Memorandum

Attn.: Gail Day
Free Market Foundation,
Law Review Project

Tuesday, 15 October 2013

FINANCIAL SERVICES LAWS GENERAL AMENDMENT BILL 29 OF 2012

The LRP lodged a submission on the Financial Services Laws General Amendment Bill [B29–2012].

I have seen subsequent comments from the Financial Services Board and others.

I am asked to comment urgently on those subsequent comments. These are my comments in the limited time available:

The Bill amends twelve financial-sector statutes:
The Pension Funds Act, 1956; South African Reserve Bank Act, 1989; Financial Services Board Act, 1990; Long-term Insurance Act, 1998; Short-term Insurance Act, 1998; Inspection of Financial Institutions Act, 1998; Financial Institutions (Protection of Funds) Act, 2001; Financial Advisory and Intermediary Services Act, 2002; Collective Investment Schemes Control Act, 2002; Co-operative Banks Act, 2007, and Financial Services Laws General Amendment Act, 2008. (The Bill also effected consequential and related amendments to certain other laws.)

The LRP restricted its submissions to two clauses of the Bill:
Clause 102 that would substitute s 62 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and cl 140 that would substitute s 55 of the Short-term Insurance Act, 1998 (Act No. 53 of 1998).

These two sections are in substance identical. In interest of simplification, the LRP made reference to s 55 of the Short-term Insurance Act. It states:

> **Protection of policyholders**
> **55.** (1) The Advisory Committee, or the Registrar after consultation with the Advisory Committee, may—
> (a) propose rules aiming to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally;
> (b) propose the variation or rescission of any such rule; and
> (c) propose the period which must elapse before a rule, variation or rescission takes effect after it has been published in the *Gazette* in terms of subsection (5).
> (2) Without derogating from the generality of subsection (1)(a), a rule may provide that—
> (a) provisions with a particular import may not appear in a policy and that they shall be void if they do so appear;

(b) particular information in relation to a policy shall be made known in a particular manner to a prospective policyholder or policyholder, and what the legal consequences shall be if that is not done;

(c) a policyholder may cancel a policy under particular circumstances and within a determined period, and what the legal consequences shall be if he or she does that;

(d) different arrangements shall apply in relation to different kinds of short-term policies; and

(e) in respect of a contravention of, or a failure to comply with, a rule, a penalty or fine referred to in section 64(1)(c) or 65(1)(c) shall apply.

(3) The Registrar shall publish in the *Gazette* a rule, variation or rescission proposed in terms of subsection (1), together with—

(a) a notice of intention to promulgate the rule, variation or rescission; and

(b) an invitation to all interested persons to make written representations in relation to the matter so as to reach the Registrar within 21 days, or a longer period specified in the notice, after the date of publication of the notice.

(4) The Registrar shall submit to the Minister the proposed rule, variation or rescission and all written representations received accompanied by the Registrar's comments and those of the Advisory Committee thereon and, after consideration thereof, the Minister may reject, or approve as proposed, or approve in a modified form which the Minister deems fit, the proposed rule, variation or rescission.

(5) If the Minister approves, whether as proposed or in a modified form, a proposed rule, variation or rescission, the Minister shall promulgate it by notice in the *Gazette*, and thereupon it shall be binding on all parties concerned with effect from a date determined by the Minister and specified in the notice.

(In essence this, s 55, says that the Advisory Committee, or Registrar after consulting it, can propose rules in the public interest about the content of insurance policies, including rules that provisions of certain import may not appear in a policy on pain of being void, and that a policyholder may cancel a policy. Interested parties can make representations. The Minister considers the proposal, any representations received, and comments from the Registrar and Advisory Committee. The Minister can reject the proposed rule, or promulgate it as proposed or modified by the Minister.)

(The executive officer of the Financial Services Board is the Registrar of Short-term Insurance.)

Clause 140 of the Bill would substitute the following section for s 55:
(I highlight the principal changes in bold print.)

''Protection of policyholders

55. (1) The **Registrar**, by notice in the *Gazette*, may—

(a) make rules aiming to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally;

(b) vary or rescind any such rule; and

(c) determine the period which must elapse before a rule, variation or rescission takes effect after it has been published in the *Gazette*.

(2) Without derogating from the generality of subsection (1)(a), rules may provide—

(a) that provisions with a particular import may not appear in a policy and that they shall be void if they do so appear;

(b) that particular information in relation to a policy shall be made known in a particular manner to a prospective policyholder or policy holder, and what the legal consequences shall be if that is not done;

(c) that a policyholder may cancel a policy under particular circumstances and within a determined period, and what the legal consequences shall be if he or she does so;

(d) **for norms and standards with which a policy, a short-term insurer or a type of short-term insurance business must comply**;

(e) **for standardised wording, definitions or provisions that must be included in a policy**; and

(f) that in respect of a contravention of, or a failure to comply with, a rule, a penalty or fine referred to in section 64(1)(c) or 65(1)(c)shall apply.

(3) Rules referred to in subsection (2) may—

(a) apply generally; or

(b) be limited in application to a particular kind or type of policy, short-term insurer or short-term insurance business.

(4) (a) Before the Registrar prescribes any rule under this section, the Registrar must—

(i) publish notice of the release of the proposed rule in the *Gazette*, indicating that the proposed rule is available on the official web site and calling for public comment in writing within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice; and

(ii) **submit the draft rules to Parliament, while it is in session, for parliamentary scrutiny at least one month before their promulgation**.

