the FSCA wants to issue a directive for a systemically important financial institution to cease offering a particular financial product or service¹⁵³³ or to modify a specific financial product, service, or its terms.¹⁵³⁴ However, the FSRA and the MoUs do not set out objective factors or guiding principles to consider in exercising such discretion by the PA, particularly when products, services, or terms are assessed as unfair by the FSCA.¹⁵³⁵

¹⁵²⁸ Godwin (n 182) at 186.

¹⁵²⁹ Toronto Centre (n 1254) at 10.

¹⁵³⁰ Koning, Izaguirre & Singh (n 712) at 6.

¹⁵³¹ Georgosouli (n 242) at 278.

¹⁵³² Krugman (n 254); Weiss (n 254).

¹⁵³³ FSRA (n 80) at s 144(5)(a).

¹⁵³⁴ Ibid at s 144(5)(b).

¹⁵³⁵ See section 6.2 above for a detailed discussion on cooperation, coordination and collaboration.

It is crucial that the execution of statutory objectives under the FSRA and the exercise of discretion given to regulators must be subject to constitutional prescripts and done in a manner that does not unduly prejudice the legal interests of customers. The current wording of clause 9.3 of the MoU and section 144(6) of the FSRA may result in an impasse in those scenarios where competing interests exist between the customer fairness objective of the FSCA and the safety and soundness objectives of the PA. The administrative law principles of ‘lawfulness, procedural fairness, and reasonableness’ must be applied to regulatory action, and operational standard and protocols of regulators must ensure these principles are applied specially in the application of section 144(6) regarding concurrence.¹⁵³⁶ Focus must be placed on consultation between regulators and clear accountability measures must be incorporated to ensure that the requirement for concurrence by the PA – aimed at protecting financial stability – is exercised in limited circumstances following a clear process that is administratively fair.¹⁵³⁷ It is vital to ensure functional independence of the FSCA,¹⁵³⁸ whilst ensuring that the consumer protection objective is not inadvertently frustrated by the need for concurrence.

Ultimately, the supervisory architecture influences power allocation, impacting policy formulation and the economic environment in which policy is introduced in terms of coordination and flow of information.¹⁵³⁹ Therefore, there is an opportunity for further refinement of collaboration and coordination arrangements, to develop a framework to elaborate on the mandate of the FSCA and to balance its consumer protection objective with the PA's objective of financial system safety and soundness and the ancillary objectives of supporting inclusion and competition.¹⁵⁴⁰ It must also be clear how concurrent jurisdiction would apply in practical terms and how conflicting opinions will be resolved in instances where financial institutions must account to multiple regulatory bodies.

¹⁵³⁶ Alberts et al (n 936) at 1915.

¹⁵³⁷ See section 6.2 for a detailed discussion on how South Africa can learn from the UK particularly in the application of section 144(6).

¹⁵³⁸ Van Wyk (n 350) at 397–398.

¹⁵³⁹ Miguel Ampudia et al ‘Working paper series: The architecture of supervision’ *European Central Bank* May 2019 at 3, available at <https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2287~0e83935ee0.en.pdf>, accessed on 21 March 2024 .

¹⁵⁴⁰ Michael et al (n 354); Godwin, Guo & Ramsay (n 177) at 10–12.

Uncertainty, ambiguity or discrepancy between regulation and supervisory policy and approaches between regulators can undermine effective implementation by presenting opportunities for regulatory arbitrage,¹⁵⁴¹ evasion or avoidance.¹⁵⁴²

8.4 APPLICABILITY OF GENERAL CONSUMER PROTECTION LAWS AND REGULATIONS TO RETAIL FINANCIAL CONSUMERS

In South Africa, the FSRA excludes the operation of the CPA to any function, act, transaction, financial product, or financial service subject to the NPSA¹⁵⁴³ or financial sector law.¹⁵⁴⁴ By implication, fundamental consumer protections under the CPA would not apply to financial products, financial services or conduct contemplated by section 10. However, at the same time, section 1 of the CPA defines services falling under its scope, to include banking services. This is distinguishable from the UK, where there is no wholesale carve out of general consumer protection laws from application to financial products and services. Instead, general consumer protection regulations under the CRA cover retail financial customers and are complemented by the Conduct of Business Handbook.¹⁵⁴⁵ In Australia, although financial products and services are carved out from Australian consumer law as set out in Australian Consumer Law,¹⁵⁴⁶ the ASIC Act largely mirrors the provisions under the ACL.¹⁵⁴⁷

Nevertheless, the carve-out in Australia has still been criticised for resulting in different consumer protection mechanisms between retail financial customers and general consumers.¹⁵⁴⁸ Similar concerns have been identified in South Africa, and the following are the most notable aspects not covered in either the Conduct Standard or the COFI Bill:

- a. Although the definition of unfair terms is included in the Conduct Standard under section 5(2), it does not cover instances of procedural unfairness which result in customer detriment.

¹⁵⁴¹ Allen (n 75) at 5.

¹⁵⁴² Herring (n 326) at 213–214.

¹⁵⁴³ NPSA (n 6).

¹⁵⁴⁴ FSRA (n 80) at s 10.

¹⁵⁴⁵ See section 6.2.3 above on mandate of the FCA compared with FSCA.

¹⁵⁴⁶ CCA (n 1311) at s 131A.

¹⁵⁴⁷ See section 7.4. above on the ASIC Act. See also Schmulow & O'Hara (n 1312) at 16. Also see Howell & Brown (n 1371) at 3 on challenges of the carve out.

¹⁵⁴⁸ Howell & Brown (n 1371) at 3. See section 7.2.3 above on detailed discussion around excision of financial products and services from certain ACL provisions.

- b. The definition in section 5(2) only deals with unfair terms, conditions and requirements but does not address unfair, unreasonable or unconscionable conduct. In contrast, the CPA under section 40 defines unconscionable conduct.
- c. There is no indicative non-exhaustive grey-list of terms that may be considered as unfair similar to Regulation 44 of the CPA. However, section 106 of the FSRA allows for developing conduct standards that may declare specific conduct, product or service prohibited. It is submitted that the grey-list should rather be in the legislation.
- d. Similarly there is a very limited number of terms that are prohibited outright in the Conduct Standard and COFI Bill. The blacklist of prohibited terms should be reviewed, considering relevant terms prohibited under section 51 of the CPA as applicable to financial services. It is submitted that the blacklist should rather be in the legislation.
- e. Unlike section 52(2) of the CPA, both the COFI Bill and the Conduct Standard are silent on factors that the court must consider in determining fairness.
- f. Similarly, neither instrument is explicit about the powers of the court, ombud, or Tribunal regarding unfair terms. In contrast, the CPA deals with the consequences of unconscionable conduct, false, misleading, or deceptive representations, and unfair, unreasonable, or unjust terms in section 52(3). The court may order the restoration of money, order compensation to the customer for losses or expenses relating to the transaction and proceedings before the court or require the supplier to cease or alter any practice. The court may order that the provision is void and sever any relevant part or declare the entire agreement void under section 52(4). However, the FSRA has several provisions that address recourse for breach of financial sector law such as investigation and enforcement powers, enforceable undertakings which may include redress, power to issue directives, debarments and administrative penalties.¹⁵⁴⁹ Yet, the FSCA has no direct powers to order redress unless through an enforceable undertaking which is made an order of court.¹⁵⁵⁰

¹⁵⁴⁹ FSRA (n 80) Chapter 9 –10.

¹⁵⁵⁰ Ibid s 151(2).

- g. There is an implied warranty of quality and suitability under the CPA¹⁵⁵¹ and a provision for strict liability for damage to goods (including goods which may be subject to a credit agreement).¹⁵⁵² The COFI Bill and the Conduct Standard have equivalent provisions that products will perform as the bank has led customers to expect and that related services will be of an acceptable standard in line with the expectation created by the bank.¹⁵⁵³ However, there is no strict liability provision for breaches in an interconnected value chain where an entity related to the lender supplies or provides access to the goods.¹⁵⁵⁴
- h. There is no express provision in the Conduct Standard or the COFI Bill that a term will be interpreted to the benefit of a consumer where the wording is capable of more than one meaning.¹⁵⁵⁵ The CPA addressed this in section 4(4).
- i. The current regulatory architecture is complex, and it would be difficult for ordinary customers, the public or even financial institutions to determine the consequences of action without legal support. Understanding the requirements would require a person to traverse and map relevant provisions of the FSRA, the COFI Act once enacted, the Conduct Standard and possibly other relevant financial sector laws.

It is evident from the above analysis that both the UK and Australia (to a large extent) incorporate fundamental consumer protection regulations under financial sector law. On the other hand, the principles outlined in the South African Conduct Standard¹⁵⁵⁶ and different financial sector laws regulate the fair treatment of customers through a complex arrangement that cuts across multiple pieces of legislation, regulatory bodies, and coordination agencies. Furthermore, the identified gaps highlight the need for a systematic analysis of the fairness control mechanisms under the CPA to ensure that equivalent protections are afforded to retail financial consumers.

¹⁵⁵¹ CPA (n 16) at ss 54 and 56.

¹⁵⁵² *Ibid* at s 61.

¹⁵⁵³ Conduct Standard (n 17) s 2(5)(e). COFI Bill s 26(2)–(3).

¹⁵⁵⁴ CPA (n 16) at s 61(2). *Nedbank v Sithole* (n 420).

¹⁵⁵⁵ Naudé & De Stadler (n 433) at 5. Hutchison (n 745) at 464.

¹⁵⁵⁶ Conduct Standard (n 17).

8.5 FAIRNESS CONTROL MECHANISMS

In analysing the consumer's right to fair and just terms, fairness control mechanisms are categorised into four (4) types of controls.¹⁵⁵⁷ There are opportunities to enhance retail financial consumer protection and fairness control mechanisms across all dimensions.

8.5.1 Incorporation controls

Incorporation controls introduce mandatory provisions that would have a similar effect of limiting the *caveat subscriptor* rule.¹⁵⁵⁸ General and specific disclosure obligations under the Conduct Standard, the COFI Bill and different financial sector laws such as FAIS¹⁵⁵⁹ and the NCA¹⁵⁶⁰ constitute fairness incorporation controls.

For instance, a general disclosure obligation is established under section 2(5)(c) of the Conduct Standard, requiring financial customers to be given clear information and kept appropriately informed before, during, and after contracting. Section 7(1) of the Conduct Standard outlines detailed factors that must be brought to the attention of a financial customer, which include a presentation of risks and benefits of the financial product or financial service, estimated costs and expected returns, contractual obligations of the bank and customer, and consequences upon breach and recourse available to the customer.¹⁵⁶¹ Mandatory incorporation controls under section 7(2) cover plain language, adequacy, appropriateness, factual correctness, relevance, timeliness, and completeness of disclosure.¹⁵⁶²

An obligation is imposed on banks to take reasonable steps before, during and after contracting to ensure that customers are made aware of relevant facts that could influence their decision.¹⁵⁶³ This current wording is open to interpretation. For instance, it is unclear whether section 7(1) imposes an absolute rule requiring inflexible application, whether banks have

¹⁵⁵⁷ Naudé (n 27). See also section 4.3 above on fairness controls.

¹⁵⁵⁸ *Van Wyk* (n 498) para 81.

¹⁵⁵⁹ FAIS (n 363).

¹⁵⁶⁰ NCA (n 238).

¹⁵⁶¹ Conduct Standard (n 17) at s 7(1)(a)–(e).

¹⁵⁶² COFI also seeks to entrench incorporation controls for information disclosure under section 31.

¹⁵⁶³ Conduct Standard (n 17) at s 7(1).

discretion in when or how they apply the provisions,¹⁵⁶⁴ or whether negligence or recklessness on the part of the bank would be required to trigger liability under this section. Even though some provisions in the FSRA address recourse for breach of financial sector law,¹⁵⁶⁵ it is unclear what penalties would apply in the event of non-compliance.¹⁵⁶⁶

The wording of section 7(1) seems to place the onus on the financial institution to provide factual evidence and prove on a balance of probabilities¹⁵⁶⁷ what steps were taken to bring the set information to the customer's attention and demonstrate that the steps were reasonable.¹⁵⁶⁸ Each case would have to be tackled on its merits, considering its context and circumstances, because no universal formula would be appropriate in every case.¹⁵⁶⁹ Determining whether the actions were adequate to discharge the bank's obligations will require the application of the reasonable person test.¹⁵⁷⁰ The reasonable person test should, therefore, be:

'[W]hether [an ordinary retail financial] customer ...of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a [retail financial] consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort'.¹⁵⁷¹

In addressing the disclosure requirements under section 7(1), financial institutions should avoid formulaic legalese and adopt an inter-disciplinary approach of writing contracts with the reader in mind, merging 'sound legal practices with the linguistic principles of document and information design' to promote better document usability.¹⁵⁷²

¹⁵⁶⁴ *Van Wyk* (n 498) para 93.

¹⁵⁶⁵ FSRA (n 80) at ss 114(1)–(2); 144(1); 144(3); 49(1)–(3); 151; 152(2); 167(1); 170 and 278. See also Pesci & Koekemoer (n 570) at 264.

¹⁵⁶⁶ Pesci & Koekemoer (n 570) .

¹⁵⁶⁷ *Everett* (n 575) at 204D.

¹⁵⁶⁸ Interestingly, section 31 of COFI does not refer to financial institutions taking 'reasonable steps' to disclose set information.

¹⁵⁶⁹ *Pick 'n Pay* (n 577) para 14. See also *Cenprop* (n 577) para 17.

¹⁵⁷⁰ *Kruger* (n 570) at 430E-F. See also *First National Bank v Duvenhage* (n 570) para 2.

¹⁵⁷¹ CPA (n 16) s 22(2).

¹⁵⁷² See article by de Stadler & Van Zyl (n 461) at 95; 97 and 106. See also *World Bank* (n 106) at 52.

The drafting of section 7 is based on principles and sets out core disclosure elements. Still, it falls short of being clear about the application and the implications of failure to satisfy the disclosure requirements.¹⁵⁷³ For instance, the Conduct Standard¹⁵⁷⁴ does not include procedural formalities and disclosure as an element to consider in determining whether conduct is unfair.¹⁵⁷⁵ Under the CPA, a ground of unfairness includes failing to draw the fact, nature and effect of the term, condition or notice referred to in section 49(1) to the consumer's attention. Therefore, based on the current wording of the Conduct Standard, a procedural failure to satisfy section 7 or to conspicuously disclose problematic or high-risk terms would not render the contract, term, condition, or requirement null, void, or unfair,¹⁵⁷⁶ even though there is an overarching disclosure obligation.¹⁵⁷⁷

In the context of promoting fair customer outcomes, there is merit in avoiding a formalistic tick-box approach, moving beyond strict statutory formalities, and focusing on substantive outcomes of the process. However, in omitting to address the impact or implication of procedural failures, the Conduct Standard fails to consider that transparency, disclosure, and the procedure followed may impact the fairness of the substantive terms that the customers agree to – such as price, product features, service delivery or other conditions. Importantly, procedural responsibilities serve as a proactive and preventative control of unfairness.¹⁵⁷⁸ It is submitted that the Conduct Standard should include failure to meet procedural formalities and disclosure requirements for problematic terms as an element to consider in determining whether conduct is unfair.

Considering the above arguments, ensuring clear language and alignment of wording, concepts, definitions, terminology, and implications of rights conferred under the Conduct Standards and COFI is vital.¹⁵⁷⁹ The lack of clarity in statutes and regulations limits the effective operation of regulatory requirements outside the formal court process.¹⁵⁸⁰ In considering the

¹⁵⁷³ See Naudé & De Stadler (n 433) at 5.

¹⁵⁷⁴ Conduct Standard (n 17) at s 5(2).

¹⁵⁷⁵ Ibid at s 49(1).

¹⁵⁷⁶ Van Huyssteen et al (n 572). See also Myburgh (2014) and (2016) (n 572).

¹⁵⁷⁷ COFI Bill (n 16) at ss 29 (2) and 31. COFI does not have a provision equivalent to s 52(4) of the CPA.

¹⁵⁷⁸ Stoop (n 579) at 208–209.

¹⁵⁷⁹ *Standard Bank Investment Corporation* (n 576) para 16. See Naudé & De Stadler (n 433) at 3.

¹⁵⁸⁰ Naudé & Barnard (n 577) at 18–19.

centrality of information disclosure and plain language to deliver fair customer outcomes, the Conduct Standard should be amended to remove the ambiguity associated with the reasonable endeavours provision in section 7(1). Therefore, section 7(1) should be reformulated to focus on the customer as the reader,¹⁵⁸¹ and on steps necessary to ensure a reasonable consumer with average knowledge, literacy skills and minimal experience or exposure could be expected ‘to understand the content, significance and import’ of the term without undue effort.¹⁵⁸² Otherwise, assessing the bank’s reasonable steps would always be subject to judicial control, resulting in time delays, costs, and litigation risks for the customer.¹⁵⁸³ The FSCA must also clarify the expected manner and form of disclosure for particular types of risky or problematic transactions, terms or contracts.¹⁵⁸⁴ Ultimately, regulatory instruments must also be precise regarding the impact and implication of procedural failures, especially as far as the determination of unfairness is concerned.

8.5.2 Content controls

a. Regulation of unfair, unjust, and unreasonable terms

Historically, the concept of fairness has been juxtaposed with freedom of contract.¹⁵⁸⁵ In *Beadica* the court held that abstract values of fairness, good faith and reasonableness have not been accorded an autonomous, self-standing status under the common law of contract but are foundational pieces of contract law that are ‘mediated through rules of contract law’.¹⁵⁸⁶

Nonetheless, it is competent for legislation to introduce principles of good faith, fairness, and reasonableness or conscionability in the assessment of fairness of contractual terms and conditions. Furthermore, within the context of retail consumer protection, there are instances where legislation makes provision for fairness to operate as an independent, free-standing ground to challenge contracts or conduct. Section 48 of the CPA, section 5(2) of the Conduct Standard, section 62(4) of the CRA and section 12BG of the ASIC Act illustrate such instances.

Notably, the 2020 version of the COFI Bill does not include express wording requiring financial institutions to ensure that the terms and conditions of a contract or agreement regarding

¹⁵⁸¹ See also de Stadler & Van Zyl (n 461) at 104.

¹⁵⁸² See discussion on reasonable person test under section 4.4.1.

¹⁵⁸³ See Naudé (n 27) at 509 on the severe limitation of judicial control in the consumer context under the CPA.

¹⁵⁸⁴ Conduct Standard (n 17) at s 7(5)

¹⁵⁸⁵ Stoop (n 579) at 192.

¹⁵⁸⁶ *Beadica* (n 32) para 81.

a financial product or financial service are fair, reasonable, and transparent but there is an overriding obligation embed throughout to treat customers fairly and to conduct business honestly, fairly, and with due skill, care and diligence.¹⁵⁸⁷ Similarly, the COFI Bill is silent on the definition of unfair terms and conditions or circumstances under which a term condition or conduct would be considered unfair. The definition initially included in the COFI 2018 version was more aligned with section 48(2) of the CPA but was subsequently deleted in the 2020 version. Therefore, based on the current draft of the COFI Bill, it appears that the fairness assessment will only be addressed in the Conduct Standard.¹⁵⁸⁸ This arrangement is problematic because it contributes to reduced visibility since consumers, financial institutions and the public will be forced to consult several regulatory instruments to understand available fairness controls.

b. Meaning of unfair

Section 5(1)(d) of the Conduct Standard says that financial institutions must ensure that contractual terms and conditions, including fees and charges, are not unfair. According to section 5(2), a contract, term or condition is considered unfair if it:

- would cause a significant and unreasonable imbalance in the rights and obligations between the financial institutions and the customer;¹⁵⁸⁹
- is not reasonably necessary to protect the legitimate interests of the financial institution that will be unduly advantaged by the term, condition, or requirement;¹⁵⁹⁰
- will result in an unfair outcome to the customer (whether financial or otherwise) if it was applied or relied upon;¹⁵⁹¹
- unreasonably requires the financial customer to waive any right,¹⁵⁹² or absolve the bank of any obligation or liability.¹⁵⁹³

¹⁵⁸⁷ COFI Bill (n 16) at ss 17(1)(a), 17(2)(b) and 33(1)(a).

¹⁵⁸⁸ See section 4.3 above for a detailed discussion.

¹⁵⁸⁹ Conduct Standard (n 17) at s 5(2)(a).

¹⁵⁹⁰ Ibid at s 5(2)(b).

¹⁵⁹¹ Ibid at s 5(2)(c).

¹⁵⁹² Ibid at s 5(2)(d)(i).

¹⁵⁹³ Ibid at s 5(2)(d)(ii).

Interestingly, section 5(2) does not use ‘or’ as a conjunction to indicate that each of the four elements can operate alternatively. Therefore, section 5(2) is unclear regarding whether all four elements must be satisfied or whether any one element would be adequate to demonstrate unfairness. Based on the current wording, it appears that all the grounds of unfairness set out in section 5(2) operate as standalone grounds of unfairness. If all four elements set out in section 5(2) were to operate cumulatively, this may result in adverse unintended consequences. For instance, it would mean that a one-sided and harsh limitation of liability clause, which results in significant imbalance between right and obligations of the parties to the detriment of the consumer,¹⁵⁹⁴ may still not be considered unfair if it is necessary to protect the reasonable legitimate interests of a financial institution regarding risk allocation or risk mitigation. It is submitted that the artificial tick box assessment of each element under section 5(2) is undesirable, and the full circumstances of each case must be considered.¹⁵⁹⁵ Ultimately, fairness should carry ideas of ubuntu, humaneness and social justice.¹⁵⁹⁶ However, to avoid the application of a subjective lens in the determination of unfairness, the Conduct Standard correctly introduces the concept of materiality by referring to the significance and unreasonableness of the imbalance caused.¹⁵⁹⁷

The approach adopted in South Africa under section 5(2) of the Conduct Standard is distinguishable from the position in the UK. In terms of the CRA,¹⁵⁹⁸ a term or notice is considered unfair if '[a] contrary to the requirement of good faith, [b] it causes a significant imbalance in the parties' rights and obligations under the contract [c] to the detriment of the consumer.'¹⁵⁹⁹ Although the requisite elements in the UK are distinct, it is argued that the test is cumulative.¹⁶⁰⁰

Notably, under the conduct Standard, the subject matter of the contract and price is not excluded in assessing fairness in the same manner that it is expressly carved out in the UK and Australia.¹⁶⁰¹ Although it is necessary to avoid undue regulatory interference with competitive market forces, the discretion of financial institution regarding subject matter and price of the contract must be exercised reasonably and not in a capricious manner.

¹⁵⁹⁴ World Bank (n 106) at 53.

¹⁵⁹⁵ FCA (n 881) para 1.3.4(2).

¹⁵⁹⁶ *Everfresh* (n 789) para 71.

¹⁵⁹⁷ Conduct Standard (n 17) at s 5(2)(a).

¹⁵⁹⁸ CRA (n 653) at s 62(4).

