
MIND THE GAP – INCREASING COMPLIANCE – BURDEN AND REGULATORY MISALIGNMENT¹

1 Introduction

Since the dawn of the new constitutional supremacy, untold pieces of legislation have been promulgated. This led to an increase in legal and regulatory measures which increased the compliance burden, compliance risk and cost of businesses in South Africa, particularly in the financial sector. The objective of this note is to provide a snapshot of the increasing compliance burden on the financial sector between 1996 and 2011. It further highlights the incidence of misalignment among different pieces of legislation with possible negative effects, using the Consumer Protection Act (68 of 2008) and the insurance industry as a case study. The author examines the generally accepted goals of good regulation and argues for an appropriate regulatory-assessment model that may alleviate the problem of misalignment and so prevent regulatory arbitrage.

2 Snapshot of increasing compliance burden

In order to devise a snapshot of the increasing compliance burden, the author examined the number of Acts promulgated since the Constitution came into effect in 1997 until the end of 2010. These pieces of legislation were divided into those impacting business in general and those aimed at and impacting the financial sector specifically. The public sector, specialist businesses (such as those in the medical and pharmaceutical sector) and state-owned enterprises (SOEs) were excluded from this exercise. It is a daunting task for any compliance officer, especially those that are not lawyers, as well as for attorneys, legal officers and in-house legal counsellors to come to grips with the ever-increasing number of statutes promulgated every year.

In the analysis, it became evident that approximately 149 Acts were promulgated which impact the business sector in general and an additional 53 Acts impact the financial sector specifically. The following Table consists of some of the statutes that are either directly or indirectly applicable to the financial sector. The most notable and far-reaching of the legislation impacting the financial sector are indicated in italics:

¹ This note is based on a paper delivered by the author at the second Private Law and Social Justice Conference hosted by the Department of Private Law of the Nelson Mandela Metropolitan University in August 2010.

Banks Amendment Act No. 19 of 2003
Banks Amendment Act No. 20 of 2007
Banks Amendment Act No. 36 of 2000
Banks Amendment Act No. 55 of 1996
<i>Bills of Exchange Amendment Act No. 56 of 2000</i>
Companies Act No. 71 of 2008*
<i>Consumer Protection Act No. 68 of 2008*</i>
Co-operative Banks Act No. 40 of 2007
Finance Act No. 6 of 1997
<i>Financial Intelligence Centre Act No. 38 of 2001*</i>
Legal Deposit Act No. 54 of 1997
Mutual Banks Amendment Act No. 54 of 1999
<i>National Credit Act No. 34 of 2005*</i>
<i>National Payment System Act No. 78 of 1998</i>
Securities Services Act No. 36 of 2004
<i>Securities Transfer Tax Act No. 25 of 2007</i>

The above Table also includes legislation marked with an asterisk, which indicate legislation that, although of a more general application and not limited to the financial sector, has had a significant impact on the financial sector and has been the subject of many commentaries. As expected, these include the Financial Intelligence Centre Act (38 of 2001, hereinafter "FICA"), Broad-based Black Economic Empowerment Act (53 of 2003, hereinafter "BBBEE"), National Credit Act (34 of 2005, hereinafter "NCA"), Companies Act (71 of 2008, hereinafter "the Companies Act") and the Consumer Protection Act.

The implementation of these statutes, particularly FICA and NCA was costly at the time and increased the regulatory and compliance burden of banks in particular. Quiding ("The Cost-Benefit of Regulation" 2006 *South African MBA Research Report* 121-122) argues that the legislation was onerous and expensive to implement as it required a substantial amount of organizational change and high costs to be absorbed by the industry. The cost of implementing the Companies Act is still unknown due to the delay in the coming into effect of the Act, and the costs of the implementation of the CPA can likewise not be calculated as yet. However, if one bears in mind some of the changes to business practices, as well as changes to standard contracts used by financial institutions, the cost may be more substantial than what appears at first glance. Further research in this area would thus be needed in future.