(b) If the Registrar alters a proposed rule because of any comment, the Registrar need not publish the alteration before making the rule.

(c) After consideration of any comments received in response to the publication and tabling of the proposed rule in terms of paragraph (a), the Registrar may publish the final rule in the *Gazette*.

(5) **The Registrar may, if circumstances necessitate the immediate publication of a rule, publish that rule without complying with subsection (4)(a), but the notice of publication of that rule must—**

(a) **set out the reason why circumstances necessitated publication of the rule without giving notice** in accordance with subsection (4)(a); and

(b) invite any person who is aggrieved by the rule to make representations to the Registrar within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice.

(6) If the Registrar publishes a rule in terms of subsection (5), the notice referred to in subsection (5) must be tabled in Parliament, and the National Assembly may instruct the Registrar to repeal or amend the rule.

(7) Any rule promulgated by the Minister prior to the commencement of the Financial Services Laws General Amendment Act, 2012, must be regarded as having been made under this section, and remains valid and enforceable until repealed or amended by the Registrar.’’

The new wording is not a comprehensive replacement of the section, and in essence makes only certain changes to s 55. (The clause could helpfully have shown the changes as mere amendments instead rather than purport to be a wholesale substitution.)

The main changes that this clause would effect to s 55 are these: The Rules would now also provide for norms and standards with which a policy, insurer or type of insurance business must comply, and for standardised wording that a policy must include. Rules may apply generally or to a particular kind or type of policy, insurer or business.The Registrar would no longer merely propose a rule for the Minister to make. The Registrar would make the rules. The Advisory Committee would no longer be involved. The Registrar must still publish a proposed rule (now by website) for public comment, and the Registrar would now also submit the draft rules to Parliament for scrutiny a month before their promulgation. If circumstances necessitate immediate publication of a rule, the Registrar would be able to publish it as binding without first inviting comments or submitting them for parliamentary scrutiny beforehand, but the notice publishing the rule must say why circumstances necessitated publication without first inviting comments, and he would have to invite anyone aggrieved by the rule to make representations to the Registrar within a period of at least 30 days, and cause the notice publishing the rule to be tabled in Parliament where the National Assembly may instruct him to repeal or amend the rule.

LRP's submission about these amendments

The LRP said about these amendments that: The existing s 55 should be repealed, and nothing substituted in its place. (For formal reasons, to do with the Bill's removing the safeguards for proposed rules of Advisory Committee involvement and ministerial approval, and the Bill's authorising the making of unfettered rules imposing norms and standards and of rules applicable to a specific insurer. And for substantive reasons, to do with the Bill's effectively ending insurance innovation and having significant financial consequences for insurers and policyholders, and with the facts that other countries' regulators do not impose standard wording, the 2008 financial crisis (including U.S. insurer AIG's straying from conventional insurance) cannot justify more stringent regulation of insurance business, the crisis had its origins in over-complex regulation and was caused by (regulated) banks, that (contrary to Treasury's contentions) the powers sought are probably not in line with international standards (in the U.K. placing banks under supervision of the now-abolished FSA was mistaken and their supervision has been returned to the Bank of England). The LRP also said the existing rules under s 55 should be treated as regulations.

National Treasury's Final Draft Submission to the Standing Committee on Finance in Response to Key Issues Raised

The National Treasury on 7 October 2013 issued its 'Final Draft Submission' to the Standing Committee on Finance, in Response to 'Key Issues Raised' in public submissions on the Bill.[*] This Treasury Key Response document deals with nine Key Issues. It treats the LRP's points in two of the nine key issues, thus:
Key issue 2: Policyholder Protection Rules (clause 102 &140)
Key issue 3: Delegation of subordinate legislative powers by Parliament.

The Treasury Key Response document said that it and the FSB acknowledged submissions presented in public hearings by the Association of Savings and Investments South Africa, South African Insurance Association, Banking Association of South Africa, Principal Officers Association, and Law Review Project.

The Treasury said that these five parties made altogether 24 points.

The Treasury ascribed nine points to the LRP.

The nine points ascribed by the Treasury to the LRP are: *Policyholder Protection Rules* (the LRP submitted that: a. The existing s 55 be repealed, 'or'[†] b. nothing is substituted in its place, 'or' c. the existing rules passed in terms to the existing s55 be re-promulgated as regulations to the Act). *Delegation of subordinate legislative powers* (the NT's proposal was unconstitutional; Parliament was being asked to hand over its legislative powers unfettered to

[*] The Treasury's documents erroneously state the year of the Bill as '2013'. It is Bill 29 of 2012.
[†] The Treasury Key Response document erroneously treats these three LRP recommendations (a, b, c) as alternatives.

an unelected regulator; constitutionally the Regulator cannot approve its own Rules). *General v specific application of Policyholder Protection Rules* (the Bill will enable the Registrar to make arbitrary specific rules applicable to a specific insurer; Parliament may not make laws applicable to specific persons and instances). *Tabling of Rules in Parliament* (it being unclear how this will overcome constitutional illegitimacy). *Regulator drafting policy wording* (Rules' providing for norms and standards with which a policy, insurer or a type of business must comply, and for standardised wording that must be included in a policy, is unprecedented). *Stifling insurance innovation* (policy wording is central to innovation; interference by the regulator will stifle innovation; the Regulator does not have the expertise to draft wording). *No consultation with Advisory Committee* (neither the Advisory Committee nor Minister will be involved in making rules since the Committees are to be abolished; the Regulator would have greater powers than the Minister to make regulations, and indeed Parliament itself). *International Benchmarking for standardised contracts* (NT's reference to Insurance Core Principle 19 of International Association of Insurance Supervisors and country examples to support the case for introducing standard contract provisions is incorrect). *Global financial crisis* (the justification for the proposed legislative changes on the basis of the global financial crisis is flawed; the 2007 crisis was a banking not a short-term insurance crisis, and the current crisis is caused by government deficits; there is no factual link or rational reason to impose draconian and unconstitutional legislation on the insurance market).