¹⁵⁹⁹ *Ibid* at ss 62(4) and 62(6).

¹⁶⁰⁰ *McKendrick* (n 977) at 360. See also *UK Housing* (n 1064).

¹⁶⁰¹ *Clark* (n 1330) at 209. See also *Abbey* (n 985).

c. Blacklisted or prohibited terms

Similar to section 51 of the CPA, there is an opportunity to consider certain types of conduct that should be prohibited outright such as terms seeking to limit or restrict the ability of consumers to rely on prescription. Although Chapter 7 on post sale barriers and obligations covers some prohibitions and limitations,¹⁶⁰² and the overall test of fairness in section 5(2) of the Conduct Standard is commendable, such a blacklist will assist to lift the standards across the industry as financial institutions review their terms and conditions. Businesses will be more likely to respond spontaneously to such lists whilst discouraging undesirable practices by recalcitrant institutions.¹⁶⁰³ The list will also strengthen the position of regulators and consumers and shift the burden of proof to the financial institution.

d. Non-exhaustive 'grey' list of terms that may be considered unfair.

The Conduct Standard and COFI Bill are silent on the indicative non-exhaustive list of terms that may be unfair. This approach is different from the indicative non-exhaustive list included in the CPA.¹⁶⁰⁴ However, the COFI Bill¹⁶⁰⁵ refers to section 106 of the FSRA to allow for the development of conduct standards that may declare specific conduct, product or service prohibited.¹⁶⁰⁶ Similar to the CRA in the UK,¹⁶⁰⁷ the Australian legislation incorporates an indicative and non-exhaustive list of potentially unfair terms¹⁶⁰⁸ that offer guidance on terms that may be considered unfair. Although the list does not create a presumption of unfairness, it is submitted that incorporation of such a list in financial sector law will assist regulators, financial institutions, and customers in identifying the types of terms that may be problematic and must be treated cautiously.¹⁶⁰⁹

¹⁶⁰² COFI Bill (n 16) at ss 32(1); 33(1) and 34.

¹⁶⁰³ Naudé & Eiselen (n 404) at reg 44 -4; reg 44-4A and reg 44-5.

¹⁶⁰⁴ CPA (n 16) at regulation 44 on the non-exhaustive grey-list of presumptively unfair terms.

¹⁶⁰⁵ COFI Bill (n 16) Part 16 s 9.

¹⁶⁰⁶ See section 3.2.3.2 above on conditions in section 106 under which conduct may be declared as prohibited.

¹⁶⁰⁷ CRA (n 653) Schedule 2 of the CRA.

¹⁶⁰⁸ ASIC Act (n 677) at s 12BH.

¹⁶⁰⁹ Clark (n 1330) at 205. See also sections 6.3 and 7.3 above on the non-exhaustive lists of unfair terms in the UK and Australia.

Whilst this thesis does not address all grey-listed terms, the following terms be considered for inclusion in the grey-list:

- a. exclusions, waivers, indemnities, or limitation of liability clauses.¹⁶¹⁰
- b. terms giving the supplier the right to increase the price without affording the consumer the right to terminate the contract if the price is too high.¹⁶¹¹
- c. terms allowing a supplier to unilaterally alter the contract without a valid reason.¹⁶¹²
- d. terms giving the supplier the exclusive right to determine if products and services are in conformity with the agreement or to interpret any term of the contract.¹⁶¹³
- e. Terms seeking to limit the liability of the supplier for actions of its agents (vicarious liability).¹⁶¹⁴
- f. a term enabling the supplier to terminate an open-ended contract at will without giving the consumer fair notice.¹⁶¹⁵
- g. terms permitting disproportionately high penalty fees i.e. where a customer fails to fulfil contractual obligations.¹⁶¹⁶
- h. terms seeking to irrevocably bind a customer even if they have not had a fair and reasonable opportunity to consider the terms and implications before concluding the contract.¹⁶¹⁷

Although the Conduct Standard creates a positive duty that indirectly covers some of the above terms, (such as the limitation of liability clauses under the fairness assessment test in section 5(2)), the list of grey-listed terms applicable to contracts with retail financial customers should be included as a schedule to the COFI Bill for easier access and prominence.¹⁶¹⁸ The list should be reviewed periodically as business practices evolve and new types of risks emerge. Including a grey-list will serve as a useful guide as businesses review their contracts and practices to ensure

¹⁶¹⁰ CPA (n 16)111 reg 44(3)(a)–(f); CRA (n 653) Schedule 2 para 1 – 2; CRA (n 653) s 62 (5) on exclusion and restriction of liability for negligence. See also COBS (n 693) para 1.1.6.

¹⁶¹¹ CPA *ibid* reg 44(3)(h). CRA *ibid* Schedule 2 para 15.

¹⁶¹² CPA *ibid* reg 44(3)(i). CRA *ibid* Schedule 2 paras 11 and 13.

¹⁶¹³ CPA *ibid* reg 44(3)(j). CRA *ibid* Schedule 2 para 16.

¹⁶¹⁴ CPA *ibid* reg 44(3)(d). CRA *ibid* Schedule 2 para 17.

¹⁶¹⁵ CPA *ibid* reg 44(3)(l). CRA *ibid* Schedule 2 para 8.

¹⁶¹⁶ CPA *ibid* reg 44(3)(r)–(s). CRA *ibid* Schedule 2 para 6.

¹⁶¹⁷ CPA *ibid* reg 44(3)(v). CRA *ibid* Schedule 2 para 10. See also McKendrick (n 977) at 361. See also *ParkingEye* (n 1115).

¹⁶¹⁸ Stoop (n 645) at 220.

fairness. Considering that different institutions are at varying levels of maturity, the list will help guide and uplift practices across the industry to promote fairer contracting terms.¹⁶¹⁹ Clear lists strengthen the hand of regulators and consumers, places the burden of proof on the supplier and not the customer, and businesses are more likely to respond to such lists on their own accord whilst any recalcitrant institutions will be less likely to go to court over problematic terms appearing on the list.¹⁶²⁰

e. Factors for courts and authorities to consider in determining fairness of terms and conditions

Neither the Conduct Standard nor the COFI Bill have a list of factors that the court must consider in deciding on fairness, in a similar manner as section 52(2) of the CPA. Interestingly, in determining whether a term is unfair, both Australia and the UK follow similar approaches, which involve (1) a definition of what is unfair, and (2) a requirement for the court to consider certain factors in determining whether a term is unfair.¹⁶²¹ South Africa is distinguishable from the UK and Australia because only the Conduct Standard (not the COFI Bill) defines unfair terms. Furthermore, neither the COFI Bill or the Conduct Standard cover factors that must be included in the determination of fairness.

A positive feature of the COFI Bill is that it introduces specific obligations relating to the culture,¹⁶²² governance,¹⁶²³ key persons,¹⁶²⁴ remuneration and compensation arrangements,¹⁶²⁵ principles for providing financial services,¹⁶²⁶ post-sale barriers and obligations, and service.¹⁶²⁷ However, the above high level comparison highlights that some relevant and material features have been omitted from the COFI Bill and the Conduct Standard.

f. Fairness jurisdiction that supports less cumbersome process to resolve matters

¹⁶¹⁹ See CRA (n 653) Part 1 Schedule 2. Also see FCA FG 18/7 (n 652) at para 3 – 4.

¹⁶²⁰ Naudé & Eiselen (n 404) at reg 44 –4, reg 44-4A and reg 44–5.

¹⁶²¹ Clark (n 1330) at 197.

¹⁶²² COFI Bill (n 16) at s 16–17.

¹⁶²³ *Ibid* at s 19.

¹⁶²⁴ *Ibid* at s 24–25

¹⁶²⁵ *Ibid* at s 20–22.

¹⁶²⁶ *Ibid* at s 26–27.

¹⁶²⁷ *Ibid* at s 32–35.

Although the courts ultimately have judicial control to adjudicate unfair, and unjust terms, and unconscionable conduct, more proactive and consumer friendly measures are still desirable – due to the risk, time, and cost limitations of litigation on consumers – to ensure effective resolution of complaints and disputes about unfair contractual terms.¹⁶²⁸ To promote effective consumer protection and ensure fair customer outcomes, fairness jurisdiction must be given to the courts, Tribunal, and regulators to protect retail consumers who may be in a weaker bargaining position.¹⁶²⁹

Overall, the current regulatory architecture remains complex. Without legal support, it would be difficult for ordinary customers, the public or even financial institutions to determine their rights and the consequences of action. The proposed architecture would require a person to traverse and map relevant provisions of the FSRA, COFI once enacted, the Conduct Standard and other specific and applicable financial sector law. Therefore, it is necessary to consolidate key fairness control mechanisms in COFI as the proposed overarching core legislation and educate customers on expected standards and recourse mechanisms.

8.5.3 Conduct controls

There are instances in which unfairness is not introduced by the contract terms or conditions but by the conduct or behaviour of the supplier or his agents. Both the CPA and the Conduct Standards anticipate a few such scenarios and provide for conduct controls to protect the customer and to deliver fair outcomes.

a. Prioritising interests of the consumer

To promote substantively fair terms, sections 2(5)(b) and (d), read with section 5(1) of the Conduct Standard, require financial institutions to implement adequate measures and controls to manage the risk of introducing and maintaining unsuitable offerings throughout the product lifecycle. Management and control measures must be applied during product design and distribution stages or as market dynamics change. Furthermore, financial services must be rendered in accordance with the contractual relationship and reasonable instructions of the customer, executed with due

¹⁶²⁸ Naudé (n 661) at 516.

¹⁶²⁹ Ibid at 516–571.

regard to the customer's interest, which must be afforded appropriate priority over the institution's interests.¹⁶³⁰ The Conduct Standard indirectly addresses conflicts of interest where some financial institutions may put their or their agents' interests above the customer's interests.¹⁶³¹ Therefore, section 2(6) introduces a higher standard of care to prioritise the interests of its customers over its interests.

A similar obligation is introduced in section 4(1), which states that product and service design must be done with due regard to the interests of the financial customer. Additionally, it is contemplated that a product design process must be informed by the needs and reasonable expectations of the customer, coupled with a detailed assessment process on product suitability, marketing and disclosure requirements.¹⁶³² The assessment must be undertaken by competent persons within the financial institution who know the key features and characteristics of the product or service.

b. Unconscionable conduct

Business models and practices designed to take advantage of customer vulnerabilities subtly and systemically have been a source of contention for consumer advocates and regulators.¹⁶³³ A specific problem arises where the consumer has a 'reduced ability' to protect their interests, and their right to be treated with dignity is ignored.¹⁶³⁴ One notable provision addressing such predatory conduct and practices is the prohibition of unconscionable conduct under the CPA¹⁶³⁵ and ASIC Act in Australia.¹⁶³⁶ It is argued that unconscionability requires the kind of moral tainting that elicit condemnation due to misalignment with community values.¹⁶³⁷

In defining the meaning of 'unconscionable' conduct, the CPA¹⁶³⁸ points to conduct that is 'unethical, or improper to a degree that would shock the conscience of a reasonable person'. A two-part test can be applied to determine unconscionability. The first part of the test is to identify

¹⁶³⁰ Conduct Standard (n 17) at s 2(6).

¹⁶³¹ Lumpkin (n 724) at 8. See also Rattue (n 724).

¹⁶³² Conduct Standard (n 17) at s 5(1)(a).

¹⁶³³ Paterson & Brody (n 740) at 331–32.

¹⁶³⁴ *Ibid* at 337.

¹⁶³⁵ CPA (n 16) at s 40.

¹⁶³⁶ ASIC Act (n 677) at ss 12BF; 12CA; 12CB and 12CC. See also section 3.2.3.1 and 6.4.3.3 above for detailed discussion on the doctrine of unconscionability. Glover (n 682) at 692. Du Plessis (n 682) at 202.

¹⁶³⁷ *Tonto Home Loans* (n 1392). See also *Lux* (n 1392).

¹⁶³⁸ CPA (n 16) at s 1.

circumstances that place a contracting party at a disadvantage (whether it is a 'special disadvantage' or a 'situational disadvantage').¹⁶³⁹ The second part identifies if another party has exploited the advantage.¹⁶⁴⁰ Furthermore, there is a procedural and substantive element in determining whether conduct is unconscionable.¹⁶⁴¹ Procedural unconscionability relates to the procedure and process around the negotiation and conclusion of the contract, where a stronger contracting party exploits the inability of a party to protect his interests but conduct can also be unconscionable due the way in which the contract is enforced .

Notably, neither the FSRA, the Conduct Standard, nor the COFI Bill have a provision similar to section 40 of the CPA, nor do any financial sector regulatory instruments refer to the concept of 'unconscionable' conduct as a content or conduct control mechanism. The FSRA in section 106(4) allows a Conduct Standard to declare specific conduct in connection with a financial product or a financial service to be considered a prohibited practice or unfair business conduct.

Although the principles of community morals enable unconscionability to serve as a 'safety net' against systemic predatory models,¹⁶⁴² the doctrine of unconscionability imposes a higher standard which is more challenging to reach than the test of unfairness.¹⁶⁴³ Furthermore, there is a lack of community understanding of the concept of unconscionability.¹⁶⁴⁴ Therefore, instead of adopting the doctrine into financial sector law, the COFI Bill and Conduct Standard must include a more understandable objective criterion (proposed below) to assess the fairness of conduct or outcomes.¹⁶⁴⁵

c. Introducing an overriding duty of good faith

Notably, neither the COFI Bill nor section 5(2) of the Conduct Standard refers to the notion of good faith in the definition of unfair terms or anywhere else. This is distinguishable from the UK, where good faith is included as an element in the test for unfairness.

¹⁶³⁹ Rajapakse & Gardner (n 1443) at 515.

¹⁶⁴⁰ Glover (n 682) at 692.

¹⁶⁴¹ Du Plessis (n 682) at 202.

¹⁶⁴² Paterson & Brody (n 740) at 344.

¹⁶⁴³ *Bridge* (n 741) at 626. Glover (n 682) at 691.

¹⁶⁴⁴ Felstead (n 742) at 286.

¹⁶⁴⁵ See discussion under section 4.4.3 and 4.5 above.

Some may argue that South African law also does not recognise an independent, standalone, and enforceable duty of good faith, and therefore, the exclusion of good faith from the definition of fairness aligns with the prevailing legal position.¹⁶⁴⁶ However, the Constitutional Court has infused public policy consideration of fairness, justice, good faith and reasonableness in contract law.¹⁶⁴⁷

In English law, there is similarly no implied general duty of good faith imputed into general contract law. Still, legislative intervention in section 62(4) of the CRA entrenched the consideration of good faith in determining the fairness of consumer terms and conditions. The FCA has also implemented the new Consumer Duty that seeks to statutorily introduce a higher standard of conduct through the duty of care imposed on financial institutions. According to the published rules:

'Firms are required to comply with the Duty's cross-cutting rules by acting in good faith towards customers, avoiding causing foreseeable harm to customers and enabling and supporting customers to pursue their financial objectives. This requires firms to be proactive in delivering good customer outcomes – rather than waiting for [the regulator] to intervene – and firms need the right culture and governance to enable this.'¹⁶⁴⁸

Therefore, the legislative imposition of a duty of good faith is not alien to consumer protection internationally.¹⁶⁴⁹ Furthermore, South African courts have already embraced the concept of good faith, albeit not as a standalone rule.¹⁶⁵⁰ Considering the complex nature of financial products and services, an opportunity exists to develop the law further by imposing a duty to act in good faith regarding the provision of financial products and services to retail financial customers. Considering the nature of the relationship, introducing a duty of good faith would not be unduly onerous.¹⁶⁵¹

¹⁶⁴⁶ *Hutchison* (n 745) at 464. *Brisley* (n 782) para 22.

¹⁶⁴⁷ *Barkhuizen* (n 26) para 51. *Hutchison* (n 745) at 464.

¹⁶⁴⁸ FCA Consumer Duty implementation (n 1187) at 2.

¹⁶⁴⁹ *McKendrick* (n 977) para 12.10.

¹⁶⁵⁰ *Beadica* (n 32).

¹⁶⁵¹ *MSC Mediterranean* (n 972).

In determining whether a party has acted in good faith, reference must be made to the context, the facts and circumstances of each case.¹⁶⁵² Good faith does not limit freedom of contract but rather gives legitimate effect to the expectation to act reasonably in line with the parties' justified expectations.¹⁶⁵³ Good faith also gives effect to the notion of ubuntu that financial service providers should not exploit the information asymmetry and take unfair advantage of customers to 'do them in'. The nature of the relationship between a bank and its customers is one premised on trust and confidence,¹⁶⁵⁴ and therefore, acting in good faith must serve as an anchor principle. Indeed, 'the reasonable expectations of honest men must be protected.'¹⁶⁵⁵

Therefore, the concept of good faith can also serve as a tool to regulate not only contractual terms but also act as an overall control of the parties' behaviour in the business relationship. Beatson and Friedman note that good faith restrains self-interest and requires a supplier to consider the customer's interests.¹⁶⁵⁶ A legal right or power conferred upon a person should not be wielded excessively or in such an oppressive or exploitative manner such that it far exceeds what is necessary to protect the party's legitimate interests.¹⁶⁵⁷ Therefore, good faith means that a supplier must act honestly with due regard to the customer's interests without exploiting or taking undue advantage of gaps in the level of the customer's knowledge, understanding, skills, experience, expertise or bargaining power. According to Willet, fairness means 'paying attention to factors that may prevent the consumer from protecting his interests in the agreement process'.¹⁶⁵⁸ Eventually, at its heart, the concept of good faith is intended to facilitate trust and cooperation.¹⁶⁵⁹ Ultimately, the basis of fairness standards cannot be decided upon by personal concepts of inherent fairness.¹⁶⁶⁰

¹⁶⁵² *Cathay Pacific Airways Ltd v Lufthansa Technik AG* (2020) EWHC 1789 (Ch).

¹⁶⁵³ *Health and Case Management Ltd v The Physiotherapy Network Ltd* (2018) EWHC 869 (QB) at 128; *Al Nehayan v Kent* (2018) EWHC 333 (Comm) at 167-174; *Bates v Post Office Ltd* (no. 3) (2019) EWHC 606 (QB) at 710.

¹⁶⁵⁴ UN General Assembly (n 14) ; *Essex County Council v UBB Waste (Essex) Ltd* (2020) EWHC 1581 (TCC) at 106.

¹⁶⁵⁵ *First Energy (UK) Ltd v Hungarian International Bank Ltd* (1993) 2 Lloyd's Rep 194 at 194–196.

¹⁶⁵⁶ Beatson & Friedmann (n 677) at 242–243.

¹⁶⁵⁷ Beatson & Friedmann (n 677) at 400.

¹⁶⁵⁸ Willet (n 1015 at 2.

¹⁶⁵⁹ Teubner (n 21) at 28.

¹⁶⁶⁰ *Director General of Fair Trading* ((n 991) at 687E.

Uncertainty is a feature of commercial dealings, and introducing the concept of good faith and its definition does not introduce any more uncertainty than already exists.¹⁶⁶¹ However, it is crucial to mitigate against the identified risks and potential unintended consequences¹⁶⁶² by clearly defining the meaning of good faith, the extent of the obligation, and the factors to be considered in assessing whether conduct is contrary to good faith. The following are proposed elements to consider in the definition of good faith:

- parties must act honestly and 'with fidelity to the bargain'.¹⁶⁶³
- parties must not act dishonestly and undermine the agreement or the substance of the negotiated contractual benefit.
- action must not be arbitrary, inconsistent, or irrational.¹⁶⁶⁴
- good faith must go beyond not telling lies. It must also be about disclosing the truth about material facts about financial products and services,
- parties must act reasonably and with fair dealing, paying due regard to the interests of the other parties. This does not require a party to subordinate his interests to that of another¹⁶⁶⁵ but instead involves consideration of the legitimate interest of the other contracting party to benefit from the contract.¹⁶⁶⁶
- a party should not exploit a personal or situational vulnerability of a customer to their advantage, to the detriment of the customer.

Indeed, it is not wrong to expect huge profits for honest efforts.¹⁶⁶⁷ However, the Constitutional Court has made the point that public policy cannot be separated from notions of fairness, justice, and equity, and public policy considers the necessity of doing simple justice between individuals.¹⁶⁶⁸

¹⁶⁶¹ *Yam Seng* (n 960) para 152.

¹⁶⁶² *McKendrick* (n 977) paras 12.10.2–12.10.3.

¹⁶⁶³ *Paciocco* (n 1296) para 288.

¹⁶⁶⁴ *Yam Seng* (n 960). *Godwin, Kourabas & Ramsay* (n 330) at 283.

¹⁶⁶⁵ *Burger King* (n 1419) at 187.

¹⁶⁶⁶ *Peden* (n 1428). *Mason* (n 1428) at 69.

¹⁶⁶⁷ *Sreeramana Aithal 'Realization of Ideal Banking Concept Using Ubiquitous Banking'* (2016) 1 *International Journal of Scientific Research and Modern Education* 119 at 123.

¹⁶⁶⁸ *Barkhuizen* (n 26) para 5.

The Constitutional Court highlighted that public policy is formed by the concept of *ubuntu*, which is an expression of the term '*umuntu ngumuntu ngabantu*'.¹⁶⁶⁹ The term requires a consciousness of the embedded link between individual conduct and action to social impact, values and principles. Ubuntu encapsulates core values of 'group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality'.¹⁶⁷⁰ Therefore, looking at good faith through the lens of ubuntu requires us not to look at customers as objects to extract value for commercial purposes. Instead, financial institutions should view customers and the opportunities they present with care, respect and with due regard to their interests.¹⁶⁷¹ The concept of ubuntu and the application of constitutional values also align with the G20/OECD high level principles, which confirm that the objective of financial institutions should be to work in the best interest of consumers.¹⁶⁷² Therefore, concepts of good faith, fairness, and ubuntu form part of public policy.¹⁶⁷³

It is submitted that incorporation of an express duty of good faith in the Conduct Standard and COFI would give statutory effect to such constitutional values.¹⁶⁷⁴ The duty of good faith also supports a principles-based approach that COFI seeks to introduce and would serve as one of the foundational values informing actions, processes and procedures adopted by financial institutions to deliver TCF outcomes.

d. TCF and the objective criterion to assess the fairness of conduct and outcomes

The dimensions of the six TCF outcomes in South Africa and the UK are largely identical,¹⁶⁷⁵ and notably, there are growing calls in Australia to legislate TCF.¹⁶⁷⁶ A closer analysis of the outcomes reveals that key areas that introduce customer risk include information failure, data and digitalisation failure, consumer characteristics, behaviour, and vulnerabilities, business models, product design and service approaches, and processes of financial institutions, and social norms

¹⁶⁶⁹ *Everfresh* (n 789) para 71.

¹⁶⁷⁰ *Ibid* para 308.

¹⁶⁷¹ Teubner (n 21) at 10 and 12.

¹⁶⁷² Financial Stability Board (n 67) Principle 9.

¹⁶⁷³ *Everfresh* (n 789) para 71. *Barkhuizen* (n 26) para 140.