3 Misalignment and Regulatory Arbitrage – The case study of the Consumer Protection Act and the Insurance Industry

With an avalanche of regulatory measures and with the practice of consequential amendments being made in different legislation, one could always expect an exploitation of *lacunae* or areas of misalignment among different pieces of legislation. This is also sometimes referred to as “regulatory arbitrage” (sometimes defined as “a practice whereby firms capitalize on loopholes in regulatory systems in order to circumvent unfavourable regulation. See also <http://www.investopedia.com/terms/r/regulatory-arbitrage.asp#ixzz1WbASOEnf>; http://www.answers.com/topic/arbitrage#Regulatory_arbitrage (accessed 2010-07-29).

The author examined the application of the CPA on the insurance sector and found as follows:

The CPA applies to:

- Every transaction within the RSA, except if exempted by the Act (s 5(1)(a)).
- The promotion of any goods or services or of the supplier of any goods and services within the Republic, unless the goods or services could not reasonably be the subject of a transaction under the Act, or unless the promotion of those goods or services is exempted (s 5(1)(b)).
- Goods or services that are supplied or performed in terms of a transaction to which the Act applies (it does not matter whether the goods or services are offered or supplied with other goods or services or separately) (s 5(1)(c)).
- Goods that are supplied in terms of a transaction that is exempt, but the goods and the importer, distributor and retailer of those goods are still subject to certain sections in the Act (s 5(1)(d)).

A “service” includes, *inter alia*:

- ... The provision of **education, information, advice or consultation**, except *advice* in terms of the Financial Advisory and Intermediary Services Act (7 of 2002, hereinafter the “FAIS Act”).
- Any **banking services** or related financial services or the undertaking, underwriting or assumption of risk by one person on behalf of another **except** if it is *advice or intermediary services* in terms of the FAIS Act or if the banking service is regulated in terms of the Long-term (Act 52 of 1998) or Short-term Insurance Act ... (53 of 1998)” (author’s own emphasis).

However, the CPA provides that even if the service is excluded, the transaction may be subject to the Act. It is interesting to note that in relation to the FAIS Act directly, only “advice” is mentioned, but that in relation to “banking services”, reference is made to “advice” or “intermediary services” which are both regulated in terms of the FAIS Act. Du Preez (“The Consumer Protection Bill: A Few Preliminary Comments” 2009 1 *TSAR* 58 70ff) argues that to not exclude both “advice” and “intermediary services”

from the ambit of the CPA would lead to confusion. If both are excluded, it will ensure that both the facilitation of the consumer's decision in respect of a financial product (advisory service) as well as the administration of the transaction that relates to the financial product (intermediary service) are excluded from the ambit of the CPA as both services are being regulated appropriately in terms of FAIS. However, the wording of the CPA in this respect is not clear and one could argue that only "advice" is excluded from the ambit of the CPA but not the "intermediary service".

One could also argue that, although not applicable to the insurance industry directly, the CPA does nevertheless have an indirect impact, as the industry will have to develop an industry code and have it approved by the Minister of Trade and Industry upon recommendation by the National Consumer Commission (see s 82). Furthermore, these industry codes would have to provide the same or similar type of protection as the CPA. In the absence thereof, one could argue, the CPA would apply. This argument is strengthened by the CPA which provides that "the exclusion of the Short-term Insurance Act ... and the Long-term Insurance Act, is subject to those sector laws being aligned with the consumer protection measures provided for in the Act within a period of eighteen months from the commencement of the Act, failing which, the provisions of the Act will apply" (see Schedule 2). Under the circumstances, it seems that insurers' exclusion from the ambit of the Act is not a done deal as no blanket exclusion is given and such exclusion seems to be dependent on the extent to which the service is regulated by the insurance legislation and whether or not the insurance Acts are aligned with the consumer-protection measures provided for in the CPA.

