



CONSUMER LAW REVIEW NEWSLETTER

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Dear CLR Reader

Long time no see! Because there has been such a long gap between editions, we have decided to do this one in two parts. The second will follow next week.

In the first part of this edition we will catch up on consumer law in parliament, unpack the impact of the Financial Services Laws General Amendment Act 45 of 2013 which came into effect on 28 February 2014, compare the Financial and Intermediary Services Act 37 of 2002 (FAIS) and Treating Customers Fairly (TCF) (part 1) and continue our series of articles on the Protection of Personal Information Act 4 of 2013.

In the second part to this edition we will discuss several cases on the National Credit Act 34 of 2005 and the National Credit Amendment Act which was passed recently. We will also continue our look at TCF versus FAIS.

Happy reading!

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Consumer law in parliament

Part of the Protection of Personal Information Act comes into effect:

Section 1, part A of chapter 5, section 112 and 113 of PoPI came into effect on 11 April 2014. In short, this means that the Information Regulator has now been established (section 39). The next step will be the appointment of a chairman who will initially be responsible for getting the office of the Information Regulator in order. Because the regulator is truly independent, it (not the minister) will also be able to make regulations (section 113).

NCA Amendment becomes an Act:

The National Credit Amendment Act 19 of 2014 was published on 19 May 2014. The amendment will come into operation at a later date. The substance of the amendment will be discussed in the next edition of *CLR*.

Legal Metrology Act:

The Legal Metrology Act 9 of 2014 was published on 19 May 2014. What is metrology and why is it a consumer issue? It regulates the way goods are measured (eg in weight or volume) and how these measurements are indicated on labelling. The Act will come into operation at a later date.

National Consumer Commission asks for proposals for opt-out registry:

The NCC asked for proposals from 'interested parties with existing registries to submit proposals to the NCC' for the administration of an opt-out registry. The notice was published on 13 December 2014, but we have heard rumours that it has been put on ice in order to investigate the interaction between the provisions of the CPA and PoPI on direct marketing. The conflict between these two acts was discussed in the [August 2012](#) and [July/August 2013](#) editions of *CLR*.

Financial Sector Regulation Bill:

The Bill was published for comment on 11 December 2014 as the latest move in establishing a twin-peaks model of regulation in the financial sector. The aim of [the Bill](#) is to 'established regulatory authorities for the purposes of strengthening financial stability and the fair treatment of financial customers in the interest of a safer financial sector'. The regulatory authorities referred to here are the Financial Stability Oversight Committee (FSOC), the Prudential Authority (PA) and the Market Conduct Authority (MCA). The FSOC will assist the SA Reserve Bank in enhancing financial stability and the PA will ensure the soundness of financial institutions (the first peak). The MCA will ensure that customers are treated fairly (the other peak).

ICASA end-user and subscriber service charter regulations:

ICASA published regulations for comment on 22 January 2014. The regulations prescribe 'minimum standards for services to end-users and subscribers' provided by Electronic Communications Network Service and Electronic Communications Service licensees.

Proposed amendment to the Short-term and Long-term Insurance Acts:

The amendments were published on 29 April 2014 and are aimed at distinguishing between health insurance products (sold under the Acts) and medical schemes. Why is this important? Treasury published the following [explanation in the FAQs](#) accompanying the amendment:

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One of the concerns which the Demarcation Regulations ('Regulations') seek to address relates to contentions that certain health insurance products (which provide similar benefits to medical schemes) in the long-term and short-term insurance market cause harm to the medical schemes environment by attracting younger and generally healthy members out of medical schemes. This practice if left unchecked could result in increasing costs for the older and less healthy who remain dependent on medical schemes for their cover. Pooling healthier and sicker individuals facilitates a form of cross-subsidisation whereby sicker people do not pay contributions according to their health status; this improves the affordability of medical schemes.

Tax Ombud launched:

The Minister of Finance launched a Tax Ombud on 7 April 2014. The objective of the ombud 'is to review and address complaints by taxpayers regarding service, procedural or administrative issues relating to their dealings with the SA Revenue of Service [*sic*] (SARS).'

More on other legislative developments will follow in part 2 of this edition.

Consumer protection in the financial services sector – what gives?