¹⁶⁷⁴ Hutchison (n 745) at 465.

¹⁶⁷⁵ See section 6.6.2 above.

¹⁶⁷⁶ Howell et al (n 1440) at 2. See also Schmulow et al (n 1440) at 16.

and expectations.¹⁶⁷⁷ Therefore, to address identified customer risk, TCF requires the application of judgment to determine what is fair, especially within the context of a principles-based and outcomes-focused approach to regulation.

A positive feature of the Conduct Standard and the COFI Bill is that they incorporate the six TCF principles¹⁶⁷⁸ and specific obligations relating to the culture,¹⁶⁷⁹ governance,¹⁶⁸⁰ key persons,¹⁶⁸¹ advertising,¹⁶⁸² disclosures,¹⁶⁸³ remuneration and compensation arrangements¹⁶⁸⁴ within financial institutions to support fair customer outcomes, principles for the provision of financial services,¹⁶⁸⁵ and post-sale barriers and obligations including service.¹⁶⁸⁶

Whilst section 5(2) of the Conduct Standard sheds light on circumstances under which a contract term or condition would be considered unfair, an objective test to assess the fairness of conduct and outcomes still needs to be defined and understood. To the extent that the Conduct Standard or financial sector law lacks clarity or may result in uncertainty or ambiguity about the fairness, reasonableness or conscionability of specific conduct or outcomes, there remains an opportunity for further development of financial sector law. The principles outlined in section 40 of the CPA on unconscionable conduct, read with section 52(2) regarding factors the court must consider in ensuring fair and just conduct, terms and conditions,¹⁶⁸⁷ are instructive to financial services regulators and organisations on the approach to proactively assess the fairness of conduct and outcomes.

Therefore, a proposal is for the Conduct Standard to develop one simplified and understandable composite criterion to determine fairness of conduct, practices or outcomes (as opposed to only terms) – derived from the abovementioned CPA provisions.¹⁶⁸⁸ The proposed criterion requires looking at the unique circumstances of the case and determining if conduct, practices or outcomes considered in light of the TCF principles set out in section 2 (5) of the

¹⁶⁷⁷ See section 4.2.2 above on TCF and sources of customer risk.

¹⁶⁷⁸ Conduct Standard (n 17) at s 2(5).

¹⁶⁷⁹ COFI (n 16) at s 16–17. Conduct Standard (n 17) at s 3(1).

¹⁶⁸⁰ COFI (n 16) at s 19. Conduct Standard (n 17) at s 3(2)–(7).

¹⁶⁸¹ *Ibid* at s 24–25. Conduct Standard (n 17) at ss 4(2) and 4(4)(g).

¹⁶⁸² Conduct Standard (n 17) at s 6.

¹⁶⁸³ *Ibid* at s 7.

¹⁶⁸⁴ COFI Bill (n 16) at ss 20–22.

¹⁶⁸⁵ *Ibid* at ss 26–27.

¹⁶⁸⁶ *Ibid* at ss 32–35.

¹⁶⁸⁷ CPA (n 16).

¹⁶⁸⁸ CPA (n 16) at ss 40 and 52(2).

Standard is unreasonable, absurd, or unduly harsh and contrary to good faith. The determination should consider factors such as whether there is significant imbalance in the nature of the relationship between the parties (considering their relative capacity, expertise, education, experience, sophistication or situational disadvantage),¹⁶⁸⁹ their relative bargaining power,¹⁶⁹⁰ and whether the customer suffered or was likely to suffer detriment or harm as a result of the conduct.¹⁶⁹¹

The above proposed criterion, if adopted, would provide more precise and objective guidance to market participants on the logical steps to follow to test for fairness of conduct or outcomes. Each case must understandably be assessed on its own merits.¹⁶⁹² Good faith will be central to any process to determine the fairness of conduct and outcomes.¹⁶⁹³

8.5.4 Interpretation controls

To aid the interpretation of contracts to protect the consumer's rights,¹⁶⁹⁴ the CPA provides that in matters before the court or Tribunal, the court and Tribunal must promote the spirit and purpose of the Act.¹⁶⁹⁵ Furthermore, where a meaning is capable of more than one interpretation, the court or Tribunal must interpret it to the benefit of the consumer.¹⁶⁹⁶

Whilst the Conduct Standard is silent on the matter of interpretation, the 2020 version of the COFI Bill 2020 states that the Act must be interpreted to promote the achievement of the objectives of the Bill and FSRA. The latter objective includes financial consumer protection and fair treatment of customers.¹⁶⁹⁷ However, there is no express provision in the COFI Bill that the term will be interpreted to the benefit of a consumer where the wording can have more than one meaning.

Considering the inherent asymmetry in the relationship between financial service providers and customers, there is also an opportunity to definitively confirm in COFI and the Conduct

¹⁶⁸⁹ See CPA (n 16) at s 52(2)(b). See also CRA (n 216) at s 62(4)

¹⁶⁹⁰ *Ibid.*

¹⁶⁹¹ Adapted from the fairness test under s 62(4) of the CRA (n 216).

¹⁶⁹² *Guardrisk* (n 820) para 24.

¹⁶⁹³ See section 5.3 and 5.4 above for detailed discussion on concept of fairness and proposed assessment criterion.

¹⁶⁹⁴ Naudé & Eiselen (n 404) at 48–51.

¹⁶⁹⁵ CPA (n 16) at ss 4(2)(b) and 4(3).

¹⁶⁹⁶ CPA (n 16) at s 4(4).

¹⁶⁹⁷ CPA (n 16) at s (2)(b).

Standard that in the case of ambiguity, where a term is capable of more than one reasonable interpretation, the contractual term, form or document would be construed liberally in favour of the customer.

8.6 SUMMARY OF RECOMMENDATIONS

8.6.1 Enhance supervisor cooperation, coordination, and accountability measures

- a. Information sharing and coordination between the FSCA, the PA and the NCR must be entrenched and built into operating procedures of these agencies instead of being discretionary or at a high level.¹⁶⁹⁸
- b. Based on well-structured legitimate interest information sharing arrangements aligned with POPIA, the FSCA, PA and the NCR can consolidate statutory reporting requirements around similar or related topics. Formal coordination structures must be supplemented with effective information sharing on an 'unsolicited basis', especially at an operational level.¹⁶⁹⁹
- c. There must be an efficient mechanism to ensure accountability and measurement to effectively drive cooperation, collaboration, and coordination amongst regulators. Therefore, the MoUs should be complemented by more detailed coordination and measurement frameworks. To ensure transparency, it is also essential that performance against success measurement criteria is made publicly available for the benefit of regulated financial institutions and customers.¹⁷⁰⁰
- d. It must be clear how concurrent jurisdiction in the context of overlapping mandates – between FSCA and NCA – would apply in practical terms. It must be clear who would be considered the lead supervisor with the appropriate jurisdiction and how conflicting opinions will be resolved.¹⁷⁰¹
- e. The MoU between the FSCA and the PA should be amended to clarify limited circumstances under which the PA's indirect 'veto' power under concurrency provisions can be exercised.¹⁷⁰² The administrative law principles of 'lawfulness, procedural fairness,

¹⁶⁹⁸ Godwin (n 182) at 185.

¹⁶⁹⁹ Ibid at 186.

¹⁷⁰⁰ Allen (n 75) at 2–3. Godwin, Kourabas & Ramsay (n 330) at 286–291. Biber et al (n 344) at 1565.

¹⁷⁰¹ World Bank (n 68) at 5.

¹⁷⁰² See section 5.2.3.1 above on cooperation, coordination, and collaboration.

and reasonableness' must be applied to regulatory action under section 144(6). The section must state 'how power is exercised, how rights are defined and protected, and how interests are represented'.¹⁷⁰³ Reasons must be provided for decisions which can be subjected to oversight and parliamentary scrutiny.

8.6.2 Strengthen capabilities and capacity of the FSCA to exercise effective oversight around TCF and retail financial consumer protection

- a. The objective of effective consumer protection will be better served by establishing a competent, adequately skilled, and resourced specialist consumer protection unit within the existing conduct regulatory body. A senior, skilled, and experienced leader in financial consumer protection must head the unit. The incumbent must serve in an executive or senior position within the conduct regulator to lift the consumer protection profile.¹⁷⁰⁴
- b. The conduct regulator should strengthen capabilities for proactive and predictive monitoring using statistical and risk analysis methodologies.¹⁷⁰⁵ A structured information sharing mechanism must be established to share thematic insights with financial institutions.

8.6.3 Ensuring assessment of retail financial consumer protections against fundamental consumer protections available under the CPA

- a. The legislature and the FSCA must conduct a systematic assessment of the consumer protections under the COFI Bill and the Conduct Standard against the fundamental consumer rights afforded under Chapter 2¹⁷⁰⁶ of the CPA. Whilst not all provisions of Chapter 2 may be relevant or appropriate in all instances to the provision of financial products and services, it is essential to harmonise relevant provisions of the FSRA, COFI

¹⁷⁰³ Thomas, Gamble & Adler (n 931). Alberts et al (n 936). See also FSRA (n 80) at ss 91 and 92.

¹⁷⁰⁴ Charles A E Goodhart 'The organizational structure of banking supervision' (2002) 31 *Economic Notes - Monte Paschi Siena* 1 at 28.

¹⁷⁰⁵ Toronto Centre (n 1254) at 10.

¹⁷⁰⁶ CPA (n 16) at ss 8– 67.

and the Conduct Standard to ensure retail financial customers do not receive lesser protections than those offered under the CPA. Regulatory instruments introduced must consider the fairness control mechanisms incorporated in the CPA and appropriately adapt these mechanisms to the context of financial products and services.¹⁷⁰⁷

- b. Considering the inherent information asymmetry, material mismatch in bargaining power between banking institutions in general versus retail consumers of financial products and services, and inherent consumer behavioural biases that increase customer vulnerability,¹⁷⁰⁸ the interpretation of contractual terms and conditions for the provision of financial products and financial services should be done in a manner that aligns with the rule that ‘the terms of a contract, if capable of more than one meaning, are to be interpreted against the party who proposed them’. However, such an interpretation would not apply in a challenge by regulators or consumer bodies against terms that are offered by a supplier generally to the public.¹⁷⁰⁹ Therefore, similar to section 4(4)(a) of the CPA, a provision must be included under section 27 of the COFI Bill and in the Conduct Standard to the effect that the FSCA, the Tribunal or court must interpret any form, contract, term or document to the benefit of a retail financial consumer where the wording is ambiguous or capable of more than one meaning.¹⁷¹⁰

8.6.4 Definition of unfair terms and conduct

- a. The COFI legislation must entrench an overarching regime prohibiting unfair terms in standard form contracts by reinserting the definition of unfair terms or conditions under section 27. Determining fairness should also apply to the pricing and value of products and services. There must be an alignment in terminology, phrases and wording used in COFI and the Conduct Standard to define unfair terms, conditions, conduct and associated requirements.

¹⁷⁰⁷ See Chapter 3, 5 and 6 above for detailed discussion.

¹⁷⁰⁸ Armour et al (n 91) at 206–207.

¹⁷⁰⁹ Naudé & Eiselen (n 404) at 4-12.

¹⁷¹⁰ Naudé & De Stadler (n 433) at 5.

- b. The COFI legislation and the Conduct Standard must include failure to satisfy procedural formalities and disclosure requirements as an element under section 5(2) in determining whether a term or condition is unfair.¹⁷¹¹ At the same time, it must be clear that procedural failure alone would not be sufficient to render a term unfair and therefore, null, void, or unenforceable.¹⁷¹² Procedural unfairness must at least result in customer detriment or the risk of detriment for a term to be considered unfair.
- c. The wording of COFI as the primary conduct legislation, must clarify if any one element under section 5(2) (as amended) can justify a term being rendered unfair or whether all elements must be satisfied.
- d. The Conduct Standard must address the potential consequences of non-compliance and failure to prioritise the customer's interests above those of the bank.
- e. The COFI Bill (and where not included in COFI, then the Conduct Standard) must be amended to include an indicative, non-exhaustive grey-list of terms that may be considered unfair. In determining the list, the legislature and the FSCA should consider non-exhaustive lists under the CPA,¹⁷¹³ the CRA in the UK¹⁷¹⁴ and the ASIC Act in Australia.¹⁷¹⁵
- f. The COFI Bill (and where not included in COFI, then the Conduct Standard) must be amended to include blacklisted terms that are outright prohibited.¹⁷¹⁶
- g. Although the courts ultimately have judicial control to adjudicate unfair, unjust, and unconscionable conduct, more proactive and consumer friendly measures are still desirable – due to the risk, time, and cost limitations of litigation on consumers – to ensure effective resolution of complaints and disputes about unfair contractual terms.¹⁷¹⁷ In addition to the FSCA's rulemaking powers, there is an opportunity to develop the law further and for COFI to also grant fairness jurisdiction to the FSCA,¹⁷¹⁸ in line with sections 141, 142 and

¹⁷¹¹ As contemplated under s 49(1).

¹⁷¹² *Director General of Fair Trading* ((n 991) at 687.

¹⁷¹³ CPA (n 16) at s 51 and reg 44.

¹⁷¹⁴ Clark (n 1330) at 197.

¹⁷¹⁵ ASIC Act (n 677) at s 12BH.

¹⁷¹⁶ Naude & Eiselen (n 404) at 48-1.

¹⁷¹⁷ Naudé (n 27) at 516.

¹⁷¹⁸ See Hutchison (n 784) at 270. See also Naudé (n 661) at 516–517. Also see Andrews & Lawson (n 983) at 358 and 360–361 indicating that the FCA is an enforcer under the CRA and under Part 8 it is empowered to issue enforcement orders and undertakings against unfair terms, including enhanced consumer measures as part of an enforcement order.

144 of the FSRA. This will confirm the FSCA’s powers to issue rulings, directives and declarations regarding the fairness of terms, practices and conduct. Such powers must be exercised with due regard to principles of fair administrative justice set out in Part 2 of the FSRA.

8.6.5 Introducing an overriding duty of good faith

a. An express statutory duty of good faith should be introduced in the Conduct Standards and COFI. The duty of good faith will support a principles-based approach that COFI seeks to introduce and would serve as one of the foundational values informing actions, processes and procedures adopted by financial institutions to deliver TCF outcomes. A duty of good faith will also give effect to the notion of ubuntu that financial service providers should not exploit the information asymmetry and take unfair advantage of customers. The nature of the relationship between a bank and its customers is one premised on trust and confidence,¹⁷¹⁹ and acting in good faith must serve as an anchor principle.

b. Good faith must be defined. Below is the proposed definition:

The obligation of good faith requires that:

- i. parties must act honestly.
- ii. parties must not undermine the agreement or the substance of the contractual benefit that was negotiated.
- iii. parties must act reasonably and with fair dealing.
- iv. a party should not exploit a personal or situational vulnerability of a customer to their advantage, to the detriment of the customer.
- v. a party must have due consideration of the legitimate interest of the other contracting party to benefit from the contract.¹⁷²⁰ However, this does not mean that a party must subordinate his interests to that of another.¹⁷²¹

A clear and consistent definition of good faith in financial sector legislation can also serve as a baseline standard to assess whether the fair treatment of customers is central to the culture of financial institutions. Reducing uncertainty will contribute towards positive and proactive market conduct risk management.

¹⁷¹⁹ UN General Assembly (n 14). *Essex County* (n 1654) at 106.

¹⁷²⁰ *Beadica* (n 32) para 57 quoting *Botha v Rich NO* (n 35) paras 45–6. Peden (n 1428) . Mason (n 1428) at 69.

¹⁷²¹ *Burger King* (n 1419) at 187.

8.6.6 An objective criterion to determine the fairness of conduct or outcomes

The Conduct Standard to develop one simplified and understandable composite criterion to determine fairness of conduct, practices or outcomes (as opposed to only terms) – derived from the abovementioned CPA provisions.¹⁷²² The proposed criterion requires looking at the unique circumstances of the case and determining if conduct, practices or outcomes considered in light of the TCF principles set out in section 2 (5) of the Standard is unreasonable, absurd, or unduly harsh and contrary to good faith. The determination should consider factors such as whether there is significant imbalance in the nature of the relationship between the parties (considering their relative capacity, expertise, education, experience, sophistication or situational disadvantage),¹⁷²³ their relative bargaining power,¹⁷²⁴ and whether the customer suffered or was likely to suffer detriment or harm as a result of the conduct.¹⁷²⁵

The proposed objective criterion should be included to test the fairness of conduct and outcomes instead of directly adopting the concept of unconscionability in financial sector law.

8.6.7 Simplify the regulatory architecture and reduce ambiguity in the wording of COFI and the Conduct Standard

- a. The wording of regulations must be written in a manner that reduces ambiguity, complexity and the possibility of differing interpretations. Ensuring clear language and alignment of wording, concepts, definitions, terminology, and implications of rights conferred under the Conduct Standard and COFI is vital to promote greater certainty for financial institutions, supervisors, customers, and the general public. It will facilitate compliance and enforcement and minimise the regulatory burden on financial institutions.¹⁷²⁶
- b. Considering the centrality of information disclosure to deliver fair customer outcomes, the Conduct Standard should be amended to remove the ambiguity associated with the

¹⁷²² CPA (n 16) at ss 40 and 52(2).

¹⁷²³ See CPA (n 16) at s 52(2)(b). See also CRA (n 16) at s 62(4).

¹⁷²⁴ *Ibid.*

¹⁷²⁵ Adapted from the fairness test under s 62(4) of the CRA (n 16).

¹⁷²⁶ See discussion under section 4.3 above. See also World Bank (n 68) at 14.

reasonable endeavours provision in section 7(1). Otherwise, assessing the bank's reasonable steps would always be subject to judicial control, resulting in time delays, costs, and litigation risks for both banks and customers.¹⁷²⁷ Determining whether the actions were adequate to discharge the bank's obligations will require application of the reasonable consumer test as opposed to focusing on the banker or financial institution.¹⁷²⁸ In this regard, it would be more appropriate to adopt a similar approach followed by the CPA which considers the interest of an ordinarily alert consumer.¹⁷²⁹ The reasonable person test should therefore be:

‘[W]hether [an ordinary retail financial] customer ...of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a [retail financial] consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort’.¹⁷³⁰

The above wording can be inserted as a subsection under section 7 of the Conduct Standard.

- c. The regulatory and supervisory framework and architecture must be designed to enable effective conduct risk management whilst allowing banks to operate sustainably and profitably.¹⁷³¹

8.7 CONCLUDING REMARKS

In a society seeking to narrow the wide gap of social and economic disparities that are exacerbated by significant information and knowledge asymmetry, it is necessary to promote ‘substantive justice’ and the transformative aspirations of the Constitution¹⁷³² and ensure regulatory instruments introduced to protect financial consumers incorporate adequate and appropriate fairness control mechanisms to promote delivery of fair customer outcomes. It is essential to have

¹⁷²⁷ See detailed discussion under clause 4.3.1.1 above.

¹⁷²⁸ *Kruger* (n 570) at 430E-F. See also *First National Bank v Duvenhage* (n 570) para 2.

¹⁷²⁹ CPA (n 16) at s 49(2)(c).

¹⁷³⁰ *Ibid* at s 22(2).

¹⁷³¹ *Hargarter & Van Vuuren* (n 399) at 8.

¹⁷³² Constitution (n 441).

regulatory instruments that are not vague so that ordinary retail users can understand their rights, obligations, and recourse options. At the same time, regulatory instruments must not be overly rigid and prescriptive, such that they stifle economic growth and activity. It requires a careful balancing act to achieve equity and fairness in the provision of financial products and services without introducing complex hurdles that impede or slow down the pace of economic activity.

Ensuring a robust and effective legal and regulatory framework for retail financial consumer protection, which includes setting a clear and objective test for fairness, an overriding duty of good faith on financial institutions, and strengthening the mandate and capabilities of the conduct authority, will contribute to economic dynamism, consumer welfare and is in the public interest.¹⁷³³ A presentation was made to the FSCA¹⁷³⁴ which proposed that review of conduct regulation should include a systematic review of consumer protections under the CPA to ensure that retail financial customers do not have fewer protections than those available to other consumers. The presentation also recommended including an indicative and non-exhaustive 'grey' list of unfair terms and adopting an overriding duty of good faith.

Although there are some concerns that more regulatory requirements decrease bank efficiency,¹⁷³⁵ the UK and Australian experience indicate that regulating unfair contract terms influences firms to eliminate such unfair terms from contracting¹⁷³⁶ and enhances economic growth through fair treatment and responsible lending.¹⁷³⁷ Whilst there is a valid reason for differentiated treatment between developed (UK and Australia) and developing economies (South Africa) due to differences in the structure of the economies, the respective financial systems and customer profiles,¹⁷³⁸ the higher levels of vulnerability and lower levels of financial education amplify the need for South Africa to pay attention to global best practice to ensure fairer outcomes for retail financial customers.¹⁷³⁹

¹⁷³³ UN Resolution 70/186 (n 14) at 2.

¹⁷³⁴ Alex Mathole 'Proposals: Treating Customers Fairly and the COFI Bill' Presentation to the FSCA 07 October 2022.

¹⁷³⁵ Chrysovalantis Gaganis et al 'Bank profit efficiency and financial consumer protection policies' (2020) 118 *Journal of Business Research* 98 at 98.

¹⁷³⁶ Clark (n 1330) at 215.

¹⁷³⁷ Maryam Kriese, Joshua Yindenaba Abor & Elipklimi Agbloyor 'Financial consumer protection and economic growth' (2019) 14 *International Journal of Emerging Markets* 1060.

¹⁷³⁸ UN Resolution 70/186 (n 14) at 2 under section 5.

¹⁷³⁹ Ibid.

Financial institutions with foresight will identify the changing consumer protection landscape, implement strategies and make appropriate investments to harness the effective implementation of TCF as a valuable asset.¹⁷⁴⁰ Sustainable banks of the future will be those that can position fair customer outcomes as a competitive differentiator.¹⁷⁴¹

¹⁷⁴⁰ Sam Peltzman “‘The theory of economic regulation’ at 50 years’ (2022) 193 *Public Choice* 7 at 18.

¹⁷⁴¹ G30 (n 10) at 7.

BIBLIOGRAPHY

Statutes

Banks Act 94 of 1990.

Conduct of Financial Institutions Bill in GN 642 GG 421141 of 14 December 2018.

Conduct of Financial Institutions Bill in GN 519 GG 43741 of 29 September 2020.

Conduct Standard 3 of 2020 (Banks).

Constitution of the Republic of South Africa, 1996.

Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

Consumer Protection Act 68 of 2008.

Consumer Protection Act Regulations in GN 293 GG. 34180 of 1 April 2011.

Consumer Protection from Unfair Trading Regulations 2008.

Electronic Communications Act 36 of 2005.

Electronic Communications and Transactions Act 25 of 2002.

Financial Advisory and Intermediary Services Act 37 of 2002.

Financial Sector Laws Amendment Act 23 of 2021.