If one takes just one of the 8 rights, namely the right to fair and responsible marketing (s 29), it is evident that:

- The CPA has a general standard for marketing of goods and services, namely that a producer, distributor, retailer or service provider must not market any goods in a manner that is reasonably likely to imply a false or misleading representation or in a manner that is misleading, fraudulent or deceptive in any way (s 29(a)).
- A supplier must not advertise any goods or services as being available at a specified price in a manner that may mislead or deceive consumers as to the actual availability of those goods or services at the advertised price AND the supplier must make the goods or services available at the advertised price to the extent of the expressed limits (s 30).
- No negative option marketing is allowed – this means that a supplier must not promote, offer or induce a person to accept goods or services on the basis that the goods or services are to be supplied or the agreement will automatically come into existence unless the consumer declines the offer or inducement. Such agreement is *void* (s 31) (author's own emphasis).
- In the case of direct marketing the consumer must be informed of the right to a cooling-off period (s 32).
- In the case of catalogue marketing, the CPA provides for certain information to be included, for example, the supplier's name and licence

or registration number, address, currency, cancellation policy *etcetera* (s 33).

- The CPA has very strict requirement for sponsors or suppliers of trade coupons, customer-loyalty programmes, promotional competitions and alternative work schemes (s 34).
- With regard to referral selling, the CPA provides that a person must not promote, offer, supply, agree to supply or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if the consumer subsequently has given the supplier the names of consumers or otherwise assists the supplier to supply goods or services to other consumers (s 38) and that rebate, commission or other benefit depends on an event occurring after the consumer has agreed to the transaction (s 38(1)(b)).
- An agreement with a person lacking legal capacity (e.g. a mentally unfit person) is void (s 39).
- An agreement with a minor is voidable if the minor is an unemancipated minor at the time of the agreement (s 39(b)(i)), the agreement was made without the consent of an adult responsible for the minor (s 39(b)(ii) and the agreement has not been fully ratified by such an adult or the consumer (minor) after having been emancipated or becoming an adult (s 39(b)(iii)).

Some of the marketing practices sometimes used by the insurance industry include direct marketing, referral sales, negative-option marketing, to name but a few. With regard to direct marketing (s 32), the CPA provides that a consumer may either refuse to accept, pre-emptively block, or require another person to discontinue any communication which may be seen as direct marketing. This may include telephone calls, e-mails, brochures or letters in the mail *etcetera*. The National Consumer Commission will facilitate the establishment of a registry where a consumer may register his/her particular preference, for example, that a consumer wishes not to receive any direct marketing (this is called a pre-emptive block – see s 11) or, where the consumer agreed to receive marketing material, he/she now wishes to change his/her mind and requires the marketer to stop marketing to him/her directly. This means that businesses would have to ensure that they have measures in place to receive and record consumers' specific preferences (s 11(4)), at no cost to the consumer and abide by the wishes of the consumers so expressed. In addition, the Minister (of Trade and Industry) may prescribe certain times when consumers may not get in touch with, for example, during public holidays or after a certain time at night (s 12).

Despite the above, it is not clear whether the FAIS Ombud would take the CPA into account in the interim period should a consumer refer a complaint to the FAIS Ombud, alleging that his/her rights with respect to fair and responsible marketing have been infringed by a person who offered advice in terms of the FAIS Act (the FAIS Ombud was established by Act 37 of 2002). One could argue that, firstly, in the absence of an industry code for the insurance sector which is aligned to the purposes of the CPA, and, on the basis that the CPA provides a framework for protection of the rights of

consumers, the industry ombud should apply the Act (an industry code means a code regulating the interaction between or among persons conducting business within an industry or regulating the interaction, or providing for alternative dispute resolution between a person within that industry and a consumer. See in this regard section 82(1)(a)). Item 10 of Schedule 2 to the Act provides that the exclusion of the Short-term and Long-term Insurance Acts (53 of 1998 and 52 of 1998 respectively) is subject to those sector laws being aligned with the consumer-protection measures provided for in this Act within a period of 18 months from the commencement of the CPA, failing which, the provisions of the CPA will apply. It is unfortunate that the Schedule does not include the FAIS Act, for the sake of clarity.