Treasury's Key issue 2:
Policyholder Protection Rules (clause 102 &140)

Registrar making Rules without consultation and drafting policy wording
The Treasury noted that the Association of Savings and Investments South Africa (ASISA) argued that the powers granted to the FSB need to be proportionally balanced with an appropriate and robust process whereby entities and persons that will be the subject of the powers being exercised will have an appropriate opportunity to be consulted and their comments properly considered and responded to by the FSB, that there should be provision for an enabling Code of Consultation, which would alleviate legal uncertainty about the consultation process. And the South African Insurance Association (SAIA) supported enhancement of market conduct practices in the financial sector and enhanced policy-holder protection; it suggested that if circumstances necessitate immediate publication of a rule, this decision be made by the Minister; rules should not be implemented without first submitting them for public comment.

The National Treasury noted the LRP's concern that authority to make rules on norms and standards that policies, insurers or a type of business must comply and standardised wording to be included in policies unreasonably interferes with contractual freedom and will stifle innovation. But it observed that the SAIA and ASISA supported the proposed amendment and provided suggested drafting proposals.

The Treasury said it 'disagrees with the Law Review Project submission'.

The Bill empowers the Registrar to make Rules to give effect to 'Treating Customers Fairly' principles, without Ministerial approval. It enables the Registrar to act swiftly to protect consumers by improving disclosure in insurance contracts and will enable consumers to compare insurance products thereby promoting competition in the insurance sector. [It is not clear to me that to achieve this aim it is necessary 'to act swiftly'.]

The Treasury continues:

> The proposed amendment to the sections of the Long-term and Short-term Insurance Acts that address Policyholder Protection Rules extends the existing subordinate powers to allow the Registrar to set down norms and standards with which a policy, an insurer or a type of insurance business must comply, and for standardised wording, definitions or provisions that must be included in a policy. This is proposed as these measures appear to be effective tools in facilitating appropriate policyholder protections and negating inappropriate market practices.
>
> The proposed amendment must also be seen against the background of the objective of insurance regulation which is to ensure safe and fair insurance markets in the interest of protecting policyholders. Fundamental to achieving this objective is the ability for the Registrar to protect policyholders by having appropriate supervisory powers.
>
> In the context of insurance contracts, Government remains of the firm view that appropriate policyholder protection is best facilitated by empowering the Registrar to act in instances where industry contracts and practices are <u>inherently unfair and against public policy</u>. In empowering the Registrar in this way, broad overarching protection is afforded to policyholders and potential policyholders, and thereby negating the need for individual policyholders to initiate costly and lengthy litigation in instances where they are the victims of unfair contractual terms relating to insurance. This approach is also consistent with internationally accepted norms and standards, like the International Association of Insurance Supervisors ("IAIS") Insurance Core Principle ("ICP") 19 that relates to the conduct of business. IAIS ICP 19 requires regulators to set requirements for the conduct of the business of insurance to ensure customers are treated fairly, both before a contract is entered into and through to the point at which all obligations under a contract have been satisfied..
>
> The ICP specifically provides that the fair treatment of customers encompasses concepts such as ethical behaviour, acting in good faith and the prohibition of abusive practices. It goes on to state that the regulator must require insurers to take into account the interests of different types of customers when developing and marketing insurance products and recognise that in some jurisdictions, this can be achieved through a product regulation approach, whereby the supervisor reviews insurance products for compliance with applicable laws. It further recognises that the latter is likely to be more appropriate in certain circumstances, such as where the insurer is dealing with less financially-capable customers or where products are complex (such as in South Africa).
>
> The FSB has also initiated a Treating Customers Fairly (TCF) programme in 2010, which programme will regulate the market conduct of financial services firms. It seeks to ensure that fair treatment of customers is embedded within the culture of regulated firms. The TCF programme will use a combination of market conduct principles and explicit rules to drive the delivery of clear and measurable fairness outcomes from product design and marketing, through to the advice, point-of-sale and after-sale stages.
>
> One of the specific outcomes identified in the Roadmap published by the FSB in March 2011 provides that products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly. This outcome envisages regulation dealing with product features, charging structures, product governance and approval processes, <u>unfair terms</u>, undesirable business practices, regimes for particular consumers such as products aimed at addressing inclusion; and marketing and advertising restrictions and standards. These proposed amendments will assist in giving legislative effect to this programme.

Further, in considering the need for these amendments strong reliance should be placed on the Constitutional Court judgment in Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007), specifically the judgement of the honourable Judge Sachs. A copy of the full judgement is attached as Annexure A to this submission. Notably the judgement also refers to research undertaken by the South African Law Commission and international trends in respect of unfair contractual terms.

Insurance is not a luxury but part and parcel of every-day life, a virtual necessity for many to insure against unexpected peril. The insurance industry deals with members of the public who place their faith in the solvency, efficiency, probity and integrity of the insurers. Insurers compete actively, but often on the basis of price rather than the quality of cover; significant issues such as exclusions and conditions often appear in the small print of insurance contracts. The public interest in promoting fair dealing in insurance contracts so as to protect relatively vulnerable individuals contracting with large, specialist business firms, is accordingly strong. The public is therefore in need of protection, not only as regards the solvency of insurers but also in respect of unfair contract terms and undesirable trade practices.