The Financial Services Laws General Amendment Act 45 of 2013 (the FSLGAB) came into effect (for the most part) on 28 February 2014. We wrote about the FSLGAB and the exemption of financial services from the CPA in [the October 2012 edition of the CLR](#). For consumer lawyers the most important section is section 66 which exempts most of the financial services industry from complying with the CPA. The list of legislation (and therefore industries) which are subject to the exception can be found in section 1 of the Financial Services Board Act 97 of 1990 under the definition of 'Financial Services Board legislation' and sub-paragraph (a) of the definition of 'financial institution' (as amended). Here is the list:

- Pension funds registered in terms of the Pension Funds Act 24 of 1956
- Friendly societies registered in terms of the Friendly Societies Act 25 of 1956
- Collective investment schemes as defined in the Friendly Societies Act 25 of 1956
- External authorised users, external central securities depositories, external clearing houses, external exchanges, external participants, external trade repositories or any regulated persons as defined in the Financial Markets Act 19 of 2012
- Long- and short-term insurers and independent intermediaries or representatives as defined in the Long-term Insurance Act 52 of 1998 or the Short-term Insurance Act 53 of 1998
- Authorised financial service providers and representatives as defined in the Financial Advisory and Intermediary Services Act 37 of 2002. In short (and in somewhat simplistic terms), an authorised financial service provider is someone who provides advice or intermediary services in respect of financial products which include:
 - Shares, debentures, money-market instruments and securities
 - Participation in collective investment schemes
 - Insurance policies
 - Benefits provided by pension funds and friendly societies





- o Foreign currency denominated investment instruments such as foreign currency deposits
- o Deposits as defined in the Banks Act 94 of 1990
- o Health service benefits provided by medical schemes as defined in the Medical Schemes Act 131 of 1998
- o Any other product which is similar in nature to any of the financial products referred to above.

Credit rating agencies as defined in the Credit Rating Services Act 24 of 2012

The Inspection of Financial Institutions Act 80 of 1998

The Financial Institutions (Protection of Funds) Act 28 of 2001

A bank as defined in [section 1 \(1\)](#) of the Banks Act, 1990 ([Act 94 of 1990](#)), a mutual bank as defined in [section 1 \(1\)](#) of the Mutual Banks Act, 1993 ([Act 124 of 1993](#)), or a co-operative bank as defined in [section 1 \(1\)](#) of the Co-operative Banks Act, 2007 ([Act 40 of 2007](#)), which deals with trust property as a regular feature of its business

Any other person who or which deals with trust property as a regular feature of his, her or its business, but who is not registered, licensed, recognised, approved or otherwise authorised to deal so in terms of any Act, other than the Companies Act, 2008 ([Act 71 of 2008](#)), the Close Corporations Act, 1984 ([Act 69 of 1984](#)), and the Trust Property Control Act, 1988 ([Act 57 of 1988](#))

Any person that performs an activity regulated under a law referred to in paragraph (a) or (b)

What does this mean? Well, the CPA will no longer protect consumers in those industries. They will have to avail themselves of the legislation in place in the particular industry. If one bears in mind that advice or intermediary services in relation to financial products were previously already excluded from the operation of the CPA (see the definition of 'service') it doesn't change much. However, whether these industries do enough to protect consumers is an entirely different question.

TFC vs FAIS: Are the two compatible? (part 1)

By Almo Lebowski

Treating Customers Fairly (TCF) is starting to become more than just a murmur in the industry. Financial services providers have taken a bit more of an active approach than financial services advisors and I think rightly so, as it is the financial services providers that have more reason for concern in terms of the TCF framework. If you are wondering what TCF is, the introductory section of the Financial Services Board's *TCF implementation update and baseline study feedback report (December 2013)* is a good place to start. It can be viewed on the FSB's [website](#).

Thus far, financial services advisors have been regulated by the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS). The impact of FAIS is more comprehensive than initially thought. Significantly, regulatory exams are now prescribed, the effect being that more advisors are (at least in theory) familiar with the obligations imposed on them in terms of the Act and have adjusted their practices accordingly. Therefore, the level one regulatory exams have been nothing but a good thing for





the industry and consumers alike. Now TCF may force advisors to adjust their practices again.

At the centre of TCF are six outcomes. In this two part article these outcomes will be compared to the existing obligations on advisors in terms of FAIS, in order to examine the extent of this adjustment.

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

It has been said that this outcome will be the most difficult to implement in organisations, as it requires a culture change. However, section 16 of the FAIS Act provides that financial services providers and their representatives must act honestly and fairly, with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry. They must act with circumspection and treat clients fairly in a situation of conflicting interests. In addition, section 2 of the FAIS General Code of Conduct for Financial Service Provider’s and Representatives (the Code) provides that a financial services provider must render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. This bears a close resemblance the principles which underpin outcome 1.

Outcome 2 – ‘Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly’

Although this outcome seems aimed at product providers, advisors can’t sidestep this outcome. Advisors will market and provide the advice on the product directly to the client. Again, this outcome will seem familiar to them. Section 8 of the Code obliges an advisor to gather as much information from the client as is possible and thereafter conduct a financial needs analysis before making any recommendations. In addition, section 9 of the Code ensures that a detailed record of advice is kept about the recommendations that were made based on the analysis conducted. This includes all products considered and which were eventually implemented. If for example a client requested a certain product, it is in the record of advice that an advisor would need to explain why this product is perhaps inappropriate to the client, his situation or both. This addresses the outcome to a large extent.