Secondly, the CPA provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3 of the Act (see also s 2(1)). In the third instance, no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law (s 2(10)). It is common knowledge that the insurance industry is regulated by the Financial Services Board (hereinafter the "FSB" – The Financial Services Board was established in terms of the Financial Services Board Act 97 of 1990). In terms of the CPA, a regulatory body may apply to the Minister for an industry-wide exemption of one or more provisions of the Act on the ground that those provisions overlap or duplicate a regulatory scheme administered by the regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol (s 5(3)). The Act further provides that the Minister may grant the exemption only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of the CPA at least as well as the provisions of the CPA and subject to any limitations or conditions necessary to ensure the achievement of the purposes of the CPA (s 5(4)). At this stage it is not clear whether or not the FSB will apply to have the insurance industry exempted in terms of this provision or whether or not the application for such an exemption would be necessary on the basis of the exclusion of advice in terms of FAIS from the application from the Act. The same arguments could be advanced in respect of other rights, for example the right to fair and reasonable terms and conditions (for more detail on the CPA see the arguments advanced by Lee and Du Plessis "The Consumer Protection Bill – Kill it Says New Marketing Body" July 2006 *Journal of Marketing* 3; and see also Du Preez 2009 *TSAR* 58).

A cursory comparison of the current FAIS Ombud/General Code of Practice (s 15 of the FAIS Act) with the consumer rights provided for in the CPA reveals that the General Code of Conduct which applies both to the giving of advice and to the rendering of intermediary services, places an obligation on all authorised financial services providers to render financial services honestly, fairly, with due skill, care and diligence, in the interests of both their clients and the integrity of the financial services industry. However, viewed from a consumer perspective, one could argue that the (FAIS) General Code of Conduct does not go as far as the CPA. Viewed differently, however, there may be some form of duplication of regulation which is bound to create confusion and unnecessary litigation. In the meantime, it seems that the insurance industry is working with the FSB to identify if there

are any gaps between the different laws and to make sure that any gaps are filled as soon as possible, in order that the policy-holder will enjoy a full and appropriate range of consumer-protection measures (see Dewey "Armour for Consumers" 2009 *Without Prejudice* 12).

It is thus clear from the above that a lot still needs to be done in order to prevent regulatory arbitrage and ensure that the purposes of the CPA are achieved as set out in section 3 of the Act. The fact that voluntary industry codes of practices may be developed by the National Consumer Commission is encouraging. The National Consumer Commission may develop such industry codes in respect of:

- The use of plain language in documents (for a comprehensive discussion of the consumer's right to fair, reasonable and just terms under the CPA, see Naude "The Consumer's Right to Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective" 2009 126 *SALJ* 505);
- standardized or uniform means of presenting and communicating the information contemplated in relation to the right of disclosure and information in sections 23-28 of the Act;
- alternative dispute resolution mechanisms; or
- any other matter to better achieve the purposes of the Act (s 93).

The National Consumer Commission (NCC) has been established and it is foreseen that the NCC will have a crucial role to play in enforcement of the Act, as well as in relation to recommendation to the Minister on applicable industry codes. However, it is still early days. One could find the provisions of the CPA becoming "toothless" if the NCC does not actively drive the accreditation of industry codes and ensure their compliance as the Act enjoins it to do.

4 Goals of good regulation

In view of the current context, the goals of regulation should be:

- Efficiency – this means that regulation should be adopted and maintained for which the costs on society are justified by the benefits to society, and that regulation should achieve these objectives at lowest cost, taking into account alternative approaches (see for, *eg*, "Cost-benefit analysis of regulation" <http://www.fsa.org.uk> (accessed 2010-07-05)).
- Effectiveness – this means that regulation should be designed to achieve the desired outcome(s).
- Transparency – this entails that the regulation-making process should be transparent to both the decision-makers and those affected by regulation.
- Clarity – this entails that regulatory processes and requirements should be as understandable and accessible as practicable.
- Equity – this means that regulation should be fair and treat those affected equitably (the five goals of good regulation are also sometimes listed as "transparency, accountability, proportionality, consistency and targeting

(see South African Foundation Designing a Regulatory Impact Assessment for South Africa August 2003 6).