Further, most insurance contracts are standard form contracts. Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a “take-it-or-leave-it” basis, thus eliminating opportunity for arm’s length negotiations. They contain a common set of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the “fine print” of the contract.

As it is impracticable for ordinary people in their daily activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through extensive small print in standard forms would be beyond the expectations that could be held of any ordinary person who simply wishes to get his or her car, house or life insured.

The use of standard forms responds to two economic pressures. It reduces the transaction costs of contracting by making available, at no extra cost, a suitable set of terms. In addition, the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate sales staff. For these reasons, it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts. What is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society.

A strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom. Parties to a contract must adhere to a minimum threshold of mutual respect in which the ‘unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts’. The constitutional State introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution.

In considering these amendments it must also be borne in mind that the insurance industry (represented by ASISA and SAIA) has not raised concerns therewith.

As to the allegation made by the Law Review Project at their presentation to the Committee on 24 April 2013, that the international trends referred to by the National Treasury are incorrect, please see the brief scan of the international landscape relating to standard contract term and definitions attached as Annexures (specify the annexures), that includes information on the USA, UK, Singapore, China, South Korea, Malaysia and a number of other countries. This document does not purport to be a

> comprehensive international research document, but is intended to give the Committee a sense for international trends in this regard.

In my view Act and the Bill both contain typical provisions authorising the regulation of a business activity, in this case insurance.

It provides for rules restricting or prohibiting certain kinds of business activity. Thus the rules might prohibit the inserting in insurance contracts of provisions of certain kinds. This is not abnormal. Legislation commonly imposes restrictions and prohibitions on various activities.

It may be true, as the Treasury says here, that '[t]he task of endlessly shopping around and wading through extensive small print in standard forms would be beyond the expectations that could be held of any ordinary person who simply wishes to get his or her car, house or life insured.'

But the Treasury's view is fallacious that the consumer is frequently 'unable to resist the terms in a standard form contract'. Insurers do not apply duress when displaying their terms of business. (Yet perhaps this is not the time or place to present this argument.)

Having said that, this Treasury Key Response document goes very far, in lauding the imposing of the authorities' own view of policy content 'to ensure standards of fairness'. This power could empower lead to the imposing of a high degree of uniformity on all insurance providers, to the detriment of competition.

The Treasury here cites the Constitutional Court judgment of Barkhuizen v Napier,[‡] specifically the judgment of Sachs J.

It should be noted that in this court decision Sachs J. was in the minority:

> The facts in that case were that the insured had insured his vehicle under a short-term insurance contract. A time-limitation clause in the contract required a claimant to institute court proceedings within 90 days after the insurer had rejected the claim. The insured contended that the clause violated the Constitutional guarantee of right of access to court and was contrary to public policy, and was therefore unconstitutional and should not be enforced.
>
> An eight-judge majority of the Constitutional Court held that constitutional challenges to contractual terms give rise to the question whether the disputed provision was contrary to public policy. Public policy represented the legal convictions of the community, those values that were held most dear by society. The proper approach to the constitutional challenges to contractual terms was to determine whether the term challenged was contrary to public policy as evidenced by the constitutional values, in particular those in the Bill of Rights. This left space for the doctrine *pacta sunt servanda* (promises should be kept) to operate, but at the same time allowed courts to decline to enforce contractual terms that were in conflict with constitutional values even though the parties might have consented to them.
>
> The question was whether the time-limitation clause gave the insured an adequate and fair opportunity to seek the assistance of a court. The period of ninety days allowed to him to sue was not inadequate or unfair (held the majority of the Court). When the ninety day period commenced to run, Applicant had all the information that was necessary for him to sue the insurer as he had already lodged his claim with the insurer and it in turn had rejected his claim. There was no evidence that the contract was not freely concluded between persons with equal bargaining power or that the insured was not

---

[‡] 2007 (5) SA 323; 2007 (7) BCLR 691 (CC).

> aware of the clause. Although the contract required him to submit his claim to the insurer within thirty days, Applicant submitted his claim to the insurer company within eight days of the accident through his broker. The insured then waited for two years after being told of the rejection of his claim to institute action. He furnished no reason for failure to comply with the clause. In the circumstances the clause was not unfair or unreasonable.
>
> Sachs J and two other judges, on the other hand, were of the view that public policy dictated that the time-bar clause should not be enforced. This was not merely because it was in small print, nor because it bore harshly on the insured, but because the clause was contained in a standard-form document, did not form part of the actual terms on which reliance was placed by the parties when the agreement was reached, was prepared with legal expertise for the benefit of the insurers without any apparent reciprocal benefit for the insured, lay buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent to the insured after negotiations had already been completed, and generally failed to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies. The time clause was, on the facts, unreasonably short and inflexible with the result that it denied the insured a reasonable and adequate opportunity to seek legal redress.
>
> Sachs J. cited numerous South African and foreign sources approvingly.[§] For example, he refers[**] to Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts which provides 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement 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 Treasury has embraced this minority view (that contract terms should comply with standards of notice and fairness which contemporary notions of consumer protection required).

Hence the Treasury concludes 'it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.'

My view: Making Rules in consumers' favour

In my view the imposing of contract terms which are tilted in favour of the consumer, in accordance with the Registrar's view of what is fair for the purpose of policyholder protection, will lead to an increase in the insurance premiums payable by policyholders so insurers can provide sufficient cover to meet the increase in insured risks.