Outcome 3 – ‘Customers are provided with clear information and kept appropriately informed before, during and after point of sale’

This outcome is often referred to the disclosure outcome. Undeniably, disclosure has become a huge element in consumer fairness. The Code provides that information provided to a client must be factually correct, in plain language, must be adequate and appropriate in relation to the assumed level of knowledge of the particular client, and be in writing if so requested by the client. The client must also be informed of all relevant monetary obligations, which includes fees and charges to the product supplier and commissions and/or fees that will be paid to the financial advisor or intermediary.

The remaining three outcomes and how they compare to the FAIS Act will be discussed in part 2.

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Intro to PoPI (part 9): For how long can personal information be kept?

One of the principles of PoPI is that 'records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected' (section 14(1)). This goes hand in hand with the purpose of minimality. That is, that the processing of personal information must never be excessive (section 10).

In my experience, this deceptively simple obligation to delete personal information when you are done with it, gives companies enormous headaches. There is a culture of hanging on to personal information 'in case we need it again.' The problem is that old information is often inaccurate (which breaches section 16) and the security around archived data is often very lax (which breaches sections 19 to 22). PoPI will become effective in the near future, which makes it worth companies' while to embark on a destruction project to avoid having to apply PoPI to data at great expense, where the quality of that (old) data is dubious at best. In other words, they stand to gain more than they will lose.

However, sometimes there are entirely legitimate reasons for keeping data and the Act acknowledges that. Here are the acceptable exceptions to the rule (see section 14(1)):

- If the retention of the record is required or authorised by law it will be lawful. There is a long list of legislation which requires the retention of personal information. If I think only of my own practice I am justified (obliged, actually) to keep my client files for 5 years before I can destroy them. Labour legislation, the companies act and many financial services laws contain similar requirements.
- If the supplier reasonably requires the record for lawful purposes related to its functions or activities, retention is lawful. An example is the retailer who keeps an account open even though the customer has not bought there for a long time, in case the customer ever returns. It seems to me that this will be legal as long as the rest of PoPI is complied with and the customer can easily close the account should they wish to.
- If the retention of the record is required by a contract between the parties, it is lawful. This does not necessarily have to be explicit, but drafters would be well advised to make it explicit in future. An example of a justifiable retention 'duty' which is not necessarily explicit, is a retailer who retains records for purposes of the possible fulfilment of a warranty.

If the data subject or a competent person (in the case of a child's information) consents to the retention it will be justified. Remember that this consent must be express, informed and specific.

A note on 'the right to be forgotten'

In related news, many of you would have read about the recent privacy ruling against Google Spain in the European Union's Court of Justice and 'the right to be forgotten.' In summary, the court said that Google must delete 'inadequate, irrelevant or no longer relevant' data from its results on request from members of the public. The case in point dealt with an auction notice for a repossessed home in 1998 of a man who had fallen on hard times (at the time). The court did not find that the information must be deleted from the newspaper's website where it appeared, but that Google had to delete two links to the notice from the search results for his name. The matter was decided under the EU's data protection



directive which is very close to PoPI. [The case](#) gives valuable insight into how our Information Regulator and the courts are likely to reason, should this question ever be raised.

Plain language tip

Writing good headings

Headings reveal the structure of a document to the reader. They help readers find information and better understand the information that they are about to read. Readers find question headings most useful, followed by statement headings that include nouns and verbs, for example: **Filling out the Application**. The least useful headings are topic headings such as **Introduction**, **Scope**, or **General**.

There are several tips and tricks for writing headings that readers will find useful. Let's explore the use of parallel structure in headings.

Using parallel structure in headings

Using parallel structure means using corresponding grammatical structure for headings in a particular section of a document, for example, using only questions as headings or only verb phrases. It makes it easier for users to understand the structure of the document if your headings look like this:

- Are my credit card details safe?
- Do I need to pay a deposit?
- How long before the goods are delivered?
- What if I want to return something?

However, using different heading structures for different levels of the document may be useful as it signals a change from top level to subtopic. Choose an appropriate heading structure for a particular level of heading in each major part of a document. One possible structure, for example, would be questions at the top level, but then verb phrases for the sub-topics, like this:

- Are my credit card details safe?
- How should I make payment?
 - Paying electronically
 - Paying a deposit
 - Including a reference number
 - Sending proof of payment
- How long before the goods are delivered?
- What if I want to return something?
 - Cancelling your order before the goods are delivered
 - Returning something that has already been delivered

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