Financial Sector Regulation Act 9 of 2017.

Financial Services Board Act 97 of 1990.

Financial Services Laws General Amendment Act 45 of 2013.

General Code of Conduct for Authorised Financial Services Providers and Representatives.

Long-Term Insurance Act 52 of 1998.

National Credit Act 34 of 2005.

National Payment Systems Act 78 of 1998.

Promotion of Administrative Justice Act 3 of 2000.

Protection of Personal Information Act 4 of 2013.

Regulation of Interception of Communications and Provisions of Communication-Regulated Information Act 70 of 2002.

Competition and Market Authority Unfair Contract Terms Guidance (2015).

Consumer Credit Act 1974.

Consumer Protection Act 1987.

Consumer Rights Act 2015.

Enterprise and Regulatory Reform Act 2013.

Financial Services Act 2021.
Financial Services and Markets Act 2000.
Financial Services Reform Act 2001.
Future of Financial Advice Act 2012.
Insurance Contracts Act 1984.
Sale of Goods Act 1979.
The Unfair Terms in Consumer Contracts Regulations 1999.
Unfair Contract Terms Act 1977.
Unfair Contract Terms Guidance (OFT311) September 2008.
Unfair Terms in Consumer Contracts Directive 93/13/EEC.
Australian Consumer Law No 51 of 2010.
Australian Prudential Regulation Authority Act 1998.
Australian Prudential Regulation Authority Regulations 2018.
Australian Securities and Investments Commission Act No 51 of 2001.
Banking Act No 6 of 1959.
Competition and Consumer Law Act 2010.
Corporations Act 50 of 2001.
Credit Legislation Amendment (Enhancements) Act 2012.
Digital Markets, Competition and Consumer Act 2024.
European Union (Withdrawal) Act 2018.
Financial Service and Markets Act 2000.
Financial Service and Markets Act 2023.
Financial Markets (Conduct of Institutions) Amendment Act 2022.
Financial Services Reform Act 2001.
Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act No 105 of 2008.
German Civil Code BGB Federal Law Gazette (*Bundesgesetzblatt*) 2909 of 2 January 2002.
German Standard Contract Terms Act 1976.
Insurance Contracts Act No 80 of 1984 as amended.
Life Insurance Act No 4 of 1995 as amended.
National Consumer Credit Protection Act No 134 of 2009.

Retirement Savings Accounts Act No 61 of 1997 as amended.
Superannuation (Resolution of Complaints) Act No 80 of 1993 as amended.
Superannuation Industry (Supervision) Act No 78 of 1993 as amended.
Trade Practices Act 1974.
Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018.
Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.
The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).
The Unfair Terms in Consumer Contracts Directive 1993/13/ECC.
The Unfair Commercial Practices Directive 93/13/EEC.

Case Law

AB and Another v Pridwin Preparatory School and Others (2020) ZACC 12.
AB v Pridwin Preparatory School 2019 (1) SA 327 (SCA).
ABSA Bank Ltd v Hanley (2014) 2 SA 448 (SCA).
ABSA Bank Limited v Hurwitz (2016) ZAGPPHC 820.
ABSA Bank Ltd v Lombart 2005 (5) SA 350 (A).
ABSA Bank v Janse van Rensburg 2002 (3) SA 701 (SCA).
Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).
Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).
AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Others (2021) ZAWCHC 17..
Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd (1983) 1 WLR 87.
Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd (1985) 1 W.L.R. 173.
Al Nehayan v Kent (2018) EWHC 333 (Comm) / (2018) 1 CLC 167-174.
Alfred MacAlpine and Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A).
Alistair Rae Burns v The Financial Conduct Authority (2018) UKUT 246 (TCC).
Androvitsaneas v Members First Broker Network (2013) VSCA 212.
Arcos Ltd v E A Ronaasen & Son (1993) AC 470.

Arpád Kasler and Hajnalka Káslerné. Rábai v OTP Jelzálogbank Zrt European Court of Justice Case C-26/13 ECLI:EU:C: 2014:282.

Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm).

Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd [2015] FCA 1204.

Australian Competition and Consumer Commission v CLA Trading (2016) FCA 377.

Australian Competition and Consumer Commission v Keshow (2005) ATPR 42-076.

Australian Competition and Consumer Commission v Lux Distributors Pty Ltd (2013) FCAFC 90.

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd (2021) FCAFC 40.

Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA 196.

Australian Securities and Investments Commission v AGM Markets (in liq) (No 3) [2020] FCA 208.

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (2023) FCA 1150.

Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) (2012) 88 ASCR 206.

Australian Securities and Investments Commission v Cassimatis (2016) 336 ALR 209.

Australian Securities and Investments Commission v Commonwealth Securities Limited (2022) FCA 1253.

Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq) [2023] FCA 1043.

Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1.

Australian Securities and Investments Commission v Membo Finance Pty Limited (No 2) (2023) FCA 126.

Australian Securities and Investments Commission v RI Advice Group Pty Ltd (2022) FCA.

Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (2014) FCA 926.

Australian Securities and Investments Commission v Westpac Securities Administration Limited (2019) FCAFC 187.

Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manresa (2013) 3 CMLR 89.

Bank of Lisbon and South Africa Ltd v De Ornelus (1988) ZASCA 35.

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Bates v Post Office Ltd (No 3) (2019) EWHC 606 (QB).

Bayport Securitisation Ltd v University of Stellenbosch Law and Others (2021) ZASCA 156.

Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC).

Bester NO and Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI and Others (2023) ZAWCHC 83.

Bhasin v Hrynew (2014) 3 SCR 494.

Blomley v Ryan (1956) 99 CLR 362.

Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA European Court of Justice Case C-143/13 ECLI:EU:C: 2015:127.

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266.

Braganza v BP Shipping (2015) UKSC 17.

Bredenkamp v Standard Bank 2010 (4) SA 468 (SCA).

Bridge v Campbell Discount Co Ltd 1962 AC 600.

Brisley v Drotsky 2002 (4) SA 1 (SCA).

Bryen & Langley Ltd v Boston (2005) EWCA Civ 973.

Burger King v Hungry Jack's Pty (2001) NSWCA 187.

Byleveld v Execor Twelve (Pty) Ltd t/a Motor City 2014 ZANCT 2 (24 February 2014).

Byrne v Australian Airlines Ltd (1995) 185 CLR 410.

Carney & Ors v NM Rothschild & Sons Limited (2018) EWHC 958.

Cathay Pacific Airways Ltd v Lufthansa Technik AG (2020) EWHC 1789 (Ch) 185.

Cenprop Real Estate (Pty) Ltd v Another v Holtzhauzen (520/2021) [2022] ZASCA 183.

Centriq Insurance Company Limited v Oosthuizen and Another 2019 (3) SA 387 (SCA).

City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others 2018 (4) SA 71 (SCA).

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.

Compass Group UK and Ireland Ltd (t/a Medirest) v MidEssex Hospital Services NHS Trust (2013) EWCA Civ 200.

Constructora Principado SA v José Ignacio Menéndez Álvarez (2014) EU:C C226/12.

Court Planet Securities Unit Trust v Dalrymple (1999) QSC 204.

Credit Lyonnais Bank Nederland NV v Burch (1997) 1 All ER 144.

Creswell v Potter (1978) 1WLR 255.

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.

Day v Forex Capital Markets Ltd [2023] EWHC 1349 (Comm).

Di Giulio v First National Bank SA Ltd 2002 (6) SA 281 (C).

Director General of Fair Trading v First National Bank (2000) 2 All ER 759.

Director General of Fair Trading v First National Bank plc (2002) 1 All ER 97.

Earl of Aylesford v Morris (1873) All E R Rep 300.

Eerste Nasionale Bank v Saayman NO 1997 (4) SA 302 (SCA).

Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A).

Essex County Council v UBB Waste (Essex) Ltd (2020) WHC 1581 (TCC).

Everett & Another v Marian Heights (Pty) Ltd 1970 (1) SA 198 (C) at 204D.

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

Financial Services Authority v Asset LI Inc (2013) EWHC 178 (Ch).

Fineland Investments Ltd v Pritchard (2011) EWHC 113 (Ch).

First National Bank of Southern Africa Limited v The Bophuthatswana Consumer Affairs Council Bophuthatswana High Court case no 359/1993 of 24 November 1994.

First Energy (UK) Ltd v Hungarian International Bank Ltd (1993) 2 Lloyd's Rep 194.

First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council 1995 (1) PH A10 (BPD).

First National Bank of Southern Africa v Duvenhage (188/2005) [2006] ZASCA 48.

First National Bank v Lukhele and seven others (2016) ZAGPPHC 616.

First Tower Trustees Ltd v CDS (Superstores International) Ltd (2018) EWCA Civ 1396.

Four Wheel Drive Accessory Distribution CC v Rattan NO 2018 (3) SA 204 (KZD).

Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO 2018 JDR 2203 (SCA).

Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd 2011 (4) SA 276 (SCA).

Fry v Lane (1888) 40 Ch D 312.

Graves v CHL (2014) EWCA Civ 1297.

Guardrisk Insurance Company Limited v Café Chameleon CC 2020 JDR 2774 (SCA).

Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd [2013] EWHC 3251 (Pat).

Health & Case Management Ltd v The Physiotherapy Network Ltd [2018] EWHC 869 (QB).

Hedley Byrne v Heller & Partners Ltd (1964) AC 465.

Interfax (Pty)Ltd and Another v Old Mutual Insure Limited [2020] ZAWCHC 166.

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd (1989) QB 433.

Investec Bank Limited v Motloung and Another (2017) ZA SSHC 36.

Ivy Puseletso Nzwana v Dukes Motors t/a Dampier Nissan [2019] ZAECGHC 81.

Jajbhay v Cassim 1939 AD 537.

Kruger v Coetzee 1966 (2) SA 428 (A).

Leutle v Kolev Motors CC [2021] ZANCT 26.

Libyan Investment Authority v Goldman Sachs (2016) EWHC 2530 (Ch).

Lloyds Bank Ltd v Bundy (1975) QB 326.

Louth v Diprose (1992) HCA 621.

Ma-Afrika Hotels Pty (Ltd) v Santam Limited [2020] JDR 2375 WCCC.

Macquarie International Health Clinic v Sydney South West Area Health Service (2010) NSWCA 268.

Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A).

Maple Leaf Macro Volatility Master Fund & Anor v Rouvroy & Anor (2009) EWHC 257 (Comm).

Marcus Gervase Johnson v FirstRand Bank Limited (London Branch) t/a Motonovo Finance (2024) EWCA Civ 1282.

Mark Faulkner & Ors v Vollin Holdings Limited & Ors (2022) EWCA CIV 1371.

Marks & Spencer v BNP Paribas Securities Services Trust Co (2015) 3 WLR 1843.

McCann v Goodall Group Operations (Pty) Ltd 1995 (2) SA 718 (C).

Mercedes Benz Financial Services South Africa (Pty) Ltd v National Credit Regulator (2019) ZANCT 47.

MFC (a division of Nedbank Ltd) v Botha (2013) JDR 1975 (WCC).

Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another [2015] ZACC 34.

Minister of Safety and Security v Van Duivenboden (2002) 3 All SA 741 (SCA).
Mokgoke v Momentum Insure Company Limited [2023] ZANCT 35.
Mortgage Express v Lambert (2016) EWCA Civ 555.
Mosia v Municipal Employees Pension Fund and another [2021] 2 BPLR 534 (PFA).
MSC Mediterranean Shipping Co SA v Cottonex Anstalt (2016) EWCA Civ 789.
Multiservice Bookbinding Ltd v Marden (1979) 1 Ch 84.
Munkenbeck & Marshall v Harold (2005) All ER (D) 227.
Murray v Professional Provident Society Retirement Annuity Fund and another [2019] 1 BPLR 224 (PFA).
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).
National Consumer Commission v Vodacom (Pty) Ltd (2023) ZANCT 44.
National Credit Regulator v Standard Bank of South Africa Limited and South African Human Rights Commission (2019) ZAGPJHC 182.
National Westminster Bank v Morgan 1985 AC 686.
Nedbank Limited v Sithole (2024) ZAGPPHC 88.
Nissan South Africa (Pty) Ltd v Marnitz NO and others (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA).
Nkata v FirstRand Bank Ltd and others 2016 (6) BCLR 794 (CC).
NM and Others v Smith and Others 2007(5) SA 250 (CC).
O'Hare v Coutts & Co (2016) EWHC 2224 (QB).
O'Rorke v Bolingbroke (1877) 2 App Cas 814.
Office of Fair Trading v Abbey National plc and others (2009) UKSC 6.
Office of Fair Trading v Ashbourne Management Services Ltd (2011) All ER (D) 276.
Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator and others (2007) 1 BPLR 117 (C).
Options UK Personal Pensions Llp v Financial Ombudsman Service Ltd (2024) EWCA Civ 541.
Oregon Trust v Beadica 231 CC (2019) ZASCA 29.
Overlook v Foxtel (2002) NSWSC 17.
Oxonica Energy Ltd v Neuftec Ltd (2008) EWHC 2127.
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199 at 364.
Palmer v Financial Conduct Authority (2017) UKUT 0313 (TCC).

Pao On v Lau Yiu Long (1980) AC 616.
ParkEye Ltd v Beavis (2016) AC 1172.
ParkingEye Ltd v Beavis (2016) AC 1172.
Photo Production Ltd v Securicor Transport Ltd [1980] UKHL 2.
Pick 'n Pay Retailers (Pty) Ltd v Pillay (900/2020) [2021] ZASCA 125.
Pitt v Commissioner for Consumer Affairs (2021) SASCA 24.
Planet Securities Unit Trust v Dalrymple (1999) QSC 204.
Plevin v Paragon (2014) UKSC 61.
Portman Building Society v Dusangh (2000) 2 All ER (Comm) 221.
Portsmouth City Council v Ensign Highways Ltd [2015] EWHC 1969 (TCC).
Potgieter v Potgieter NO 2012 (1) SA 637 (SCA).
Profi Credit Polska SA v QJ (C-84/19).
Quinn v IG Index Ltd [2018] EWHC 2478 (Ch).
Rahman v HSBC (2012) EWHC 11.
Re Hres and Australian Securities and Investments Commission (2008) 105 ALD 124.
Regina British Bankers Association v Financial Services Authority and another (2011) ACD 71.
Renard Constructions (ME) Pty Ltd v Minister of Public Works (1992) 33 Con LR 72.
Riley v Belmont Green Finance Ltd (t/a Vida Homeloans) (2020) UKEAT/0133/19/BA.
Russell v Cartwright (2020) EWHC 41 (Ch).
S v Makwanyane and Another 1995 (3) SA 391.
Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A).
Schindehutte v Alexander Forbes Retirement Fund [2022] 2 BPLR 45 (PFA).
Schoombie v Central Retirement Annuity Fund and others (2018) JOL 39854 (PFA).
Schroeder v Central Retirement Annuity Fund (2015) 1 BPLR 94 (PFA).
Scotland v British Credit Trust (2014) EWCA Civ 790.
Singh v Marsh Proprietary Limited and Another [2023] ZAFST 39.
Slabbert v Liberty Group Limited (2022) ZAECPEHC 34.
South African Forestry Co. Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA).
Springwell Navigation Corporation v JP Morgan Chase Bank (2008) EWHC 1186 Comm.
Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others 2000 (2) SA 797 (SCA).

Standish & Ors v Royal Bank of Scotland plc & Anor (2018) EWHC 1829 (Ch).
Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others (2021) 4 All SA 219 (WCC).
Story v National Companies and Securities Commission (1988) 13 NSWLR 661.
Street v Derbyshire Unemployed Workers' Centre (2004) EWCA Civ 964.
Strydom v Vendside Ltd (2009) EWHC 2130 (QB).
Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale (1967) 1 AC 361.
Tarr v Central Retirement Annuity Fund and another [2019] 2 BPLR 559 (PFA).
Tek Corporation Provident Fund and Others v Lorentz [2000] 3 BPLR 227 (SCA).
Tonto Home Loans Australia Pty Ltd v Tavares (2011) NSWCA 389.
Uber BV and others v Aslam and others (2021) UKSC 5.
UK Housing Alliance (North West) Ltd v Francis (2010) 3 All ER 519.
UPS SCS South Africa (Pty) Ltd v Van Wyk (2021) ZASCA 131.
Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty)Ltd 2020 (1) All SA 857 (WCC).
Vodafone Pacific Ltd v Mobile Innovations Ltd (2004) NSWCA 15.
Walford v Miles (1992) 2 AC 128.
Weinerlein v Goch Buildings Ltd 1925 AD 282.
Wells v SA Alumenite 1927 AD 69.
West & Anor v Ian Finlay & Associates (2014) EWCA Civ 316.
Wirz v Lifestyle Retirement Annuity Fund and another [2022] 3 BPLR 70 (PFA).
Wood v Commercial First Business Ltd (2021) EWCA Civ 471.
Yam Seng Pte Ltd v International Trade Corporation Ltd (2013) EWHC 111 (QB).

Books

Adler, Michael *Administrative Justice in Context* (2010) Hart Publishing, Oregon.
Anderson, Mark & Victor Warner *McDonald's Exemption Clauses and Unfair Terms* 3ed (2022) Bloomsbury Publishing, London.
Andrews, Neil & RG Lawson *Exclusion Clauses and Unfair Contract Terms* Clare College Cambridge 13ed (2023) Sweet & Maxwell, London.

- Armour, John; Dan Awrey & Paul Davies et al *Principles of Financial Regulation* (2016) Oxford University Press, Oxford.
- Baldwin, Robert; Martin Cave & Martin Lodge *Understanding Regulation: Theory, Strategy and Practice* 2ed (2011) Oxford University Press, New York.
- Barnett, Katy Eloise; Kenneth Yin & Martin Allcock *Remedies Cases and Materials in Australian Private Law* 1ed (2023) Cambridge University Press, Cambridge.
- Baxter, Lawrence *Administrative Law* (1984) Juta, Cape Town.
- Beale, Hugh G (ed) *Chitty on Contracts* 35ed (2023) Sweet & Maxwell, London.
- Beatson, Jack & Daniel Friedmann *Good Faith and Fault in Contract Law* (1995) Clarendon Press, Oxford.
- Beatson, Jack; Andrew Burrows & John Cartwright *Anson's Law of Contracts* 31ed (2020) Oxford University Press, New York.
- Beatty, Andrea 'Australia' in Rick Fischer & Jeremy Mandell (eds) *The Consumer Finance Law Review* 6ed (2022) Morrison & Foerster, California.
- Bennett, T W *Ubuntu: An African Equity* in F Diedrich (ed) *Ubuntu Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) Juta, Claremont.
- Bhana, Deeksha; Minette Nortjie & Elsje Bonthuys *Student's Guide to Law of Contract* 4 ed (2015) Juta, Cape Town.
- Black, Julia *The Rise, Fall and Fate of Principles Based Regulation* 2010 Department of Law London School of Economics and Political Science, London.
- Bright, Susan 'Unfairness and the Consumer Contract Regulations' in Andrew S Burrows & Edwin Peel (eds) *Contract Terms* (2007) Oxford University Press, New York.
- Brownsword, Roger 'Regulating Transactions: Good Faith and Fair Dealing' in Geraint Howells and Reiner Schulze (eds) *Modernising and Harmonising Consumer Contract Law* (2009) Sellier European Law Publishers, Munich.
- Brownsword, Roger; Norma J Hird & Geraint G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) Ashgate Publishing, Aldershot.
- Burrows, Andrew S & Edwin Peel (eds) *Contract Terms* (2007) Oxford University Press, Oxford.
- Busch, Danny & Matthius Lehmann (eds) *Unfair Terms in Banking and Financial Contracts* (2023) Oxford University Press, Oxford.

- Carter, John W & Laina Chan *Contract and the Australian Consumer Law* (2019) The Federation Press, Alexandria.
- Carter, John W *Cases and Materials on Contract Law in Australia* 7ed (2019) Lexis Nexis, Chatswood.
- Carter, John W *Contract Law in Australia* 6ed (2018) Lexis Nexis, Chatswood.
- Cerny, Philip G 'Rethinking financial regulation: risk, club goods and regulatory fatigue' in Thomas Oatley and W Kindred Winecoff (eds) *Handbook of the International Political Economy of Monetary Relations* (2015) Edward Elgar Publishing, Cheltenham.
- Chen, Tsai-Jyh *An International Comparison of Financial Consumer Protection* (2018) Springer, Singapore.
- Chitty, Joseph & H G Beale (eds) *Chitty on Contracts* 34ed (2021) Sweet & Maxwell Ltd, London.
- Christie, R H & G B Brandfield *The Law of Contract in South Africa* 6 ed (2011) Butterworths, Durban.
- Collins, Hugh *The Law of Contract* 4ed (2008) Cambridge University Press, Cambridge.
- Cornell, Drucilla & Nyoko Muvangua *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) Fordham University Press, New York.
- Corones, Stephen G & Philip H Clarke *Australian Consumer Law: Commentary and Materials* 4ed (2011) Thomson Reuters (Professional) Australia Limited, Sydney.
- Cranston, Ross; Emiliou Avgouleas & Kristin van Zwieten et al *Principles of Banking Law* 3ed (2018) Oxford University Press, Oxford.
- Davis, Dennis & Walter Geach (eds) *Companies and other Business Structures in South Africa* 5ed (2021) Oxford University Press, South Africa.
- Forte, ADM (ed) *Good Faith in Contract and Property Law* (1999) Hart Publishing, Oxford.
- Furmston, Michael P *Cheshire, Fifoot & Furmston's Law of Contract* 17ed (2017) Oxford University Press, London.
- Geach, Walter D (ed) *Guide to the Companies Act and Regulations* (Revision service 41, 2021) Juta.
- Godwin, Andrew & Andrew Schmulow (eds) *The Cambridge handbook on Twin Peaks financial regulation* (2021) Cambridge University Press, Cambridge.
- Goodhart, Charles; Philipp Hartmann & David T Llewellyn et al *Financial Regulation: Why, How and Where Now?* 1ed (1998) Routledge, London.