(At the same time, widespread public opinion (and hence 'public policy') probably favours a tilting of insurance contracts in favour of policyholders and against insurers.)

[§] I can provide you with the full judgment of Judge Sachs if you request.

[**] At para [164].

Immediate publication of Rules

The Treasury agreed with the comments by the other commentators about the immediate publication of Rules.

ASISA had commented (see Annexure 3, 'Insurance Acts'[††]):

> Amendments to policyholder protection rules may have devastating consequences for both an insurer and a policyholder. The process to determine and amend these rules should therefore be particularly sound, fair and transparent. …
>
> It is imperative that the amendment of rules be motivated and explained properly and that the Registrar responds to comments received. There is a concern that the Registrar may consider comments but not necessarily take them into account properly and then proceed to publish a rule without further consultation. To further enhance the soundness of the process, it is suggested that when the draft rules are submitted to Parliament for scrutiny, they be accompanied by comments submitted to the Registrar and that such scrutiny will also provide for the public to be able to raise any issues which may not have been resolved through the process of consultation.
>
> As policyholder protection rules will have general application, ASISA members are unable to envisage circumstances which would necessitate the immediate publication of a rule of general application. As indicated above, … the Registrar should not be able to make rules with general application without a proper consultation process being followed. National Treasury has indicated that it may be conceivable that certain conduct must be prohibited or restrained as a matter of urgency, but it is submitted that the Registrar already has powers to deal with specific circumstances as a matter of urgency. This proposed section provides for general application and not specific circumstances.
>
> It is also not practical to allow for a rule to be repealed or amended by the National Assembly after the fact. The practical implications of such a possibility should not be underestimated. Insurers who conduct business from the time the emergency rule is published until such time as it may be repealed or amended by the National Assembly will face extreme legal uncertainty and more importantly, consumers may be severely prejudiced as a result thereof. It is therefore suggested that these proposed amendments be deleted.

In my view ASISA's submissions are well made.

The 'Proposed National Treasury Final Draft Amendments to the Financial Services Laws General Amendment Bill, presented to the Standing Committee on Finance, 7 October 2013' would now amend the clause, in order to remove the proposed provisions contemplating immediate publication of a rule, by omitting the following wording:

> "(5) The Registrar may, if circumstances necessitate the immediate publication of a rule, publish that rule without complying with subsection (4)(a), but the notice of publication of that rule must—
>
> (c) set out the reason why circumstances necessitated publication of the rule without giving notice in accordance with subsection (4)(a); and
>
> (d) invite any person who is aggrieved by the rule to make representations to the Registrar within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice.
>
> (6) If the Registrar publishes a rule in terms of subsection (5), the notice referred to in subsection (5) must be tabled in Parliament, and the National Assembly may instruct the Registrar to repeal or amend the rule."

The Registrar would still publish a proposed rule for public comment, and the Registrar must submit the draft rules to Parliament for scrutiny a month before their promulgation.

[††] Erroneously listed in the Treasury Key Response document as 'Annexure 5'.

The Treasury puts forth its proposed amendments as a *fait accompli* with implicit confidence that the Standing Committee will adopt them. This seems probable.

General vs specific application of Policyholder Protection Rules (Bill of Attainder)
The Treasury noted the LRP's concern that the proposed new s 55(3) stating that 'Rules… may— (a) apply generally; or (b) be limited in application to a particular kind or type of policy, short-term insurer or short-term insurance business' will enable the Registrar to make specific rules applicable to a specific insurer.

With respect, I did not share that concern. The clause does not authorise the making of rules applicable to a specific insurer. In my view, in this wording ('a particular kind or type of policy, short-term insurer or short-term insurance business'), the expression 'a particular kind or type of' qualifies all three nouns: 'policy', 'short-term insurer' and 'short-term insurance business'.

The clause means that Rules may be limited in application to 'a particular kind or type of' policy, 'a particular kind or type of' short-term insurer or 'a particular kind or type of' short-term insurance business.

Be that as it may, the Treasury has proposed that the clause be amended to clarify that the power is intended to be of general application.The clause would now read (Annexure 3, changes in bold):

> (3) Rules referred to in subsection (2) may—
> *(a)* apply generally; or
> *(b)* be limited in application to a particular kind or type of **policies**, short-term **insurers** or short-term insurance business.

This places it beyond doubt, that Rules may be limited in application to a particular kind or type of policies, of short-term insurers or of business.

Treasury's Key Issue 3:
Delegation of subordinate legislative powers by Parliament

The Treasury notes the LRP's view that Parliament is being asked to hand over its legislative powers unfettered to an unelected regulator.

The Treasury disagrees with the LRP's view.
The Treasury took opinion from Adv. Gerrit Grové SC on the ambit of Parliament's power to delegate legislative powers to officials (see Annexure 9, 'Opinion: Delegation of Legislative Powers to Officials.' [‡‡]).

Mr. Grové's advice is worth quoting substantially in full:

[‡‡] Erroneously listed in the Treasury Key Response document as 'Annexure 11'.

'Constitutional context of Parliament's power to delegate legislative powers

It is universally accepted in all constitutional democracies that only the elected parliament can make law and that the elected parliament cannot surrender its law-making function to the executive. However, it is equally accepted that inherent in the law-making function is the power to assign discretions to the executive as to the execution of the law, which includes the assignment or delegation of subordinate legislative powers. A distinction is drawn between law as the instrument laying down principles and policies and subordinate legislation which is seen as a legitimate instrument enabling the executive to implement those principles and policies. Delegated legislation that purports to determine principles and policies would generally be regarded as invalid.