It is evident from this note that the fourth principle, namely that of “clarity”, is not always achieved and this can lead to unintended consequences, such as the lack of legal certainty in the case study of the CPA and the insurance industry.

There are always unintended costs and spin-offs to regulation and, in many cases policy-makers are primarily concerned with the first-order effects of regulation and do not consider spill-over and second-order effects. The mindset is one of “regulate first” and then deal with unintended consequences after regulation has been imposed rather than trying to prevent it. Furthermore, aggravating the problem of unintended consequences is the uneven balance of these costs. Smaller firms do not always have the scale of operation to offset regulatory costs and often cannot afford to appoint dedicated staff to look after compliance issues. Much of the reticence on the issue of regulatory-impact assessments stems from the perception that most costs and benefits cannot be quantified. However, much work has been done by regulatory organisations in particularly the United Kingdom (through its Regulatory Impact Unit (RIU) in the Cabinet Office, departmental RIUs, an RIU scrutiny team and a Better Regulation Task Force); United States of America (through its Office for Information and Regulatory Affairs); Australia (through its Office of Regulation Review) and in New Zealand. In the UK, for example, new legislation drafted for the Financial Services Authority (FSA) requires publicly available cost-benefit analyses of all new regulation and changes to existing regulation. In addition, the FSA has made cost-benefit analysis an explicit part of its regulatory-development process. In New Zealand, all policy proposals submitted to cabinet or that have cost implications for businesses have to be accompanied by Regulatory Impact Statements (RIS) and Business Compliance Cost Statements (BCSS). The Business Compliance Cost Unit has been established under the Ministry of Economic Development to monitor and assess these statements. This unit also advises departments (see South Africa Foundation Designing a Regulatory Impact Assessment for South Africa August 2003 4-8).

Upon analysis of the legislation impacting the South African financial sector it became evident that few pieces of legislation started with a Green Paper or Discussion Paper process. Rather, the process is shortened by the publication of a Draft Bill and a short explanatory memorandum which is available in the public domain. Internally, a due-diligence report and regulatory-impact assessment may have been compiled, as was the case for the National Credit Act at the time. However, the due diligence is not necessarily public knowledge or capable of being part of the public consultation on legislation. It is submitted that a standard regulatory-impact assessment could be prudent to gauge some of the impact of proposed legislation. This could be conducted prior to or parallel with the drafting of the Bill. If the process is slower and a more gradual process is adopted, more benefits may result from the undiluted focus that each form of intended regulation would receive (Quiding 2006 *MBA Report* 121-122). Some of the

factors that could be taken into account in such a draft Regulatory Impact Assessment are:

- Title of proposed measure;
- the issue and objective;
- risk assessment;
- identification of options;
- issues of equity and fairness and Constitutional imperatives (if any);
- identification of the benefits;
- quantifying and valuing the benefits;
- compliance costs for business;
- implementation costs;
- consultation with small business;
- identification of any other costs;
- results of consultation;
- summary and recommendation; and
- enforcement, sanctions, monitoring and review (see “Regulatory Impact Assessments in General” <http://www.bis.gov.uk/files/file23037.pdf> (accessed 2010-07-05)).

The above factors are not exhaustive, but they may go some way towards taking into account the impact that such legislation would have on the economy, weighed against the imperatives of the necessity of regulation of the specific activities or a so-called “cost-benefit analysis”. To this end, guidelines could be drafted that include principles to be borne in mind to ensure effective, efficient and equitable regulation. In the absence thereof, the possibility exists that unintended costs may derail the very objectives intended by the legislation.

5 Conclusion

This paper examined the increasing compliance burden on the financial sector and consequent regulatory misalignment. The author argues that unless certain guidelines for regulation-making are drafted and regulatory-impact assessments become the norm, the consumer may fall through the cracks, bearing in mind the expression: “many a slip ’twixt cup and lip”.

Vivienne Lawack-Davids
Nelson Mandela Metropolitan University, Port Elizabeth