- Grant, Wyn & Graham K Wilson (eds) *The Consequences of the Global Financial Crisis – The Rhetoric of Reform and Regulation* (2012) Oxford University Press, Oxford.
- Grundmann, Stefan ‘A modern standard contract terms law from reasonable assent to enhanced fairness control’ (2019) 15 *De Gruyter* 148.
- Harms et al (eds) *Law of South Africa* (2014) LexisNexis, South Africa.
- Hill, Jennifer G ‘Why Did Australia Fare So Well in the Global Financial Crisis?’ in Eilis Ferran; Niamh Moloney & Jennifer G Hill et al *The Regulatory Aftermath of The Global Financial Crisis* (2012) Cambridge University Press, New York.
- Howells, Geraint & Stephen Weatherill *Consumer Protection Law* 2ed (2017) Routledge, London.
- Howells, Geraint; André Janssen & Reiner Schulze *Information Rights and Obligations* 1ed (2005) Routledge, London.
- Howells, Geraint et al *Consumer Protection in Asia* (2022) Oxford Hart Publishing Web.
- Howells, Geraint; Iain Ramsay & Thomas Wilhelmsson (eds) *Handbook of Research on International Consumer Law* 2ed (2018) Edward Elgar Publishing, Cheltenham.
- Huang, Robin Hui & Dirk Schoenmaker (eds) *Institutional Structure of Financial Regulation* (2016) Routledge, London.
- Hutchison, Dale & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) Oxford University Press, Southern Africa.
- Hutchison, Dale & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) Oxford University Press, Southern Africa.
- Hutchison, Dale & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 4 ed (2022) Oxford University Press, Southern Africa.
- Kenny, Mel; James Devenney & Lorna Fox O’Mahony (eds) *Unconscionability in European Private Financial Transactions* (2010) Cambridge University Press, Cambridge.
- Lubbe, Gerhard & Christina Murray C *Farlam and Hathaway on Contract: Cases, Materials, Commentary* (1988) Juta, Claremont.
- Malbon, Justin & Luke Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (2013) The Federation Press, Sydney.
- McKendrick, Ewan *Contract Law* 15ed (2023) Red Globe Press, London.
- McKendrick, Ewan, *Contract Law: Text, Cases and Materials* 9ed (2020) Oxford University Press, London.

- Mick, David Glen; Simon Pettigrew & Cornelia Pechmann et al (eds) *Transformative Consumer Research for Personal and Collective Wellbeing* 1ed (2012) Routledge Taylor & Francis Group, New York.
- Miles, Matthew B & A Michael Huberman *Qualitative Data Analysis: An Expanded Sourcebook* 2ed (1994) Sage Publications, London.
- Millard, Daleen & Wendy Hattingh *The FAIS Act Explained* 2 ed (2017) LexisNexis, South Africa.
- Moloney, Niamh *How to Protect Investors: Lessons from the EC and the UK* (2010) Cambridge University Press, Cambridge.
- Moloney, Niamh; Eilis Ferran & Jennifer Payne (eds) *The Oxford Handbook of Financial Regulation* (2015) Oxford University Press, London.
- Monateri, Pier Giuseppe (ed) *Comparative Contract Law* (2018) Edward Elgar Publishing, Cheltenham.
- Moorcraft, J & ML Vessio *Banking Law and Practice* (2024) LexisNexis, South Africa.
- Morse, Geoffrey & Francis Beaufort Palmer *Palmer's Company Law* 25ed (1992) Sweet & Maxwell, London.
- Naudé, Tjakié & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (Revision service 2, 2017) Juta, Claremont.
- O'Donovan, James *Lender Liability* 1ed (2000) Law Book Co of Australasia, Sydney.
- Paterson, Jeannie Marie *Corones' Australian Consumer Law* 5ed (2023) Thompson Reuters, Australia.
- Reid, Kenneth; Reinhard Zimmermann & Daniel Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) Oxford University Press, New York.
- Ridge, Pauline & James Stellios (eds) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (2018) Federation Press.
- Riefa, Christine & Chris Willett 'Enforcement and Effectiveness of Consumer Law in the UK' in Hans-W Micklitz & Genevieve Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (2018) Springer International Publishing, New York.
- Sarel du Toit S and Charl Hugo (eds) *Annual Banking Law Update* (2019) Juta & Company South Africa.
- Schiek, Dagmar (ed) *The EU Economic and Social Model in the Global Crisis: Interdisciplinary Perspectives* (2013) Ashgate Publishing, Farnham.

- Schmulow, Andrew D & James O'Hara 'Protection of Financial Consumers in Australia' in *An International Comparison of Financial Consumer Protection* (2018) Springer, Singapore.
- Scholtz, JW (ed) *Guide to the National Credit Act* (2024) LexisNexis, South Africa.
- Sharrock, Robert (ed) *The Law of Banking & Payments in South Africa* 1 ed (2016) Juta & Company, Claremont.
- Siciliani, Paolo; Christine Riefa & Harriet Gamper *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (2019) Hart Publishing, Oxford.
- Siliquini–Cinelli, Luca & Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017) Springer International Publishing, New York.
- Smith, Julian (ed) *Halsbury's Laws of England* 5ed (2022) LexisNexis, United Kingdom.
- Taylor, Michael W 'Twin Peaks' Revisited...a second chance for regulatory reform (2009) Centre for the Study of Financial Innovation, London.
- Taylor, Michael W "Twin Peaks": A regulatory structure for the new century (1995) Centre for the Study of Financial Innovation, London.
- Taylor, Michael W *Peak Practice: How to reform the UK's regulatory system* (1995) Centre for the Study of Financial Innovation, London.
- Tjakie, Naude & Jacolien Barnard 'Enforcement and effectiveness of consumer law in South Africa' in Hans-Wolfgang Micklitz & Genevieve Saumier (eds) *Enforcement and effectiveness of consumer law in South Africa* (2018).
- Van der Merwe, Schalk WJ *Contract: General Principles* 3 ed (2007) Juta, Lansdowne.
- Van Eeden, Evert & Jacolien Barnard *Consumer Protection Law in South Africa* 2 ed (2018) LexisNexis, South Africa.
- Van Eeden, Evert & Jacolien Barnard *Consumer Protection Law in South Africa* 2ed (2018) Lexis Nexis South Africa, Johannesburg.
- Van Huyssteen, L F & G F Lubbe et al *Contract: General Principles* 5ed (2016) Juta & Co, Cape Town.
- Van Huyssteen, Louis F & Catherine J Maxwell *Contract Law in South Africa* 2 ed (2012) Kluwer Law International BV, Netherlands.
- Van Huyssteen, Louis F; GF Lubbe & MFB Reinecke et al *Contract General Principles* 6 ed (2020) Juta, Claremont.
- Van Raaij, W Fred *Understanding Consumer Financial Behavior: Money Management in an Age of Financial Illiteracy* (2016) Palgrave Macmillan, New York.

Wilhelmsson, Thomas & Geraint Howells (eds) *Consumer Law* (2019) Edward Elgar Publishing Limited, Cheltenham.

Willett, Chris *Fairness in Consumer Contracts: The Case of Unfair Terms* 1ed (2007) Routledge, London.

Yin, K; S Kozlina & K Green et al *Contract Law: Cases and Materials*. (2020) Cambridge: Cambridge University Press.

Zimmerman, Reinhard & Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) Cambridge University Press, Cambridge.

Zimmermann, Reinhard & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Oxford University Press, New York.

Journals

Afghan, Shazia Khan 'Should banks owe a statutory duty of care to their customers' (2017) 32 *Journal of International Banking Law and Regulation* 494.

Ahmed, Shakeel; Kenbata Bangassa & Saeed Akbar 'A study on trust restoration efforts in the UK retail banking industry' (2020) 52 *The British Accounting Review* 1.

Akinbami, Folarin 'Financial Services and consumer protection after the crisis' (2011) 29 *International Journal of Bank Marketing* 135.

Alberts, R C; F P Retief & C Roos et al 'EIA decision-making and administrative justice: an empirical analysis' (2021) 65 *Journal of Environmental Planning and Management* 1914.

Alderman, Richard et al 'Consumer law and policy relating to change of circumstances due to the COVID-19 pandemic' (2020) 43 *Journal of Consumer Policy* 437.

Ali, Paul; Cosima Hay McRae & Ian Ramsay 'The politics of payday lending regulation in Australia' (2013) 39 *Monash University LR* 412.

Allen, Hilary J 'Experimental strategies for regulating fintech' (2020) 3 *Journal of Law & Innovation* 1.

Allen, Hilary J 'Putting the 'Financial Stability' in Financial Stability Oversight Council' (2015) 76 *Ohio State LJ* 1087.

Arnold, Ross D & Jon P Wade 'A definition of systems thinking: A systems approach' (2015) 44 *Procedia Computer Science* 669.

Atamer, Yeşim M 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics' (2017) 80 *The Modern Law Review* 624.

- Baber, Graeme 'The Financial Conduct Authority and financial conduct: hand in glove?' (2015) 36 *The Company Lawyer* 263.
- Baker, Todd H & Corey Stone 'Making Outcome Matter: An Immodest Proposal for a New Consumer Financial Regulatory Paradigm' (2020) 4 *The Business & Finance LR* 1.
- Baldwin, Robert & Julia Black 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.
- Barnard, Jacolien 'Suppliers, consumers and redress for defective vehicles — the reach of the National Consumer Tribunal: Tshehla v Aucamp Eiendoms Beleggings' (2020) 137 *SALJ* 229.
- Benöhr, I 'The United Nations guidelines for consumer protection: Legal implications and new frontiers' (2020) 43 *Journal of Consumer Policy* 105.
- Bhana, Deeksha & Marius Pieterse 'Towards a reconciliation of contract and constitutional values: Brisley and Afrox Revisited' (2005) 122 *SALJ* 865.
- Bhati, Shyam S 'An analysis of the financial services regulations of Australia' (2008) 4 *International Review of Business Research Papers* 13.
- Biber, Eric; Sarah E Light & J B Ruhl et al 'Regulating business innovation as policy disruption: from the model T to Airbnb' (2017) 70 *Vanderbilt LR* 1561.
- Bigwood, Rick 'Kakavas v Crown Melbourne Ltd - Still curbing unconscionability: Kakavas in the High Court of Australia' (2013) 37 *Melbourne University LR* 463.
- Black, Julia 'Forms and paradoxes of principles based regulation' (2008) 3 *Capital Markets Law Journal* 425.
- Black, Julia; Martyn Hopper & Christa Band 'Making a Success of Principles-based Regulation' (2007) *Law and Financial Markets Review* 191.
- Bollen, Rhys 'Quality and Safety for Financial Services and Products' (2015) 26 *Journal of Banking and Finance Law and Practice* 1.
- Boonzaier, Leo 'Contractual Fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 1
- Botha, Erika & Daniel Makina 'Financial regulation and supervision: theory and practice in South Africa' (2011) 10 *International Business and Economics Research Journal* 27.
- Brand Fritz D J 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution' (2009) 126 *SALJ* 71.
- Brand, Fritz D J 'The role of good faith, equity and fairness in the South African law of contract: A further instalment' (2016) 27 *SLR* 238.

- Brenncke, Martin 'A Theory of Exploitation for Consumer Law: Online Choice Architectures, Dark Patterns, and Autonomy Violations' (2024) 47 *J Consum Policy* 127.
- Bridge, Michael 'Good faith, the common law, and the CISG' (2017) 22 *Uniform LR* 98.
- Bright, Susan 'Winning the battle against unfair contract terms' (2000) 20 *Legal Studies* 333.
- Brits, Reghard 'The National Credit Act's remedies for reckless credit in the mortgage context' (2018) 21 *Potchefstroom Electronic LJ* 1.
- Brody, Gerard & Katherine Temple 'Unfair but not illegal: Are Australia's consumer protection laws allowing predatory businesses to flourish?' (2016) 41 *Alternative LJ* 169.
- Brogi, Marina & Valentina Lagasio 'New but naughty. The evolution of misconduct in FinTech' (2024) 95 *International Review of Financial Analysis* 1.
- Brownsword, Roger "'Good faith in contracts" Revisited' (1996) 49 *Current Legal Problems* 111.
- Brownsword, Roger 'Two concepts of good faith' (1994) 7 *Journal of Contract Law* 197.
- Budlender, Geoff 'Access to courts' (2004) 121 *SALJ* 339.
- Cairns, Patrick 'So you treated me fairly. Should I be grateful?' (2019) 2019 *Personal Finance* 13.
- Camacho, Alejandro E & Robert L Glicksman 'Functional government in 3-D: A framework for evaluating allocations of government authority' (2014) 51 *Harvard Journal on Legislation* 19.
- Chen-Wishart, Mindy 'Transparency and Fairness in Bank Charges' (2010) 126 *Law Quarterly Review* 157.
- Chew, Charles YC 'Common law and equitable aspects of unjust banking contracts: a legal analysis' (2014) 29 *Journal of International Banking Law and Regulation* 248.
- Chitimira, Howard, & Phemelo Magau 'The role of selected regulatory bodies in the promotion of financial education in South Africa' (2023) 19 *Acta Universitatis Danubius Juridica* 28.
- Chiu, Iris H Y 'A Rational Regulatory Strategy for Governing Financial Innovation' (2017) 8 *European Journal of Risk Regulation* 743.
- Clifford, Damian & Jeannie Marie Paterson 'Consumer Privacy and Consent: Reform in the Light of Contract and Consumer Protection Law' (2020) 94 *Australian Law Journal* 741.
- Collins, Hugh 'Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229.

- Comsa, Paul ‘A fresh approach to unfair terms in commercial contracts: Are the latest law amendments beneficial to consumers?’ (2014) 4 *Challenges of the Knowledge Society* 96.
- D’Avino Carmela & Maria Tselika ‘Unveiling the drivers of banks’ misconduct: Sanctions, signals, and the extent of unethical behaviour’ (2024) 96 *International Review of Financial Analysis* 1.
- Danielsson, Jon; Marcela Valenzuela & Ilknur Zer ‘Learning from History: Volatility and Financial Crises’ (2018) 31 *The Review of Financial Studies* 2774.
- De Jager, Johann ‘The South African Reserve Bank: Blowing winds of change (part 2)’ (2013) 25 *South African Mercantile LJ* 492.
- De Jager, Johann ‘The South African Reserve Bank: Blowing winds of change (part 2)’ (2013) 25 *SA Merc LJ* 492.
- De Moor, Anne ‘Common and Civil Law Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 257.
- De Pascalis , Francesco ‘Sales Culture and Misconduct in the Financial Services Industry: An Analysis of Cross-Selling Practices’ (2018) 39 *Business Law Review* 150.
- De Wet, Shaun; Ilse Botha & Marno Booyens ‘Measuring the effect of the national credit act on indebtedness in South Africa’ (2015) 8 *Journal of Economic and Financial Sciences* 83–104.
- De Wet, Shaun; Ilse Botha & Marno Booyens ‘Measuring the effect of the national credit act on indebtedness in South Africa’ (2015) 8 *Journal of Economic and Financial Sciences* at 83.
- Dean, Meryll ‘Defining unfair terms in consumer contracts – Crystal ball gazing? Director General of Fair Trading v First National Bank plc’ (2002) 65 *Modern LR* 773.
- Denters, Erik ‘Regulation and supervision of the global financial system: A proposal for institutional reform’ (2009) 1 *Amsterdam Law Forum* 63.
- DeYoung, Robert & Tara Rice ‘How do banks make money? The fallacies of fee income’ (2004) 28 *Economic Perspectives* 34.
- Donoghue, Sune & Helena M De Klerk ‘The right to be heard and to be understood: a conceptual framework for consumer protection in emerging economies’ (2009) 33 *International Journal of Consumer Studies* 456.
- Du Plessis, Jacques ‘Fairness in the Law of Contract: Reflections on Beadica’ (2022) 12 *Constitutional Court Review* 197.
- Du Plessis, Jacques ‘Giving practical effect to good faith in the law of contract’ (2018) 29 *SLR* 379.

- Du Plessis, Jacques 'Lessons from America? A South African perspective on the draft Restatement of the Law, Consumer Contracts' (2018) 30 *South African Mercantile LJ* 189.
- Du Plessis, MA (Riette) 'Redress for Consumers in Terms of the Consumer Protection Act 68 of 2008: The Watchdog's Failure to Support an Accredited Industry Ombud - Alternative Suggestions' (2022) 33 *SLR* 230.
- Eiselen, Sieg 'What to do with Bitcoin and Blockchain?' (2019) 82 *Journal of Contemporary Roman-Dutch Law* 632.
- Elson, Raymond J & Patrice Ingram 'Wells Fargo and the unauthorized customer accounts: A Case Study' (2018) 2 *Global Journal of Business Pedagogy* 124.
- European Union 'Council Directive 93/13/EEC of 05 April 1993 on Unfair Terms in Consumer Contracts' (1993) 36 *Official Journal of the European Communities* 29.
- European Union 'Directive 2005/29/EC of the European Parliament and of the Council' 2005 *Official Journal Of the European Union* L149/22.
- Felstead, Nicholas 'Beyond unconscionability: Exploring the case for a new prohibition on unfair conduct' (2022) 45 *University of New South Wales LJ* 285.
- Ferran, Eilís 'Regulatory lessons from the Payment Protection Insurance mis-selling scandal in the UK' (2012) 13 *European Business Organization LR* 247.
- Ferran, Eilís 'The Break-up of the Financial Services Authority' (2011) 31 *Oxford Journal of Legal Studies* 455.
- Gadinis, Stavros 'The Financial Stability Board: The New Politics of International Financial Regulation' (2012) 48 *Texas International LJ* 157.
- Gaganis, Chrysovalantis; Emiliou Galariotis & Fotios Pasiouras et al 'Bank profit efficiency and financial consumer protection policies' (2020) 118 *Journal of Business Research* 98.
- Georgosouli, Andromachi 'Payment Protection Insurance (PPI) mis-selling: Some lessons from the UK' (2014) 21 *Connecticut Insurance LJ* 261.
- Georgosouli, Andromachi 'The FSA's treating customers fairly (TCF) initiative: what is so good about it and why it may not work' (2011) 38 *Journal of Law and Society* 405.
- Giancaspro, Mark 'It's Just Business' Or Is It? When an Efficient Breach of Contract Becomes Unconscionable Conduct under the Australian Consumer Law' *Monash University Law Review* (2022) 48 272.
- Giliker, Paula 'The Consumer Rights Act 2015 – A bastion of European consumer rights?' (2016) 37 *Legal Studies* 78.

- Gilligan, George & Ian Ramsay 'Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions Under the ASIC Act and Corporations Act: 2009–2018' (2021) 38 *Company and Securities Law Journal* 435.
- Girasa, Roy J & Richard J Kraus 'The Libor scandal: A need for revised national and international reforms and regulations' (2014) 32 *North East Journal of Legal Studies* 89.
- Glover, Graham B 'Section 40 of the Consumer Protection Act in comparative perspective' (2013) 4 *SALJ* 689.
- Godwin, Andrew 'Australia's trek towards Twin Peaks – Comparisons with South Africa' (2017) 11 *Law and Financial Markets Review* 183.
- Godwin, Andrew & Andrew D Schmulow 'The Financial Sector Regulation Bill in South Africa second draft: lessons from Australia' (2015) 132 *SALJ* 756.
- Godwin, Andrew; Li Guo & Ian Ramsay 'Is Australia's "Twin Peaks" system of financial regulation a model for China?' (2016) 46 *Hong Kong LJ* 621.
- Godwin, Andrew; Steve Kourabas & Ian Ramsay 'Twin peaks and financial regulation: The challenges of increasing regulatory overlap and expanding responsibilities' (2016) 49 *The International Lawyer* 273.
- Goodhart, Charles A E 'The organizational structure of banking supervision' (2002) 31 *Economic notes* 1.
- Gordon, Frances & Candice Burt 'Plain language: the law' (2010) 10 *Without Prejudice* 59–60.
- Goyens, Monique 'Effective consumer protection frameworks in a global and digital world' (2020) 43 *Journal of Consumer Policy* 195.
- Graef, Inge; Damian Clifford & Peggy Valcke 'Fairness and enforcement: Bridging competition, data protection, and consumer law' (2018) 8 *International Data Privacy Law* 200.
- Hadrill, Lucy & Emma Radmore 'Prevention is better the cure: the UK's proposals for a new "consumer duty"' (2022) 37 *Journal of International Banking Law and Regulation* 257.
- Hanrahan, Pamela 'Twin peaks after Hayne: tensions and trade-offs in regulatory architecture' (2019) 13 *Law and Financial Markets Review* 124.
- Hargarter, Antje & Gary Van Vuuren 'Assembly of a conduct risk regulatory model for developing market banks' (2017) 20 *South African Journal of Economic and Management Sciences* 1.
- Harkin, Diarmaid; Monique Mann & Ian Warren 'Consumer IoT and its under-regulation: Findings from an Australian study' (2022) 14 *P&I Policy and Internet* 96.

- Harrison, Paul; Marta Massi & Kathryn Chalmers 'Beyond door-to-door: The implications of invited in-home selling' (2014) 48 *Journal of Consumer Affairs* 195.
- Hartley, Trevor C 'Five forms of uncertainty in European community law' (1996) 55 *Cambridge LJ* 265.
- Hawthorne, Luanda 'Bredenkamp v Standard Bank 2010 43 (4) SA 468 SCA' (2010) 43 *De Jure LJ* 395.
- Hawthorne, Luanda 'Justice Albie Sachs' contribution to the law of contract: Recognition of relational contract theory' (2010) 25 *South African Public Law* 80.
- Hawthorne, Luanda 'Public policy: the origin of a general clause in the South African law of contract' (2013) 19 *Fundamina* 300.
- He, Weiping & Han-Wei Liu 'Rebuilding trust: regulation of financial advisers in the UK' (2016) 16 *Capital Markets LJ* 393.
- Healy, Sarah 'Swimming against the Tide' (2016) 6 *King's Inn Law Review* 39.
- Herring, Richard John 'International coordination of financial supervision: why has it grown? Will it be sustained?' (2018) 10 *Journal of Financial Economic Policy* 213.
- Hockett, Robert C 'The macroprudential turn: From institutional safety and soundness to systematic financial stability in financial supervision' (2015) 9 *Virginia Law and Business Review* 201.
- Hondius, Ewoud H. 'Unfair Contract Terms: New Control Systems' (1978) 26 *American Journal of Comparative Law* 524.
- Howells, Geraint 'Protecting consumer protection values in the fourth industrial revolution' (2020) 43 *Journal of Consumer Policy* 145.
- Huneberg, Samantha 'Consumer protection measures in non-life insurance contracts: a South African and Australasian trend?' (2019) 40 *Obiter* 170.
- Hutchison, Andrew 'Good faith in contract: A uniquely South African perspective' (2019) 1 *Journal of Common Wealth Law* 227.
- Hutchison, Dale 'Non-variation clauses: any escape from the Shifren straitjacket?' (2001) 118 *SALJ* 720.
- Inderst, Roman 'Retail finance: Thoughts on reshaping regulation and consumer protection after the financial crisis' (2009) 10 *European Business Organisation LR* 455.
- Jaaron, A M Ayham & Chris J Backhouse 'Fostering sustainable performance in services through systems thinking' (2019) 39 *The Service Industries Journal* 1072.