In *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*,[§§] which was one of its first cases under the new constitutional order, the Constitutional Court considered the question of delegation of legislative powers and held that although the Interim Constitution did not directly empower Parliament to delegate subordinate legislative powers to other bodies, such a power must be implied.

The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms –'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. (Chaskalson P at par 51).

In delivering their judgement, the Court pointed out that the power to delegate legislative powers is not open-ended and that there are implied limitations despite the absence of express constitutional criteria to this effect. Sachs J explained these limitations as follows:

> "[206] At the same time, if it *(i.e. Parliament)* is not to fail to discharge the functions entrusted to it by the Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other. To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul. At the other extreme, Parliament can, within the framework of clearly established criteria, delegate to other authorities or persons law-making power to regulate the implementation of its laws. There is however a large amount of delegation in between these two extremes that might or might not be permissible. As I have said, I do not think that any hard and fast rule or simple formula can be used to find a point on the continuum that automatically distinguishes between the two classes of case. To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority, is whether or not it involved a shuffling-off of responsibilities which in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:
>
> a. The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;
> b. The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;
> c. The shortness of the time period involved;
> d. The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;
> e. The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

[§§] 1995 (4) SA 877 (CC).

f. Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.

> [207] These items should in not in my view be regarded as a checklist to be counted off, but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament. None of them, it should be emphasized, permit Parliament to infringe fundamental rights, violate protected spheres of provincial autonomy or in any other way deviate from the constitutional framework within which Parliament must function. Delegation takes place within, not outside the constitutional framework, but even within that framework it can be unconstitutional if it fails to satisfy the above criteria."

In turn Mohammed DP explained the criteria for validity of a delegation of legislative powers in the following words:

> "[136] The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends *inter alia* on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."

The above case was decided under the Interim Constitution, but in a number of subsequent cases the Constitutional Court reaffirmed that the position it took in that case is the same under the final Constitution.[***] As such it remains the leading case on the Parliament's power to delegate legislative powers.

Another issue relevant to the granting of subordinate legislative powers is the impact such powers may have on constitutional rights. In *Dawood v Minister of Home Affairs*[†††] the Court ruled that when assigning discretions to an executive authority that may affect a person's rights in terms of the Bill of Rights, the enabling Act must give directions as to the circumstances in which those discretions should be exercised, the rationale being that Parliament cannot sanction the breach of a person's entrenched rights by open-ended executive discretions. The Court recognised, however, that there may be circumstances where the factors leading up to an executive decision may be so numerous and varied that it would be inappropriate or impossible for Parliament to stipulate in advance precise guidelines for the exercise of the executive discretion.

In *Armbruster & Another v Minister of Finance and Others*[‡‡‡] the Court distinguished the *Dawood* case from a situation where the economic interests of a person as opposed to his or her fundamental rights were affected. In this case the Court did not insist on specific criteria for the exercise of the relevant discretion which only affected the economic interests of a person. In coming to its conclusion, the Court relied on its earlier view that circumstances may be so numerous and varied that it would simply not be possible for Parliament to determine precise guidelines for each and every eventuality.

The approach of the Court seems to be a practical one, viz not to expect the impossible from Parliament to legislate for every conceivable eventuality, but rather to accept executive discretion, whether legislative or administrative, as a necessary tool to assist Parliament to achieve its aims and policies as enacted in its laws, subject, of course, to the ordinary checks and balances against the abuse of power. However, when fundamental rights may be compromised by wide executive discretions, the Court may insist on more strict safeguards.

Constitutionality of delegation of regulation-making powers to officials

From the above decisions of the Constitutional Court one can safely accept that there is nothing in the Constitution that prevents Parliament from delegating rule-making powers to an administrative authority such as an official as opposed to political office-bearers such as Ministers. The only issue that needs to be considered is the degree of any constitutional constraints on Parliament

[***] *In re Constitutionality of the Mpumalanga Petitions Bill,* 2000 2002 (1) SA 447 (CC) at para 19; and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC).
[†††] 2000(3) SA 936 CC.
[‡‡‡] 2007(6) SA 550 CC.

when conferring such delegations on officials and determining the scope and extent of the powers to be delegated.

That these two factors are valid considerations for determining constitutionality appear from the judgement of Mohammed DP in the 1995 case where he quotes with approval the following from a leading Australian case on the delegation of legislative powers by the Federal Parliament:[§§§]

> "The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be (valid.)
>
> The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of lawmaking power conferred, the less likely is it that the enactment will be a (valid) law**…"**

The delegation of legislative powers to Ministers is the acceptable norm as Ministers are in terms of section 92 of the Constitution accountable collectively and individually to Parliament for the exercise of their powers and functions and are also required to provide Parliament with full and regular reports concerning matters under their control. Ministers are also members of Parliament which facilitates direct interaction between them and Parliament, including Parliamentary Committees.

Administrative office-bearers, on the other hand, are not equally accountable to Parliament. As officials they are more specifically responsible to their political heads, although they are subject to parliamentary oversight in terms of section 55(2)(b) and to be summoned to appear before Parliamentary Committees to explain and justify their actions. Because of this "distance" between Parliament and officials, the delegation of legislative powers to officials are bound to be more contentious than delegations to Ministers.

As shown above, delegations to officials are not unconstitutional *per se*, but would be more prone to attack than delegations to Ministers unless appropriate parliamentary oversight mechanisms are built into the enabling Act. The norm should be full accountability to both Parliament and the Minister to ensure that any rules issued by the official are aimed at carrying out the principles and policies of the enabling Act.

In the example quoted in paragraph 1 (proposed section 62 of the Long-term Insurance Act), the Registrar to whom the rule-making power is delegated, is required to submit any draft rules to Parliament for parliamentary scrutiny at least one month before their promulgation and to consider any comments received before publishing the final rules. This may well be the "direct link" between the official and Parliament that may be required to ensure constitutionality. Not only does this provision enable parliamentary scrutiny of all rules in draft form, but it also confers on the relevant parliamentary committee a kind of *de facto* veto over the rules before their enactment into law.

Another way to deal with this issue is to vest all subordinate legislative powers in the Minister who is directly accountable to Parliament. However, under the current financial regulation system, rule-making powers are extensively vested in an official (the Registrar) and not in the Minister. In this regard I am advised that numerous practical considerations justify the current system, including the following:

(a) The technical nature of financial regulation and the degree to which specialist knowledge is needed for effective regulation.
(b) The importance of the time factor in addressing matters where rapid intervention is critical.
(c) Issues on which regulations are made are more often than not of a non-political, administrative/technical nature.
(d) Best practice in other jurisdictions indicate that regulation-making powers are vested in financial-specialist or administrative authorities/bodies rather than in political office-bearers.
(e) Regulations are subject to the ultra vires rule which means that they may be struck down by a court if not authorised in the enabling Act.

Directly related to the issue of the political or administrative identity of the person or body in whom legislative powers are vested, is the extent and scope of the delegation. The delegation of so-

---

[§§§] *The Victorian Stevedoring & General Contracting Company (Pty) Ltd v Dignan* 46 C.L.R. 73.

called plenary powers in circumstances short of war or other national emergencies would as a rule be unconstitutional irrespective of whether they are granted to a political or administrative office-bearer. In other instances the delegation of wide but justifiable legislative powers may pass muster only if they are delegated to a political office-bearer and not to an official.

When granting rule-making powers to officials, special attention should be given to the language used. Technically speaking, if careful attention is given to setting clear boundaries in the enabling Act for regulation-making, which is usually achieved by spelling out or listing the matters on which regulations may be made, and to avoiding unnecessary wide, open-ended language there should not be unmanageable constitutional complications. The overriding consideration should be to respect the fundamental rule that law-making is the function of Parliament and that the purpose of regulations is a subordinate one, namely to give effect to the principles and policies set out in the law and not to create new law.

Having said that, it must be stressed that wide language is not in itself a ground for unconstitutionality and may, in some cases, be the appropriate mechanism to ensure that the principles and policies of the enabling Act are carried out. The language of section 62(1)(a) is undeniably wide and the question is whether the wide language is justified given the matter it purports to address, viz. protection of policyholders. Consumer protection appears to me to be one of those topics for which it is probably impossible to give a precise checklist of what must and what may not be done or what will or will not harm consumers unjustifiably. The only way to deal with undesirable insurance practices effectively is to assign discretionary powers to the relevant authority to deal with them as and when they are contrived, given the infinite nature of human ingenuity.

Although section 62 will probably pass muster as drafted, I feel a bit uncomfortable with the fact that the purpose of the rule-making function, viz. policyholder protection, is only mentioned in the heading and not in the text. It may be advisable to work the concept of policyholder protection, and perhaps also the requirement of consistency with the Act, into the text of section 62(1)(a), ….

The deletion of the words ‘in the interests of the parties and in the public interest generally’ could also be considered as these words are to some extent tautological and secondary. To make rules to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice, will as a matter of fact always be in the interest of the parties and in the public interest.

Conclusion

Nothing in the Constitution prevents Parliament from delegating wide rule-making powers to officials provided the basic principles as highlighted by the Constitutional Court are respected and adhered to in the legislation assigning those powers.

I strongly agree with Mr. Grové. Parliamentary delegation of limited law-making power to officials is not unconstitutional.

Parliament is not expected to deal itself with the detailed provisions often required to apply its statutes. Delegation of law-making functions is legitimate, subject to reasonable guidelines in the circumstances.

(I give but one example: In a typical year Parliament might pass only 40 or so statutes no longer on average than about 50 pages each, say 2,000 pages in total. Yet Civil Aviation Regulations can cover 2,000 pages alone. Parliament is not expected to deal itself with every detailed or technical provision. The same would apply for medical codes of conduct, rules governing financial services, and the like.)

Where the delegated lawmaker is not a Minister accountable to Parliament but a more remote official, the enabling statute should set clearer boundaries for regulation-making and where practicable avoid unnecessary open-ended language.

It is futile to argue to government departments that delegation of law-making power is a breach of the notion of separation of powers.

Government departments are bound by judicial rulings of the Constitutional Court and others.[****] The courts accept that inherent in the law-making function is power to assign discretions to the executive as to execution of the law, which includes within limits the assignment or delegation of subordinate legislative power.

The body to whom any argument against delegation of law-making power should ultimately be directed is the Constitutional Court. The argument would almost certainly fail.

Mr. Grové's recommended wording that Rules should be aimed at ensuring certain matters 'for the purpose of policyholder protection'

Pursuant to Mr. Grové's advice, the Treasury recommends that the clause be altered by adding phrasing to define the ambit of delegated law-making power more closely and deleting wording considered redundant, as follows (the insertions being underlined bold and the deletions shown bold in square brackets):

> ''Protection of policyholders
>
> 55. (1) The Registrar, by notice in the *Gazette*, may—
>
> (f) make rules <u>not inconsistent with this Act, aimed at ensuring for the purpose of policyholder protection</u> **[aiming to ensure]** that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally; …"

In my view, Mr. Grové is correct in recommending that the statute should contain clear guidelines that define the ambit of the Registrar's rule-making power.