- Kastner, Lisa “‘Much ado about nothing?’ Transnational civil society, consumer protection and financial regulatory reform’ (2014) 21 *Review of International Policy Economy* 1313.
- Kawadza, Herbert ‘Notes: Rethinking the definition of the ‘business of banking’ in South Africa against the backdrop of Registrar of Banks v Net Income Solutions [2013] ZAWCHC 92’ (2015) 1 *Journal of Corporate and Commercial Law & Practice* 105.
- Kawadza, Herbert ‘Taming the mechanics of mortgage foreclosures: the case of ABSA Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ)’ (2019) 52 *De Jure LJ* 102.
- Kearney, Colm ‘The Wallis Inquiry: An Assessment’ (1997) 8 *The Economic and Labour Relations Review* 308.
- Kloppers, Henk ‘The regulation of advice within the financial services sector’ (2022) 28 *Obiter* 113.
- Knights, David & Darren McCabe ‘Masters of the universe: Demystifying leadership in the context of the 2008 global financial crisis’ (2015) 26 *British Journal of Management* 197.
- Korobkin, Russell ‘Bounded rationality, standard form contracts, and unconscionability’ (2003) 70 *University of Chicago LR* 1203.
- Kriese, Maryam; Joshua Yindenaba Abor & Elipklimi Agbloyor ‘Financial consumer protection and economic growth’ (2019) 14 *International Journal of Emerging Markets* 1060.
- Krige, Detlev ‘Fields of dreams, fields of schemes: Ponzi finance and multi-level marketing in South Africa’ (2012) 82 *Africa: The Journal of the International African Institute* 69.
- Laplante, Phil & Nir Kshetri ‘Open Banking: Definition and Description’ (2021) 54 *Computing Economics* 122.
- Latimer, Paul ‘Protecting Consumers from Unfair Contract Terms: Australian Comparisons’ (2016) 44 *Australian Business LR* 274.
- Legrand, Pierre ‘Against a European Civil Code’ (1997a) 60 *Modern LR* 44.
- Legrand, Pierre ‘Comparative legal studies and commitment to theory’ (1995b) 58 *Modern LR* 262.
- Legrand, Pierre ‘The Impossibility of “Legal Transplants”’ (1997b) 4 *Maastricht Journal of European and Comparative Law* 111.
- Liew, Ying Khai & Debbie Yu ‘The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?’ (2021) 45 *Melb U L Rev* 206.
- Lewis, Jonathan ‘Fairness in South African contract law’ (2003) 120 *SALJ* 330.
- Lumpkin, Stephen ‘Consumer protection and financial innovation: A few basic propositions’ (2010) 2010 *OECD Journal: Financial Market Trends* 117.

- Macdonald, Elizabeth ‘Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v. First National Bank’ (2002) 65 *Modern Law Review* 763.
- Malady, Louise ‘Consumer protection issues for digital financial services in emerging markets’ (2016) 31 *Banking & Finance LR* 389.
- Mashigo, Polly & Christie Schoeman ‘Stokvels as an instrument and channel to extend credit to poor households in South Africa’ (2012) 5 *Journal of Economic and Financial Sciences* 49.
- Maurer, Bill; Taylor C Nelms & Stephen C Rea ““Bridges to cash”: Channelling agency in mobile money’ (2013) 19 *The Journal of the Royal Anthropological Institute* 52.
- Maxwell, Chris & Matthew Harding ‘Private Law, Conscience and Moral Reasoning: The Role of the Judge’(2022) 46 *Melbourne University Law Review* 123.
- Mayser, Sabine & Florian von Wangenheim ‘Perceived Fairness of Differential Customer Treatment: Consumers’ Understanding of Distributive Justice Really Matters’ (2012) 16 *Journal of Service Research* 99.
- Mertzanis, Charilaos ‘Financial supervision structure, decentralized decision-making and financing constraints’ (2020) 174 *Journal of Economic Behavior & Organization* 13.
- Michael, Bryane; Say Hak Goo & Dariusz Wojcik et al ‘Does objectives-based financial regulation imply a rethink of legislatively mandated economic regulation?’ (2019) 46 *Notre Dame Law School Journal of Legislation* 245.
- Micklitz, Hans-W ‘Case: House of Lords - Fair Trading v National Bank’ 2006 (2) *European Review of Contract Law* 471.
- Micklitz, Hans-W & Norbert Reich ‘The court and sleeping beauty: the revival of the Unfair Contract Terms Directive’ (2014) 51 *Common Market Law Review* 771.
- Millard, Daleen ‘So much owed by so many to so few: how the Financial Advisory and Intermediaries Act 37 of 2002 addresses “conflict of interest”’ (2012) 33 *Obiter* 152.
- Millard, Daleen & Choene Jacqueline Maholo ‘Treating customers fairly: A new name for existing principles?’ (2016) 79 *Journal of Contemporary Roman-Dutch Law* 594.
- Millard, D. & B. Kuschke ‘Transparency, trust and security : an evaluation of the insurer's precontractual duties’ (2014) 17 *Potchefstroom Electronic LJ* 2411.
- Moore, Marcus ‘Controlling fairness in standard form contracts: What can courts do, and what should they do’ (2022) 55 *University of British Columbia Law Review* 447.
- Muir, Garry A. ‘Stipulations for the Payment of Agreed Sums’ (1985) 10 *Sydney Law Review* 503.

- Mupangavanhu, Yeukai 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) 48 *De Jure* 116.
- Myburgh, Franziska 'On constitutive formalities, estoppel and breaking the rules' (2016) 27 *SLR* 254.
- Myburgh, Franziska 'The South African approach to the rectification of agreements subject to constitutive formalities: one step too many?' (2014) 131 *SALJ* 787.
- Naudé, Tjakie 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2010) 127 *SALJ* 515.
- Naudé, Tjakie 'The Consumer's right to "fair, reasonable and just terms" under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505.
- Naudé, Tjakie 'The use of black and grey lists in unfair contract terms legislation: a comparative perspective' (2007) 124 *SALJ* 128.
- Naudé, Tjakie 'Towards augmenting the list of prohibited contract terms in the South African consumer protection act 68 of 2008' (2017) 2017 *TSAR* 138.
- Naudé, Tjakie 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) 17 *Stellenbosch LR* 361.
- Naudé, Tjakie & Charlotte Koep 'Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: some guidance from the German law on standard contract terms' (2015) 26 *Stellenbosch LR* 85.
- Naudé, Tjakie & Elizabeth de Stadler 'Innovative orders under the South African Consumer Protection Act 68 of 2008' (2019) 22 *Potchefstroom Electronic LJ* 1.
- Naudé, Tjakie & Gerhard Lubbe 'Exemption clauses – a rethink occasioned, AfroxHealthcare Bpk v Strydom' (2005) 122 *SALJ* 441.
- Ngidi, Mzwandile 'The termination of the bank-client relationship in South African banking law' (2020) 53 *De Jure LJ* 54.
- O'Brien, Lucinda; Vivien Chen & Ian Ramsay et al 'An Impending 'Avalanche': Debt Collection and Consumer Harm after COVID-19' (2021) 49 *Australian Business LR* 84.
- O'Donovan, James 'Lender liability for investment or financial advice' (1999) 11 *Corporate &*
- O'Donovan, James 'Receivers duties in carrying on the business: good faith or due diligence?' (1999) 17 *Company and Securities Law Journal* 528.

- O'Mahony, Lorna Fox; Christian Twigg-Flesner & Folarin Akinbami 'Conceptualizing the consumer of financial services: a new approach?' (2015) 38 *Journal of Consumer Policy* 111.
- Ooi, Vincent & Walter Yong 'A reformulated test for unconscionability' (2019) 135 *Law Quarterly Review* 400.
- Otto, Jannie M; Corlia M van Heerden & Jacolien Barnard 'Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement' (2014) 26 *SA Mercantile LJ* 247.
- Otto, J.M. 'Onagsame wetsopstelling – die Nasionale Kredietwet op die operasietafel' (2023) 2 *TSAR* 217.
- Ozili, Peterson & Erick Outa 'Bank earnings management using commission and fee income: The role of investor protection and economic fluctuation' (2019) 20 *Journal of Applied Accounting Research* 172.
- Paterson, Jeannie Marie ; Elise Bant & Matthew Clare 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: ASIC v Kobelt' (2019) 13 *Journal of Equity* 81.
- Paterson, Jeannie Marie 'Consumer Protection Law in Australia - Emerging Law from a Rise in Class Actions' (2024) 13 *Journal of European Consumer and Market Law* 157.
- Paterson, Jeannie Marie 'The Australian unfair contract terms law: The rise of substantive unfairness as a ground for review of standard form consumer contracts' (2009) 33 *Melbourne University LR* 934.
- Paterson, Jeannie Marie 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 *Melbourne University Law Review* 252.
- Paterson, Jeannie Marie & Elise Bant 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 1.
- Paterson, Jeannie Marie & Gerard Brody "'Safety Net" consumer protection: Using prohibitions on unfair and unconscionable conduct to respond to predatory business models' (2015) 38 *Journal of Consumer Policy* 331.
- Pearson, Gail; Phillip N Stoop & Michelle Kelly-Louw 'Balancing Responsibilities —Financial Literacy' (2017) 20 *Potchefstroom Electronic LJ* 1.
- Peden, Elisabeth 'Incorporating terms of good faith in contract law in Australia' (2001) 23 *Sydney LR* 233.
- Peltzman, Sam "'The theory of economic regulation" after 50 years' (2022) 193 *Public Choice* 7.

- Perry, Christina ‘Good faith in English and US contract law: Divergent theories, practical similarities’ (2016) 17 *Business Law International* 27.
- Pesci, Alexandra & Michel M Koekemoer ‘The FSCA Conduct Standard for Banks as a means to reform the internal financial consumer complaint resolution mechanisms of South African Banks’ (2023) 4 *Obiter* 254.
- Petty, Ross D & Jennifer Hamilton ‘Seeking a single policy for contractual fairness to consumers: A comparison of US and EU efforts’ (2004) 38 *The Journal of Consumer Affairs* 146.
- Phillip Morgan ‘Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999: The End of the Road for Consumers?’ 2010 *Lloyd’s Maritime and Commercial Law Quarterly* 208.
- Pollman, Elizabeth ‘Tech, Regulatory Arbitrage, and Limits’ (2019) 20 *European Business Organization LR* 567.
- Price, Alistair ‘Contractual fairness: Conflict resolved?’ (2021) 2021 *AJ* 321.
- Qumba, Mmiselo Freedom ‘A comparative analysis of the twin peaks model of financial regulation in South Africa and the United Kingdom’ (2022) 139 *SALJ* 78.
- Rajapakse, Pelma Jacinth & Jodi Gardner ‘The unconscionable conduct and subprime lending in Australia’ (2014) 29 *Banking & Finance LR* 485.
- Ramos, Gabriela I ‘The OECD in the G20: A natural partner in global governance’ (2011) 43 *The George Washington International LR* 325.
- Ring, Patrick ‘The retail distribution review’ (2016) 24 *Journal of Financial Regulation and Compliance* 140.
- Ring, Patrick John; Cormac Bryce & Rick McKinney et al ‘Taking notice of risk culture – the regulator’s approach’ (2016) 19 *Journal of Risk Research* 364.
- Santucci, Philip ‘Substantive fairness in Australian standard form consumer contracts: Lessons from the UK experience’ (2011) 11 *Oxford University Commonwealth LJ* 171.
- Sarin, Natasha ‘Making consumer finance work’ (2019) 119 *Columbia Law Review* 1519.
- Schmulow, Andrew ‘Consumer financial well-being in South Africa’s Twin Peaks regulatory regime: from measurement, to confidence in outcomes’ (2020) 5 *The International Review of Financial Consumers* 11.
- Schmulow, Andrew ‘Regulating the regulator: Improving consumer protection under a Twin Peaks regulatory framework’ (2018) 3 *The International Review of Financial Consumers* 1.

- Schmulow, Andrew 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 151.
- Schmulow, Andrew 'Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks,' (2020) 30 *African Journal of International and Comparative Law* 25.
- Schmulow, Andrew D 'Financial regulatory governance in South Africa: The move towards Twin Peaks' (2017) 25 *African Journal of International and Comparative Law* 393.
- Schmulow, Andrew D 'Retail market conduct reforms in South Africa under Twin Peaks' (2017) 11 *Law and Financial Markets Review* 163.
- Schmulow, Andrew D 'Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks' (2022) 30 *African Journal of International and Comparative Law* 25.
- Schmulow, Andrew D 'Twin Peaks: An analysis of the Australian architecture' (2016) in HJ Jung(ed) *International Academy of Financial Consumers* 1.
- Schmulow, Andrew; Nicola Howell & Paul Mazzola et al 'Treating Customers Fairly. A concept. A framework. An alternative? Australian Law Reform Commission Review of the Legislative Framework for Corporations and Financial Services Regulation' (2021) *ALRC Review* 1.
- Schmulow, Andrew; Baladev Dayaram & Sian Mullen 'Consumer Protection in Insurance Contracts: The Need for a 'Treating Customers Fairly' Regime'(2023)8 *The International Review of Financial Consumers* 47.
- Schmulow, Andrew; Paul Mazzola & Daniel de Zilva 'Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority' (2021)49 *Federal Law Review* 505.
- Schmulow, Andy; Karen Fairweather & John Tarrant 'Twin Peaks 2.0: reforming Australia's financial regulatory regime in light of failings exposed by the Banking Royal Commission' (2018) 12 *Law and Financial Markets Review* 193.
- Schulze, Wilhelm G 'The reversal of electronic payments under South African law: Possible guidance from recent developments in European Union' (2020) 32 *SA Mercantile LJ* 22.
- Schulze, Wilhelm G 'The Sources of South African banking law a twenty-first century perspective (Part 1)' (2002) 14 *SA Mercantile LJ* 440.
- Schulze, Wilhelm G & SLW Mokobi 'The case for further reform of the banks' advisory duty in South Africa post the Financial Advisory and Intermediary Services Act 37 of 2002' (2021) 33 *SA Mercantile LJ* 419.

- Sharrock, R D 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 22 *SA Mercantile LJ* 295.
- Siliquini–Cinelli, Lucas & Andrew Hutchison 'Constitutionalism, good faith and the doctrine of specific performance: rights, duties and equitable discretion '(2016) 133 *SALJ* 73.
- Sims, Alexandra 'Unfair Contract Terms: A New Dawn in Australia and New Zealand' (2013) 39 *Monash University Law Review* 739.
- Singleton, John & James Reveley 'How exceptional is Australian financial sector misconduct? The Hayne Royal Commission revisited' (2020) 14 *Law and Financial Markets Review* 77.
- Smith, Gillian 'Assessing the effectiveness of ethics legislation in influencing parliamentary attitudes toward corruption: A cross national comparison between the UK and Ireland' (2011) 11 *Journal of Public Affairs* 100.
- Stace, Victoria 'Mis-selling financial products: when can the customer claim in negligence?' (2016) 6 *Journal of Business Law* 517.
- Steyn, Johan 'Contract law: Fulfilling the reasonable expectations of honest men' (1997) 113 *Law Quarterly Review* 433.
- Stoop, Philip N 'Background to the regulation of fairness in consumer contracts' (2015) 27 *SA Mercantile LJ* 191.
- Stoop, Philip N 'The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts' (2015) 18 *Potchefstroom Electronic LJ* 1091.
- Stoop, Philip N & Chrizzell Churr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' (2013) 16 *Potchefstroom Electronic LJ* 514.
- Sutherland, P J 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) - Part 2' (2009) 20 *SLR* 50.
- Tait, Mark 'Judicial guidance on the application of Section 49 of the Consumer Protection Act 68 of 2008' (2020) 41 *Obiter* 948.
- Taylor, Michael W 'The road from "Twin Peaks" - and the way back' (2009) 16 *Connecticut Insurance LJ* 61.
- Teubner, Gunther 'Legal irritants: Good faith in British law or how unifying law ends up in new divergencies' (1998) 61 *Modern LR* 11.
- Trautman, Lawrence J 'The FTX crypto debacle: Largest fraud since Madoff?' (2022) *University of Memphis LR* 1.

- Valverde, Santiago Carbó & Francisco Rodríguez Fernandez ‘Financial Digitalization: Banks, Fintech, Bigtech, and Consumers’ (2020) 8 *Journal of Financial Management, Markets and Institutions* 1.
- Van der Merwe, Stephan ‘Judicial Intervention and the Call to Transformative Constitutionalism in the Context of Consumer Law, Debt Collection and the National Credit Act: Bayport Securitisation Ltd v University of Stellenbosch Law Clinic’ (2023) 140 *SALJ* 328.
- Van Heerden, Corlia & Gerda van Niekerk ‘Twin Peaks in South Africa: A new role for the central bank’ (2017) 11 *Law and Financial Markets Review* 154.
- Van Niekerk, Gerda & Corlia van Heerden ‘The importance of a legislative framework for co-operation and collaboration in the Twin Peaks model of financial regulation’ (2020) 137 *SALJ* 108.
- Van Wyk, JS ‘A Comparative Analysis of the Regulatory Independence of the Financial Sector Conduct Authority and the National Credit Register’ (2019) 82 *THRHR* 392.
- Varuhas, Jason N E ‘Three issues in the law of contractual discretion’ (2022) 42 *Oxford Journal of Legal Studies* 787.
- Vessio, ML ‘What does the National Credit Regulator Regulate?’ (2018) 2 *SA Merc LJ* 227.
- Visagie-Swart, Lynette & Vivienne Lawack ‘An Overview of the first draft of the Conduct of Financial Institutions Bill and the Potential Impact on the National Payment System in South Africa’ (2020) 32 *SA Mercantile LJ* 129.
- Viven-Wilksch, Jessica ‘Good faith in contracts: Australia at the crossroads’ (2019) 1 *Journal of Common Wealth Law* 273.
- Warren, Marilyn ‘Good faith: Where are we at?’ (2010) 34 *Melbourne University LR* 344.
- Wells, Alan ‘Mis-Selling Payment Protection Insurance’ (2011) 32 *Business LR* 188.
- Whittaker, Simon ‘Distinctive features of the new consumer contract law’ (2017) 133 *Law Quarterly Review* 47.
- Whittaker, Simon ‘Unfair contract terms, unfair prices and bank charges’ (2011) 74 *Modern LR* 106.
- Willett, Chris ‘Re-theorising consumer law’ (2018) 77 *The Cambridge LJ* 179.
- Woker, Tanya ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ (2010) 31 *Obiter* 217.
- Worthington, Steve & James F Devlin ‘Fairness and financial services in Australia and the United Kingdom’ (2013) 31 *International Journal of Bank Marketing* 289.

Wymeersch, Eddy 'The structure of financial supervision in Europe: About Single, Twin Peaks and multiple financial supervisors' (2007) 8 *European Business Organization Review* 237.

Zaman, Monisha P 'The Recent Scandalous Crypto Collapses: Regulatory Prospects on the Horizon?' (2023) 20 *Manchester Journal of International Economic Law* 84.

Articles and Newspapers

ABSA 2023 Pricing Guide available at <https://www.absa.co.za/content/dam/south-africa/absa/pdf/pricing-brochure/2023/2023-Pricing-Brochure.pdf>, accessed on 20 September 2023, available at https://www.businesslive.co.za/bd/companies/financial-services/2024-01-24-sp-sa-banks-on-par-with-developed-markets-fintech/#google_vignette accessed 02 October 2024.

Alex Erskine 'Regulating the Australian financial system' available at https://erskinomics.com/wp-content/uploads/2014/09/regulating_the_australian_financial_system.pdf, accessed on 17 May 2023.

Allison Morrow 'Customers who trusted crypto giant FTX may be left with nothing' *CNN Business* 15 November 2022 available at <https://edition.cnn.com/2022/11/14/business/ftx-customer-money-bankruptcy/index.html>, accessed on 15 October 2023.

Andy Schmulow 'Law & Business seminar: Does Australia need a treating customers fairly (TCF) regime for the financial industry?' available at <https://law-events.sydney.edu.au/events/law-business-seminar-does-australia-need-a-treating-customers-fairly-tcf-regime-for-the-financial-industry>, accessed on 04 July 2022.

Angela Itzikowitz & Era Gunning 'The application of the Consumer Protection Act to Open Banking' *ENS Africa* 09 November 2021, available at <https://www.ensafrika.com/news/detail/4999/the-application-of-the-consumer-protection-ac>, accessed on 09 November 2021.

Antonique Koning; Juan Carlos Izaguirre & Avesha Singh 'Customer Outcomes-Based Approach to Consumer Protection: a Guide to Measuring Outcomes' *CGAP* June 2022 available at <https://www.cgap.org/research/reading-deck/customer-outcomes-based-approach-to-consumer-protection-guide-to-measuring>, accessed 12 November 2024.

Bank Zero Pricing Guide 2022 available at <https://www.bankzero.co.za/wp-content/uploads/2021/10/Bank-Zero-pricing-guide-2022-1.pdf>, accessed 20 September 2023.

Business Day 'S&P: SA banks on par with developed markets fintech' 24 January 2024 available at https://www.businesslive.co.za/bd/companies/financial-services/2024-01-24-sp-sa-banks-on-par-with-developed-markets-fintech/#google_vignette accessed 02 October 2024.

- Capitec Transaction Fees available at <https://www.capitecbank.co.za/globalassets/pages/documents-library/transact/Transact-flyer-2024-update-150224.pdf>, accessed on 20 September 2023.
- Christoph Breidbach; Chris Culnane & Andrew Godwin et al ‘FinFuture: The future of personal finance in Australia’ available at https://www.unimelb.edu.au/__data/assets/pdf_file/0004/3145612/FinFuture_White_Paper.pdf, accessed on 14 May 2023.
- Christoph Breidbach; Chris Culnane & Andrew Godwin et al ‘How Australians feel about their finances and financial service providers’ available at <https://www.unimelb.edu.au/finfuture?a=3145613>, accessed on 14 May 2023.
- Ciaran Ryan ‘Calls for inquiry into home and car repossession abuses’ *Moneyweb* 11 December 2017 available at <https://www.moneyweb.co.za/news/south-africa/calls-for-inquiry-into-home-and-car-repossession-abuses/>, accessed on 28 March 2024.
- Clive Briault ‘Revisiting the Rationale for a Single National Financial Services Regulator’ *Financial Services Authority* February 2002, available at <https://rb.gy/gxdult>, accessed on 26 October 2023.
- Consumer Action Law Centre ‘Issues paper’ available at <https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review/issues-paper>, accessed on 12 September 2023.
- Consumer’s Federation of Australia ‘Mass complaint made against Motor Finance Wizard’ available at <https://consumersfederation.org.au/mass-complaint-made-against-motor-finance-wizard/>, accessed on 14 May 2023.
- Daniel Calvo; Juan Carlos Crisanto & Stefan Hohl et al ‘Financial Supervisory Architecture: What Has Changed After the Crisis?’ *Bank of International Settlements* 30 April 2018 available at <https://www.bis.org/fsi/publ/insights8.htm>, accessed on 14 July 2022.
- Daniel Crennan ‘The future of the corporation: The regulator’s perspective’ available at <https://asic.gov.au/about-asic/news-centre/speeches/the-future-of-the-corporation-the-regulator-s-perspective/>, accessed on 15 May 2023.
- Danièle Nouy ‘Gaming the rules or ruling the game? – How to deal with regulatory arbitrage’ *European Central Bank* 15 September 2017, available at <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html>, accessed on 25 January 2021.
- David T Llewellyn ‘Institutional structure of financial regulation and supervision: The basic issues’ available at <https://letr.org.uk/references/storage/QW6PBIDS/Llewellyn%20-%202005%20-%20Institutional%20structure%20of%20financial%20regulation%20an.pdf>, accessed on 18 October 2023.

Debra Cassens Weiss ‘SEC accuses Goldman Sachs of selling mortgage investment designed to fail’ *ABA Journal* 16 April 2010, available at https://www.abajournal.com/news/article/sec_accuses_goldman_sachs_of_selling_mortgage_investment_designed_to_fail#google_vignette, accessed 25 June 2024.

Experian ‘Consumer Default Index’ available at <https://www.experian.co.za/content/dam/noindex/emea/soafrica/consumer-index/CDIx-Podcast-2023-Q2.pdf>, accessed on 26 October 2023.

Finance Standing Committee ‘Conduct of Financial Institutions (COFI) Bill 2018 – draft’ *Parliamentary Monitoring Group* 11 December 2018 available at <https://pmg.org.za/call-for-comment/784/>, accessed on 24 October 2023.

Fintech Futures ‘Challenger banks in South Africa: who’s who and what’s their tech’ 31 July 2019 available at <https://www.fintechfutures.com/2019/07/challenger-banks-in-south-africa-whos-who-and-whats-their-tech/> accessed on 02 October 2024.

FNB Transact Pricing Guide available at <https://www.fnb.co.za/rates/Transact-Pricing-Guide.html>, accessed on 20 September 2023.

Hans Falkena; Gabriel Davel & Penelope Hawkins et al ‘Competition in South African banking’ (2004) available at https://www.academia.edu/2003746/Competition_in_South_African_Banking, accessed on 04 August 2024.

Hippo ‘2023 banking fees guide’ available at <https://www.hippo.co.za/blog/money/2023-banking-fees-guide/>, accessed 20 September 2023.

Isdale, William & Christopher Ash, ‘Undue Complexity in Australia’s Corporations and Financial Services Legislation’ 30 November 2021 *Australian Law Reform Commission News* available at <https://www.alrc.gov.au/news/undue-complexity/>, accessed 27 December 2024.

James J Davidson ‘The UK Financial Services Authority’s “Treating Customers Fairly” initiative and its potential for application in the Australian financial services industry’ *Analysis & Policy Observatory* 27 February 2007, available at <https://apo.org.au/node/2680>, accessed on 14 July 2022.

Jan Trzaskowski ‘The unfair commercial practices directive and vulnerable consumers’ available at <https://research.cbs.dk/en/publications/the-unfair-commercial-practices-directive-and-vulnerable-consumer>, accessed on 18 October 2023.

Jane Greenwood ‘Why the FCA’s Consumer Duty matters’ *Money Marketing* 19 October 2021, available at <https://www.moneymarketing.co.uk/opinion/the-fcas-new-consumer-duty-has-attracted-criticism/>, accessed on 26 October 2023.

Jeanne Marie Paterson & Nicola Howell ‘Everyday Consumer Credit – Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans’ available at

<https://apo.org.au/sites/default/files/resource-files/2018-03/apo-nid136491.pdf>, accessed on 14 July 2022.

Jonathan Faurie ‘A New Playing Field with the Introduction of the FSCA’ *Financial Intermediaries Association of Southern Africa* 18 June 2018 available at <https://fia.org.za/2018/06/18/a-new-playing-field-with-the-introduction-of-the-fsca/>, accessed on 24 October 2023.

Jorge Camarate & Simon Brinckmann ‘A marketplace without boundaries: The future of banking: A South African perspective’ *PWC Strategy & 2017* at 4–9 available at <https://www.pwc.co.za/en/assets/pdf/strategyand-future-of-banking.pdf>, accessed on 18 August 2019.

Kabelo Khumalo ‘S&P: SA banks on par with developed markets fintech’ *BusinessDay* 24 January 2024, available at https://www.businesslive.co.za/bd/companies/financial-services/2024-01-24-sp-sa-banks-on-par-with-developed-markets-fintech/#google_vignette, accessed on 02 October 2024.

Kabelo Khumalo ‘Shadow banking raising important policy concerns, says Reserve Bank’ *IOL News* 20 December 2017, available at <https://www.iol.co.za/business-report/shadowbanking-raising-important-policy-concerns-says-reserve-bank-12486404>, accessed on 07 March 2024.

Kenneth J Robinson ‘Savings and loans crisis’ available at <https://www.federalreservehistory.org/essays/savings-and-loan-crisis>, accessed 20 September 2023.

Krugman, Paul ‘Looters in Loafers’ *New York Times* 19 April 2010, available at <https://www.nytimes.com/2010/04/19/opinion/19krugman.html>, accessed on 21 February 2024.

Liesl Pretorius ‘Analysis: Did poor people lose money in VBS bank’s collapse?’ *The Citizen* 31 July 2019 available at <https://www.citizen.co.za/business/personal-finance/analysis-did-poor-people-lose-money-in-vbs-banks-collapse/>, accessed on 23 October 2023.

Martin Melecky & Sue Rutledge ‘Financial consumer protection and the global financial crisis’ *World Bank* 20 January 2011, available at <https://econpapers.repec.org/paper/pramprapa/28201.htm>, accessed on 12 October 2023.

Michael Vrisakis; Tamanna Islam & Shan-Verne Liew ‘The fairness doctrine: a return to the status quo?’ *Herbert Smith Freehills* 26 March 2020, available at <https://hsfnotes.com/fsraustralia/2020/03/26/the-fairness-doctrine-a-return-to-the-status-quo/>, accessed on 11 May 2023.

Miguel Ampudia et al ‘The architecture of supervision’ *European Central Bank* 12 June 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402889, accessed on 20 October 2024.

- Myles Illidge ‘Cheapest bank accounts in South Africa’ *My Broadband* 16 March 2023, available at <https://mybroadband.co.za/news/banking/483261-cheapest-bank-accounts-in-south-africa-3.html>, accessed 20 September 2023.
- Nedbank Rates & Fees available at <https://personal.nedbank.co.za/home/rates-and-fees.html>, accessed on 20 September 2023.
- Nicola Howell & Catherine Brown ‘Submission to ALRC Financial Services Inquiry – Interim Report A’ available at <https://www.alrc.gov.au/wp-content/uploads/2022/03/47.-N-Howell-and-C-Brown.pdf>, accessed on 30 August 2023.
- Oliver E Browne & Alex Cox ‘Meaning of “good faith” under English law: Latest clarification’ *Latham & Watkins LLP* 10 November 2022 available at <https://www.latham.london/2022/11/meaning-of-good-faith-under-english-law-latest-clarification/>, accessed on 26 October 2023.
- Pamela Hanrahan ‘Legal framework governing aspects of the Australian superannuation system: background paper 25’ *Analysis & Policy Observatory* 26 July 2018, available at <https://apo.au/node/184256>, accessed on 17 May 2023.
- Regina Finn & Simon Less ‘Letters and notes on regulation: Capture of independent sectoral regulators’ available at https://www.regulation.org.uk/library/2013_regulatory_capture.pdf, accessed on 23 April 2024.
- Richard Rattue ‘Conflicts of interest: Are you managing yours?’ *MoneyMarketing* 02 July 2018 available at https://issuu.com/newmediab2b/docs/mm_july_18, accessed 21 April 2024.
- Rodney Ramcharan ‘IMF Survey: Sound policies shield South Africa from worst of recession’ *International Monetary Fund* 25 September 2009 available at <https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar092509a>, accessed on 20 June 2022.
- Sam Burdyl ‘On Startups and Regulatory Entrepreneurship’ *The Regulatory Review* 10 December 2023 available at <https://www.theregreview.org/2023/12/10/sunday-spotlight-on-startups-and-regulatory-entrepreneurship/>, accessed 02 October 2024.
- Sharon Thiruchelvam ‘FTX failure resets US crypto legislative programme’ *Risk.Net* 29 November 2022, available at <https://www.risk.net/regulation/7955328/ftx-failure-resets-us-crypto-legislative-programme>, accessed on 02 October 2024.
- Sonja Kelly; Dennis Ferenzy & Allyse McGrath ‘How Financial Institutions and Fintechs Are Partnering for Inclusion: Lessons from the Frontlines’ *Center for Financial Inclusion* 30 July 2017 available at <https://www.centerforfinancialinclusion.org/how-financial-institutions-and-fintechs-are-partnering-for-inclusion-lessons-from-the-frontlines-2/>, accessed 02 October 2024.

- Spencer Wright ‘Misleading or deceptive conduct’ *Gibbs Wright Litigation Lawyers* 25 May 2020, available at <https://gibbswrightlawyers.com.au/publications/misleading-deceptive-conduct/>, accessed on 02 October 2024.
- Staff Writer ‘South Africa’s new payment system PayShap fees compared – Nedbank vs Absa vs Standard Bank vs FNB’ *BusinessTech* 14 March 2023, available at <https://businesstech.co.za/news/banking/672429/south-africas-new-payment-system-payshap-fees-compared-nedbank-vs-absa-vs-standard-bank-vs-fnb/>, accessed 20 September 2023.
- Staff Writer ‘South Africa’s new payment system PayShap fees compared – Nedbank vs Absa vs Standard Bank vs FNB’ *Business Tech* 14 March 2023, available at
- Standard Bank available at <https://www.standardbank.co.za/southafrica/personal/products-and-services/bank-with-us/bank-accounts/our-accounts>, accessed on 20 September 2023.
- Stephen Grenville ‘Banks misbehaving everywhere’ *Lowy Institute - The Interpreter* 8 May 2018, available at <https://www.lowyinstitute.org/the-interpreter/banks-misbehaving-everywhere>, accessed on 18 August 2019.
- The Finance Ghost ‘Will history rhyme at African Bank?’ *Financial Times* 19 October 2023 available at <https://www.businesslive.co.za/fm/opinion/2023-10-19-the-finance-ghost-will-history-rhyme-at-african-bank/>, accessed on 19 October 2023.
- The Library of Congress ‘Regulation of cryptocurrency around the world’ available at <https://tile.loc.gov/storage-services/service/ll/lglrd/2018298387/2018298387.pdf>, accessed on 28 March 2024.
- Tom Otter; Elaina Bailes & Aleks Valkov ‘Financial services litigation: Global overview’ *Lexology* 13 August 2021 available at <https://www.lexology.com/library/detail.aspx?g=a9c57e10-9927-4af7-9abd-f0f21a29180e>, accessed on 09 May 2023.
- Trading Economics ‘South Africa Households Debt to Income’ available at <https://tradingeconomics.com/south-africa/households-debt-to-income>, accessed on 23 October 2023.
- Troy Pilkington & Joe Edwards ‘What is "unconscionable conduct"? The Australian definition morphs again’ *Russell McVeagh* 20 April 2021, available at <https://www.russellmcveagh.com/insights/april-2021/what-is-unconscionable-conduct-the-australian-definition-morphs-again>, accessed on 09 May 2023.
- Tyme Bank Everyday Account Fees and Charges available at <https://www.tyembank.co.za/fees/everyday-banking/>, accessed on 20 September 2023.
- Vicky Robinson ‘Bank Charges under scrutiny’ *Mail & Guardian* 30 August 2004, available at <https://mg.co.za/article/2004-08-30-bank-charges-under-scrutiny/>, accessed on 26 September 2023.

Who Owns Whom ‘The rise of new competition in the South African banking sector’ *Who Owns Whom* 20 May 2014, available at <https://www.whoownswhom.co.za/the-new-faces-of-banking-in-south-africa/>, accessed on 26 September 2023.

Government Policy Documents, Bills and Presentations

Advocate Terry Motau ‘VBS Mutual Bank – The great bank heist’ *South African Reserve Bank* 30 September 2018 at 9, available at <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2018/8830>, accessed 23 October 2023.

Australia Royal Commission ‘Misconduct in the Banking, Superannuation and Financial Services Industry: Final Report Volume 1’ Royal Commissions 4 February 2019, available at <https://www.royalcommission.gov.au/banking>, accessed 15 May 2023.

Australian Government - The Treasury ‘Unfair trading practices Consultation on the design of proposed general and specific prohibitions’ November 2024 available at <https://treasury.gov.au/sites/default/files/2024-11/c2024-602157-cp.pdf>, accessed 26 December 2024.

Australian Government -Financial Regulator Assessment Authority website available at <https://fraa.gov.au/>, accessed 27 December 2024.

Australian Government ‘Government Response to the Financial System Inquiry’ *Treasury.gov.au* 20 October 2015 available at <https://treasury.gov.au/publication/government-response-to-the-financial-system-inquiry#:~:text=The%20Government's%20response%20sets%20out,financial%20system%20in%20the%20world>, accessed on 17 May 2023.

Australian Government ‘Restoring trust in Australia’s financial system: Financial Services Royal Commission implementation roadmap’ available at https://treasury.gov.au/sites/default/files/2019-08/399667_Implementation_Roadmap_final.pdf, accessed on 16 May 2023.

Australian Government Productivity Commission ‘Review of Australia’s Consumer Policy Framework’ available at <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>, accessed on 16 August 2022.

Australian Government the Treasury ‘Financial System Enquiry Final Report’ available at <https://treasury.gov.au/publication/c2014-fsi-final-report>, accessed 10 November 2024.

Australian Government the Treasury ‘Financial System Inquiry (1996) Final Report’ available at <https://treasury.gov.au/publication/p1996-fsi-fr>, accessed on 14 July 2022.

Australian Government the Treasury ‘Financial system inquiry interim report’ available at <https://treasury.gov.au/consultation/c2014-fsi-interim-report>, accessed on 18 July 2022.

- Australian Law Reform Commission ‘Final Report Confronting Complexity: Reforming Corporations and Financial Services Legislation ALRC Report 141’ November 2023 at 18 available at <https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf>, accessed 27 December 2024.
- Australian Law Reform Commission ‘Financial services legislation: Interim Report B’ Australian Government September 2022 at 85, available at <https://www.alrc.gov.au/wp-content/uploads/2022/09/ALRC-FSL-Interim-Report-B-139.pdf>, accessed 12 September 2023.
- Australian Law Reform Commission Background Paper ‘All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law (FSL9) - FS19 Legislative Framework for Corporations and Financial Services Regulation’ December 2022 available at <https://www.alrc.gov.au/wp-content/uploads/2022/12/FSL9-All-roads-lead-to-Rome.pdf>, accessed 27 December 2024.
- Australian Securities & Investment Commission ‘Our Structure’ available at <https://asic.gov.au/about-asic/what-we-do/our-structure/>, accessed on 20 September 2023.
- Australian Securities & Investment Commission Organisational Chart 18 November 2024 available at <https://download.asic.gov.au/media/qfedk5uh/asic-organisation-chart-18-november-2024.pdf>, accessed 27 December 2024.
- Australian Securities & Investments Commission ‘Review into open banking in Australia’ available at https://treasury.gov.au/sites/default/files/2019-03/c2017-t224510_ASIC.pdf, accessed 20 September 2023.
- Bank of England ‘Members of the Financial Policy Committee’ available at <https://www.bankofengland.co.uk/about/people/financial-policy-committee>, accessed 19 December 2024.
- Bank of England ‘Memorandum of understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-pra.pdf>, accessed 08 June 2022.
- Bank of England ‘Memorandum of understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/mou-fca-and-boe.pdf>, accessed 19 December 2024.
- Consumer Affairs Australia and New Zealand ‘Australian consumer law review final report’ available at https://consumer.gov.au/sites/consumer/files/2017/04/ACL_Review_Final_Report.pdf, accessed on 12 September 2023.
- Department of Justice & Correctional Development ‘Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society’ available at <https://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015-Final.pdf>, accessed on 18 August 2019.

Department of Planning, Monitoring & Evaluation Republic of South Africa ‘Initial impact assessment template (Phase 1) on the Conduct of Financial Institutions Bill’ available at <https://www.treasury.gov.za/twinpeaks/SEIA%20COFI%20Bill.pdf>, accessed on 18 August 2019.

FAIS Ombud ‘Annual Report 2018-2019’ available at https://www.faisombud.co.za/wp-content/uploads/2019/12/FAIS_Ombud_Annual_Report_2018-2019.pdf, accessed on 16 February 2022.

FCA ‘A new Consumer Duty: Feedback to CP21/13 and further consultation’ December 2021 available at <https://www.fca.org.uk/publication/consultation/cp21-36.pdf>, accessed on 02 July 2024.

Financial Action Task Force ‘FATF methodology for assessing compliance with the FATF recommendations and the effectiveness of AML/CFT systems’ available at <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Fatf-methodology.html>, accessed on 19 December 2024.

Financial Conduct Authority ‘A new consumer duty: Feedback to CP21/13 and further consultations’ May 2021 available at <https://www.fca.org.uk/publication/consultation/cp21-36.pdf>, accessed on 20 November 2021.

Financial Conduct Authority ‘Banking: Conduct of business sourcebook’ available at <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf>, accessed on 08 January 2025.

Financial Conduct Authority ‘Consumer duty implementation: good practice and areas for improvement’ available at <https://www.fca.org.uk/publications/good-and-poor-practice/consumer-duty-implementation-good-practice-and-areas-improvement>, accessed on 21 February 2024.

Financial Conduct Authority ‘Culture and non-financial misconduct survey – findings’ available at <https://www.fca.org.uk/data/culture-non-financial-misconduct-survey-findings>, accessed 04 November 2024.

Financial Conduct Authority ‘Executive Committees’ available at <https://www.fca.org.uk/about/who-we-are/executive-committees>, accessed on 28 November 2023.

Financial Conduct Authority ‘FCA statement on Court of Appeal judgment in Hopcraft, Johnson and Wrench’ available at <https://www.fca.org.uk/news/statements/court-appeal-judgment-hopcraft-johnson-wrench>, accessed 04 November 2024.

Financial Conduct Authority ‘FG 21/1 Guidance for firms on treatment of vulnerable customers’ available at <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf>, accessed on 18 October 2024.

Financial Conduct Authority ‘FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015’ available at <https://www.fca.org.uk/publication/finalised-guidance/fg18-07.pdf>, accessed 18 October 2024.

Financial Conduct Authority ‘Financial lives 2020 survey: the impact of coronavirus’ available at <https://www.fca.org.uk/publications/financial-lives/financial-lives-2020-survey-impact-coronavirus>, accessed on 02 July 2024.

Financial Conduct Authority ‘Handbook’ available at <https://www.handbook.fca.org.uk/>, accessed on 10 January 2025.

Financial Conduct Authority ‘Memorandum of understanding between the Competition and Markets Authority and the Financial Conduct Authority – concurrent competition powers’ available at <https://www.fca.org.uk/publication/mou/fca-cma-concurrent-competition-powers-mou.pdf>, accessed on 08 June 2022.

Financial Conduct Authority ‘Memorandum of understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation’ available at <https://www.fca.org.uk/publication/mou/fca-cma-consumer-protection-mou-2019.pdf>, accessed on 08 June 2022.

Financial Conduct Authority ‘Memorandum of Understanding between the Financial Conduct Authority and the Prudential Regulatory Authority’ available at <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/fca-and-bank-prudential-july-2019.pdf>, accessed on 19 December 2024.

Financial Conduct Authority ‘PPI Complaints’ available at <https://www.fca.org.uk/consumers/ppi-complaints#:~:text=We%20set%20a%20deadline%20of,2019%20deadline%20had%20been%20handled>, accessed 04 November 2024.

Financial Conduct Authority ‘Principles of good regulation’ available at <https://www.fca.org.uk/about/how-we-regulate/handbook/principles-good-regulation>, accessed on 11 January 2022.

Financial Conduct Authority ‘The Unfair Contract Terms Regulatory Guide’ available at <https://www.handbook.fca.org.uk/handbook/UNFCOG.pdf>, accessed on 29 March 2022.

Financial Conduct Authority ‘Treating customers fairly – guide to management information’ available at <https://www.fca.org.uk/publication/archive/fca-tcf-mi-july2007.pdf>, accessed on 29 March 2022.

Financial Conduct Authority ‘Applying behavioural economics at the Financial Conduct Authority’ available at <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>, accessed on 24 October 2023.

Financial Markets Authority ‘Conduct of Financial Institutions (CoFI) legislation’ available at <https://www.fma.govt.nz/business/legislation/conduct-of-financial-institutions-cofi-legislation/>, accessed on 24 October 2023.

Financial Ombudsman Service ‘Financial dispute resolution that’s fair and impartial’ available at <https://www.financial-ombudsman.org.uk/>, accessed on 08 December 2024.

Financial Sector Conduct Authority ‘FSCA Statement on Consumer Vulnerability’ available at https://www.fsca.co.za/Documents/FSCA%20Statement%20on%20Consumer%20Vulnerability_PUBLISHED.pdf, accessed 20 October 2024.

Financial Sector Conduct Authority ‘Communication 13 of 2024 (FAIS): Submission of annual financial statements and other statutory returns by Financial Service Providers’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2013%20of%202024.pdf>, accessed 12 November 2024.

Financial Sector Conduct Authority ‘Communication 16 of 2022 (General): Publication of Roadmap for roll-out and implementation of cross-sectoral Conduct of Business Return (Omni-CBR)’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Industry-Communication.aspx>, accessed 06 December 2024.

Financial Sector Conduct Authority ‘Digital financial inclusion trends presentation and panel discussion 21 July 2022’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Digital%20Financial%20Inclusion%20presentation.pdf>, accessed on 18 April 2024.

Financial Sector Conduct Authority ‘Financial Education Summit 28 August 2024 Draft South African Financial Education Commitment Charter’ available at <https://www.fsca.co.za/Documents/Draft%20SA%20FE%20Commitment%20Charter.pdf>, accessed 05 December 2024.

Financial Sector Conduct Authority ‘Financial Sector Outlook Study’ available at <https://www.fsca.co.za/Documents/FSCA%20Financial%20Sector%20Outlook%20Study%202022.pdf>, accessed on 21 June 2023.

Financial Sector Conduct Authority ‘FSCA Organogram’ available at <https://www.fsca.co.za/Pages/Organogram.aspx>, accessed on 07 July 2024.

Financial Sector Conduct Authority ‘Guidance Note – “Deposit” in the Financial Advisory and Intermediary Services Act’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Guidance%20Notes/GuidanceNoteDepositFAISAct.pdf>, accessed on accessed 07 July 2024.

Financial Sector Conduct Authority ‘Integrated Report 2023-2024’ available at <https://www.fsca.co.za/Annual%20Reports/FSCA%20Integrated%20Report%202023-24.pdf>, accessed 06 December 2024.

Financial Sector Conduct Authority ‘List of Acts administered’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/legislation.aspx>, accessed on 06 June 2022.

Financial Sector Conduct Authority ‘List of All Notices’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>, accessed on 28 March 2024.

Financial Sector Conduct Authority ‘Memorandum of understanding between the FSCA & local and foreign jurisdiction/bodies’ available at [https://www.fsca.co.za/Documents/LATEST%20LIST%20OF%20MEMORANDUM%20OF%20UNDERSTANDING%20BETWEEN%20THE%20FSCA%20AND%20OTHER%20AUTHORITIES%20\(January%202019\).pdf](https://www.fsca.co.za/Documents/LATEST%20LIST%20OF%20MEMORANDUM%20OF%20UNDERSTANDING%20BETWEEN%20THE%20FSCA%20AND%20OTHER%20AUTHORITIES%20(January%202019).pdf), accessed on 06 June 2022.

Financial Sector Conduct Authority ‘Memorandum of understanding between the Financial Sector Conduct Authority and the National Credit Regulator’ available at https://www.fsca.co.za/Regulatory%20Liaison/MoU_%20FSCA%20and%20NCR.pdf, accessed on 27 June 2024.

Financial Sector Conduct Authority ‘Notice regarding the publication of the draft Conduct Standard 1 of 2019 (Banks)’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Banks.aspx>, accessed on 23 June 2020.

Financial Sector Conduct Authority ‘Regulatory Strategy of the Financial Sector Conduct Authority October 2018-September 2021’ available at https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf, accessed on 16 February 2022.

Financial Sector Conduct Authority ‘Regulatory Strategy of the Financial Sector Conduct Authority 2021-2025’ available at <https://www.fsca.co.za/News%20Documents/FSCA%20Regulatory%20Strategy%202021-2025.pdf>, accessed on 16 February 2022.

Financial Sector Conduct Authority ‘Release of the Financial Sector Conduct Authority’s regulatory strategy and memoranda of understanding’ available at <https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20Regulatory%20Strategy%20and%20Memoranda%20of%20Understanding%20-%202011-10-2018.pdf>, accessed on 06 June 2022.

Financial Sector Conduct Authority ‘Retail distribution review: General status update December 2019’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/RDR%20General%20Status%20Update%20December%202019.pdf>, accessed on 06 June 2022.

- Financial Sector Conduct Authority ‘South African financial customer behaviour and sentiment study’ available at <https://www.fsca.co.za/Documents/South%20African%20Retail%20Financial%20Customer%20Behaviour%20and%20Sentiment%20Report.pdf>, accessed 20 October 2023.
- Financial Sector Conduct Authority ‘Statement supporting the proposed amendments to the general code of conduct for authorised financial services providers and representatives’ available at <https://www.masthead.co.za/wp-content/uploads/2023/01/3-Statement-need-impact-operation-supporting-the-Proposed-Amendments-to-the-General-Code-2022.pdf>, accessed on 07 March 2024.
- Financial Sector Contingency Forum ‘Lessons from the Covid-19 Pandemic in South Africa’ Centre of Excellence in Financial Services at 13 available at <https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-stability/Lessons%20from%20the%20Covid-19%20pandemic%20in%20South%20Africa.pdf>, accessed 08 December 2024.
- Financial Service Ombudsman ‘Insight summary: complaints resulting from Covid-19 and the impact on consumers and SMEs’ available at <https://www.financial-ombudsman.org.uk/data-insight/our-insight/insight-summary-complaints-resulting-covid-19-impact-consumers-smes>, accessed 08 December 2024.
- Financial Services Board ‘Assessing Your TCF Readiness: How to use the FSB’s self-assessment tool’ available at <https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/Completing%20the%20self-assessment.pdf>, accessed 12 November 2024.
- Financial Services Council ‘Australian Law Reform Commission - Financial Services Legislation Inquiry: ALRC Report 137’ available at <https://www.alrc.gov.au/wp-content/uploads/2022/03/39.-Financial-Services-Council.pdf>, accessed on 12 September 2023.
- Finmark Trust ‘Consumer protection in SADC’ February 2016 available at https://finmark.org.za/system/documents/files/000/000/476/original/ConsumerProtectionSADC_2016.pdf?1615197048, accessed 06 June 2025.
- House of Commons Library ‘Consumer Rights Act 2015 – Research’ available at <https://researchbriefings.files.parliament.uk/documents/SN06588/SN06588.pdf>, accessed 10 November 2024.
- Kagiso Mothibi & Dino Lazaridis ‘Fintech Digital Platforms – An investigation into fintech digital platform activity in South Africa and their regulatory implications’ FSCA 2021 available at https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Fintech_Digital-Platforms_An_investigation_into_Fintech_Digital_platform_activity_in_South_Africa_and_d_their_regulatory_implications.pdf, accessed 17 October 2024.

- Kyle ‘CR385 Exclusion of psychiatric disorders; constitutional rights infringed?’ *National Financial Ombud Scheme South Africa* 28 February 2024 available at <https://nfosa.co.za/cr385-exclusion-of-psychiatric-disorders-constitutional-rights-infringed/>, accessed 30 June 2024.
- National Credit Regulator ‘Annual Report 2022/2023’ available at <https://www.thedtic.gov.za/wp-content/uploads/2023-NCR-Annual-Reports.pdf>, accessed on 24 October 2023.
- National Credit Regulator ‘Consumer credit market report’ available at <https://www.ncr.org.za/documents/CCMR/CCMR%202023Q1.pdf>, accessed on 24 October 2023.
- National Treasury Department of the Republic of South Africa ‘Explanatory Policy Paper accompanying the first draft of the Conduct of Financial Institutions Bill’ available at <https://www.treasury.gov.za/twinpeaks/cofi%20bill%20policy%20paper.pdf>, accessed on 16 February 2022.
- National Treasury Department of the Republic of South Africa ‘Fintech and financial inclusion’ available at https://static.pmg.org.za/181121Fintech_and_financial_inclusion_SCOF.pdf, accessed on 24 October 2023.
- National Treasury Department of the Republic of South Africa ‘Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa’ available at <https://www.treasury.gov.za/public%20comments/fsr2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amendment%20Jan2015%20WithAp6.pdf>, accessed on 18 August 2019.
- National Treasury of the Republic of South Africa ‘A known and trusted ombuds system for all’ available at https://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%200known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf, accessed on 18 August 2019.
- National Treasury of the Republic of South Africa ‘A safer financial sector to serve South Africa better’ available at <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf>, accessed on 18 August 2019.
- National Treasury of the Republic of South Africa ‘Implementing a twin peaks model of financial regulation in South Africa’ available at <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf>, accessed on 09 February 2024.
- Parliament of Australia ‘Royal Commission into the failure of HIH Insurance Report by the Royal Commissioner the Honourable Justice Owen’ available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F19869%22>, accessed on 18 July 2022.

- Payment Association of South Africa ‘Debit Orders’ available at <https://pasa.org.za/resources/debit-orders/>, accessed 22 October 2024.
- Reserve Bank of Australia ‘The Global Financial Crisis’ available at <https://www.rba.gov.au/education/resources/explainers/the-global-financial-crisis.html>, accessed on 10 November 2024.
- Roy Havemann & Katherine Gibson ‘Financial Sector Regulation Bill 2013’ *Department of National Treasury South Africa* available at [https://www.treasury.gov.za/twinpeaks/20140128%20\(workshops\)%20v4%20twin%20peaks%20presentation.pdf](https://www.treasury.gov.za/twinpeaks/20140128%20(workshops)%20v4%20twin%20peaks%20presentation.pdf), accessed on 26 October 2023.
- Sheldon Mills ‘Consumer Duty: the art of the possible in a year’ *Financial Conduct Authority* 20 February 2024, available at <https://www.fca.org.uk/news/speeches/consumer-duty-art-possible-year>, accessed on 21 February 2024.
- South African Government ‘National Treasury invites comments on the draft Conduct of Financial Institutions Bill’ available at <https://www.gov.za/news/media-statements/national-treasury-invites-comments-draft-conduct-financial-institutions-bill>, accessed on 26 October 2023.
- South African Human Rights Commission ‘Report on the public hearing on housing, evictions and repossessions’ available at https://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf, accessed on accessed 28 March 2024.
- South African Reserve Bank ‘South African Reserve Bank Occasional Paper Series OP/17/01’ available at <https://www.resbank.co.za/content/dam/sarb/publications/occasional-papers/2017/8160/OP1701.pdf>, accessed on 07 March 2024.
- South African Reserve Bank Corporation for Deposit Insurance ‘The Corporation for Deposit Insurance (CODI) is South Africa’s deposit insurance scheme and the newest subsidiary of the South African Reserve Bank’ available at <https://www.resbank.co.za/en/home/what-we-do/Deposit-insurance>, accessed on 07 March 2024.
- The Competition Commission of South Africa ‘The banking enquiry’ available at <https://www.noseweek.co.za/relocate/Uncensored%20Competition%20Commission%20Report%20on%20Banking.pdf>, accessed on 07 March 2024.
- Toronto Centre ‘Supervisory responses to retail misconduct’ (2020) available at https://www.torontocentre.org/index.php?option=com_content&view=article&id=95&Itemid=99, accessed on 17 December 2024.

Other papers & Internet sources

- Australia Consumer Law ‘The Australian Consumer Law’ available at <https://consumer.gov.au/australian-consumer-law>, accessed 10 November 2024.
- Australian Banking Association ‘The Banking Code’ available at <https://www.ausbanking.org.au/banking-code/#:~:text=The%20Banking%20Code%20is%20a,higher%20standards%20than%20the%20law>, accessed 16 May 2023.
- Bank for International Settlements ‘Marrying the macro and microprudential dimensions of financial stability’ available at <https://www.bis.org/publ/bppdf/bispap01.htm>, accessed 18 October 2023.
- Bank of International Settlements ‘BIS member central banks’ available at https://www.bis.org/about/member_cb.htm, accessed 02 October 2024.
- Basel Committee on Banking Supervision ‘Core Principles for Effective Banking Supervision’ available at <https://www.bis.org/publ/bcbs230.htm>, accessed on 02 October 2024.
- Council of Australian Governments ‘Intergovernmental agreement for the Australian consumer law’ *Australian Consumer Law* 30 August 2019 available at https://consumer.gov.au/sites/consumer/files/2015/06/acl_iga.pdf, accessed 17 May 2023.
- Dani le Nouy ‘Gaming the rules or ruling the game? – How to deal with regulatory arbitrage’ *European Central Bank* 15 September 2017, available at <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html>, accessed on 25 January 2021.
- David T Llewellyn ‘Institutional Structure of Financial Regulation and Supervision: The Basic Rules’ *World Bank* 7 June 2006, available at <https://letr.org.uk/references/storage/QW6PBIDS/Llewellyn%20-%202005%20-%20Institutional%20structure%20of%20financial%20regulation%20an.pdf>, accessed on 18 October 2023.
- Deloitte ‘2018 Banking Outlook: Accelerating the transformation’ available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-fsi-dcfs-2018-banking-outlook.pdf>, accessed on 18 August 2019.
- Department of Treasury South Africa ‘National Assembly Question to Written Reply Question Number: 2478 [NW2735E]’ available at <https://www.treasury.gov.za/publications/other/MinAnsw/2018/PQ%202478%20-%20Shivambu%20-%20NW2735E.pdf>, accessed 07 October 2024.
- Douglas Randall; Oya Pinar Ardic Alper & Minita Mary Varghese et al ‘Global financial inclusion and consumer protection survey: 2017 report’ available at <https://documents1.worldbank.org/curated/en/430051513370920202/pdf/Global-financial-inclusion-and-consumer-protection-survey-2017-report.pdf>, accessed on 18 October 2023.

Financial Stability Board ‘G20/OECD high-level principles on financial consumer protection’ available at https://www.fsb.org/2011/11/cos_111104a/, accessed 08 February 2022.

Financial Stability Board ‘Members of the FSB’ available at <https://www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board/> accessed 02 October 2024.

Financial Stability Board ‘Peer Review of South Africa Review Report’ available at <https://www.fsb.org/2020/03/peer-review-of-south-africa/>, accessed on 02 October 2024.

G20 ‘Overview’ available at <https://g20.org/about-g20/overview/>, accessed 02 October 2024.

G20 Leaders’ Summit ‘Communique’ available at <https://www.oecd.org/g20/summits/cannes/Cannes%20Leaders%20Communique%204%20%20November%202011.pdf>, accessed on 08 February 2022.

G20-G8 France 2011 ‘Cannes Summit Final Declaration - Building our common future: renewed collective action for the benefit of all’ *Group of 20* 4 November 2011, available at https://g7g20-documents.org/fileadmin/G7G20_documents/2011/G20/France/Leaders/1%20Leaders%27%20Language/Cannes%20Summit%20Final%20Declaration%20-%20Building%20Our%20Common%20Future%2C%20Renewed%20Collective%20Action%20for%20the%20Benefit%20of%20All_04112011.pdf, accessed 08 February 2022.

Gerard Caprio; Asli Demirguc-Kunt & Edward Kane, ‘The 2007 meltdown in structured securitization: Searching for lessons, not scapegoats’ available at <https://documents1.worldbank.org/curated/en/759851468327562018/pdf/767980JRN0WBRO00Box374387B00PUBLIC0.pdf>, accessed 17 October 2023.

GPII ‘G20 2020 Financial Inclusion Action Plan’ available at <https://www.gpfi.org/publications/g20-2020-financial-inclusion-action-plan>, accessed by 08 February 2022.

Group of Thirty ‘Banking conduct and culture: A permanent mindset change’ available at https://group30.org/images/uploads/publications/aaG30_Culture2018.pdf, accessed on 18 August 2019.

International Monetary Fund ‘South Africa: Financial sector assessment program technical note on banking regulation and supervision’ available at <https://www.imf.org/en/Publications/CR/Issues/2022/06/16/South-Africa-Financial-Sector-Assessment-Program-Technical-Note-on-Banking-Regulation-and-519725>, accessed on 20 June 2022.

International Monetary Fund ‘United Kingdom: IOSCO objectives and principles of securities regulation: Detailed assessment of implementation’ available at <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/United-Kingdom-IOSCO-Objectives-and-Principles-of-Securities-Regulation-Detailed-Assessment-25124>, accessed on 21 June 2022.

International Organization for Standardization ‘ISO 24495-1:2023 Plain language’ available at <https://www.iso.org/standard/78907.html>, accessed 17 December 2024.

Juan Carlos Izaguirre ‘Making consumer protection regulation more customer-centric’ available at <https://documents1.worldbank.org/curated/en/745951599028334289/pdf/Making-Consumer-Protection-Regulation-More-Customer-Centric.pdf>, accessed on 17 October 2023.

Justine van Vuuren *A historical analysis of the origins, development and nature of market conduct regulation: a study of four insurance markets* (Unpublished Masters thesis Faculty of Commercial Law and Management University of the Witwatersrand, 2017).

Luck Mavhuru *A comparative analysis of the regulations governing mobile money services in South Africa and Zimbabwe and their impact on sustainable financial inclusion of the poor and vulnerable people* (unpublished PhD thesis, University of Cape Town, 2022).

Martha Gertruida van Niekerk *A comparative analysis of the role of the central bank in promoting and maintaining financial stability in South Africa* (Unpublished PhD thesis, University of Pretoria, 2018).

Ministry of Foreign Affairs Japan ‘G20 Cannes summit final declaration "building our common future: renewed collective action for the benefit of all" draft’ available at https://www.mofa.go.jp/policy/economy/g20_summit/2011/declaration.html, accessed on 08 February 2022.

Ministry of Foreign Affairs of the Netherlands ‘Consumer risks in fintech: New manifestations of consumer risks and emerging regulatory approaches’ *World Bank Group* April 2021 available at <https://documents1.worldbank.org/curated/en/515771621921739154/pdf/Consumer-Risks-in-Fintech-New-Manifestations-of-Consumer-Risks-and-Emerging-Regulatory-Approaches-Policy-Research-Paper.pdf>, accessed on 20 August 2023.

OECD ‘Consumer Finance Risk Monitor’ available at <https://www.oecd-ilibrary.org/docserver/be5cb8fe-en.pdf?expires=1733928007&id=id&accname=guest&checksum=D680953C1C79B24CC3E4E3FD56A7B82B>, accessed 11 December 2024.

OECD ‘Feedback summary and response: Public consultation on proposed updates to the high-level principles on financial consumer protection’ available at <https://web-archive.oecd.org/2022-12-12/648359-Feedback-summary-public-consultation.pdf>, accessed on 22 January 2024.

OECD ‘Financial consumer protection risk drivers: A framework for identification and mitigation in line with the high-level principles’ available at [https://one.oecd.org/document/DAF/CMF/FCP/RD\(2017\)3/FINAL/en/pdf](https://one.oecd.org/document/DAF/CMF/FCP/RD(2017)3/FINAL/en/pdf), accessed on 22 January 2024.

- OECD ‘G20/OECD high-level principles on financial consumer protection’ available at https://www.consob.it/documents/1912911/1933821/OCSE-G20_Principi_di_alto_livello_20221212_EN.pdf/177610c6-d5bb-b132-3926-ee0b5372e70, accessed on 22 January 2024.
- OECD ‘Guidelines for Consumer Protection in the Context of Electronic Commerce’ available at https://www.oecd.org/en/publications/guidelines-for-consumer-protection-in-the-context-of-electronic-commerce_9789264081109-en-fr.html, accessed on 22 January 2024.
- OECD ‘OECD/INFE 2023 international survey on financial literacy’ available at https://www.oecd.org/en/publications/oecd-infe-2023-international-survey-of-adult-financial-literacy_56003a32-en.html, accessed on 22 January 2024.
- OECD ‘Partnerships in OECD Bodies’ available at <https://www.oecd.org/en/about/legal/partnerships-in-oecd-bodies.html#:~:text=Key%20Partners,Participant%20without%20prior%20Council%20approval>, accessed 03 October 2024.
- OECD ‘Recommendation of the Council on High-Level Principles on Financial Consumer Protection OECD/LEGAL/0394’ available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394>, accessed on 21 December 2023.
- OECD ‘Report on the implementation of the recommendation of the Council on high-level principles on Financial Consumer Protection’ available at [https://one.oecd.org/document/C\(2022\)7/en/pdf](https://one.oecd.org/document/C(2022)7/en/pdf), accessed 10 February 2022.
- OECD ‘Updated G20/OECD high-level principles on financial consumer protection’ available at <https://www.oecd.org/finance/high-level-principles-on-financial-consumer-protection.htm>, accessed on 21 December 2023.
- Ouarda Merrouche & Erlend Nier ‘What Caused the Global Financial Crisis - Evidence on the Drivers of Financial Imbalances 1999: 2007’ available at <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/What-Caused-the-Global-Financial-Crisis-Evidenceon-the-Drivers-of-Financial-Imbalances-1999-24370>, accessed on 21 December 2023.
- Philip Stoop *The Concept ‘Fairness’ in the Regulation of Contracts Under the Consumer Protection Act 68 of 2008* (LLD thesis, University of South Africa, 2012) at 220.
- Roy Charles Havemann *Lessons from South African Bank failures 2002-2014* (unpublished PhD dissertation, Faculty of Economic and Management Sciences, Stellenbosch University, 2019).
- Rudzani Mulaudzi *From consumers to investors: an investigation into the character and nature of stokvels in South Africa's urban, peri-urban and rural centres using a phenomenological approach* (Unpublished Masters thesis, University of Cape Town – Graduate School of Business, 2017).

- South African Reserve Bank ‘Joint communication from the South African Reserve Bank, the liquidator of VBS Mutual Bank (in liquidation) and Nedbank Limited’ available at <https://www.resbank.co.za/content/dam/sarb/publications/media-releases/2021/vbs-guaranteed-retail-deposits-at-nedbank/VBS%20completes%20transfer%20of%20guaranteed%20retail%20deposits%20to%20Nedbank%201%20April%202021.pdf>, accessed 07 October 2024.
- South African Reserve Bank ‘Myburgh Report on African Bank – Executive Summary’ available at <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2016/7288>, accessed 23 October 2023.
- South African Reserve Bank ‘Release of Myburgh report on African Bank’ available at <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2016/7288>, accessed on 23 October 2023.
- Stijn Claessens; Giovanni Dell’Ariccia & Deniz Igan et al ‘Lessons and Policy Implications from the Global Financial Crisis’ available at <https://www.imf.org/external/pubs/ft/wp/2010/wp1044.pdf>, accessed 08 February 2022.
- Tegan Sham *A Comparison between the COFI Bill and the FAIS Act in Light of the TCF Requirements* (published Masters thesis, University of Johannesburg, 2019).
- The Banking Association South Africa ‘Code of Banking Practice’ available at <https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf>, accessed on 19 December 2024.
- The Banking Association South Africa (BASA) ‘Main submission on the Draft Conduct of Financial Institutions (COFI) Bill (v2) November 2020’ available at <https://www.banking.org.za/news/submission-draft-conduct-financial-institutions-cofi-bill/>, accessed 17 December 2024.
- The Banking Code Compliance ‘BCCC Guidance Note No. 2 Clause 10 – fair, reasonable and ethical behaviour’ available at <https://bankingcode.org.au/app/uploads/2019/11/BCCC-Guidance-Note-Clause-10-Fair-reasonable-and-ethical-behaviour.pdf>, accessed 30 December 2024.
- The World Bank ‘Achieving Effective Financial Inclusion in South Africa: A Payment Perspective’ available at <https://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf>, accessed on 18 August 2019.
- The World Bank ‘South Africa: Retail Banking Diagnostic - Treating customers fairly in relation to transactional accounts and fixed deposits’ available at <https://documents1.worldbank.org/curated/en/732111536246467778/pdf/129778-WP-South-Africa-Retail-Banking-Diagnostic-Report.pdf>, accessed on 26 September 2023.

The World Bank Group ‘Global Financial Development Report 2019 / 2020: Bank Regulation and Supervision a Decade after the Global Financial Crisis’ available at <http://www.worldbank.org/financialdevelopment>, accessed on 24 February 2022.

United Nations Conference on Trade and Development ‘United Nations Guidelines for Consumer Protection’ available at https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf, accessed 04 December 2024.

United Nations General Assembly ‘Resolution 70/186 adopted by the General Assembly on 22 December 2015’ available at https://unctad.org/system/files/official-document/ares70d186_en.pdf, accessed 15 February 2022.

United Nations Office on Drugs and Crime ‘G20 Cannes Summit Communique 3 to 4 November 2011’ available at https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Leaders-Communiqués/2011_G20_Leaderss_Communique_Cannes_Summit.pdf accessed 08 February 2022.

World Bank Group ‘2017 Good practices for financial consumer protection’ available at <https://www.worldbank.org/en/topic/financialinclusion/brief/2017-good-practices-for-financial-consumer-protection>, accessed 10 February 2022.

World Bank Group ‘Poverty & Equity Brief’ available at <https://www.worldbank.org/en/topic/poverty/publication/poverty-and-equity-briefs>, accessed 16 October 2024.

World Bank Group ‘Public sector–operated price comparison websites: Case studies and good practices’ available at <https://documents1.worldbank.org/curated/en/437261468214827213/pdf/787830REVISED00price-comparison-eng.pdf>, accessed 03 October 2024.

Delegated legislation

FAIS Board Notice 102 in GG 26844 of 29 September 2004.

FAIS Board Notice 39 in GG 26201 of 30 March 2004.

FAIS Board Notice 79 in GG 25299 of 8 August 2003.

The General Code of Conduct Authorised Financial Services Providers and Representatives in Board Notice 80 in GG 25299 of 8 August 2003.