However, his recommended guideline that rules should be 'for the purpose of policyholder protection', clearly tilt s 55 in the consumer's favour.

Section 55 could now have contradictory objects: Rules are to aim 'for the purpose of policyholder protection' at ensuring policies are 'in the interests of [both of] the parties'

The clause, with Mr. Grové's recommended adjustment, would now amend s 55 to say that rules should be aimed at ensuring for the purpose of 'policyholder protection', that policies are entered into, etc. in accordance with 'sound insurance principles and practice in the interests of the parties and in the public interest generally'.

This passage, that rules should aim at ensuring that policies are entered into in accordance with sound 'insurance…practice' in the 'interests of the parties', appear to dilute or even partly contradict the added purpose of 'policyholder protection'. Clauses that aggressively protect insured parties at the expense of insurers are not 'in the interests of [both of] the parties'. Nor would they be in the public interest (they would discourage continued provision by insurers of insurance products).

[****] An order or decision issued by a court binds all persons to whom and organs of state to which it applies: Constitution s 165(5).

Mr. Grové also proposed that the deletion of this passage ‘in the interests of the parties and in the public interest generally’ could be considered. He said that making rules to ensure that policies are entered into in accordance with sound insurance principles and practice *will always be* in the interest of the parties and in the public interest. He said the passage (‘in the interests of the parties and in the public interest generally’) was for that reason *to some extent tautological and secondary*. His ground for proposing its deletion was not to avoid any contradiction with the new insertion that rules be aimed at ensuring things for the purpose of ‘policyholder’ protection.

Delete ‘in the interests of the parties and in the public interest generally’?
I would let sleeping dogs lie. To draw further attention to this clause and to its possibly being tautological, secondary or contradictory to prior wording would put it at risk of being deleted.

I would leave it to the judges to reconcile this tension between the fact rules should be aimed at ensuring for the purpose of ‘policyholder protection’, that policies are entered into in accordance with sound principles and practice in the interests of ‘the parties’ and the public interest.

CERTAIN OTHER TREASURY KEY POINTS

I draw your attention to certain of the other nine Key Points made by the National Treasury in its document (Final Draft Submission to the Standing Committee on Finance, in Response to Key Issues Raised in public submissions on the Bill, 7 October 2013).

Key issue 4:
Removal of powers of the Minister or the Court in certain instances

The Standing Committee on Finance had expressed concern that removing the requirement to secure the Minister’s or Court’s approval for certain actions would place too much power with the Registrar.

This would affect the Long-term and Short-term Insurance Acts.
Clauses 76 and 118 of the Bill would amend s 12(2)(c) of both Acts so as to remove the requirement that approval of the Minister of Finance be obtained before the Registrar can direct an insurer to stop conducting new business.

The National Treasury disagrees with the Committee’s concern.

The Treasury says dispensing with the need for ministerial consent before the Registrar can direct an insurer to prohibit an insurer from carrying on business, is consistent with the existing authorisations afforded to other Registrars to withdraw registrations and licences under legislation administered by the FSB; is consistent with the Insurance Core Principles determined by the International Association of Insurance Supervisors (IAIS ICP) that calls for the operational independence of supervisors; and is pragmatic as the Registrar who is responsible for the continued supervision of insurers is best placed to determine when such a step is necessary to protect existing and potential policyholders.

The Treasury also points out that the circumstances under which the Registrar may act under s 12 of the Insurance Acts are 'clearly defined'. Any decision of the Register is subject to the Promotion of Administrative Justice Act, 2000, and can be taken on appeal to the FSB Appeal Board or review to the High Court.

My view

If the FSB (wearing its Registrar hat under the other statutes it administers) can in terms of those statutes stop the carrying on of business without ministerial approval, then it is difficult to oppose these clauses to achieve the same arrangement under the Insurance Acts.

(For example, the Collective Investment Schemes Control Act, 2002 does not require ministerial approval for the Registrar to act against the manager of an investment scheme. It says, if the Registrar under that Act (who, once again, is the Executive Officer of the FSB), after an investigation or inspection under the statute, 'considers' that the interests of the investors of a collective investment scheme or of members of the public so require, he may require a manager to take steps in accordance with the registrar's directions and provisions of the statute for the winding-up of a portfolio of its investment scheme and the realisation of the assets and distribution of the net proceeds; or direct a manager to withdraw from administration of a scheme.[††††])

Section 12 of the Insurance Acts (in like vein) describes the circumstances under which the Registrar may act (with ministerial approval, see s 12(2)(c)). Thus the Short-term Insurance Act says:

> **Registrar may under certain circumstances prohibit short-term insurers from carrying on business**
>
> **12.** (1) If a short-term insurer—
>
> *(a)* has not furnished all information which is material to an application made to the Registrar under this Act or has furnished information which is false;
>
> *(b)* (i) has made a material misrepresentation to members of the public in connection with the short-term insurance business carried on by it;
>
> (ii) has failed to comply with a material condition subject to which it is registered or deemed to be registered as a short-term insurer; or
>
> (iii) has contravened or failed to comply with a material provision of this Act,
>
> and has thereafter, within a period determined by the Registrar, failed to remedy such conduct to the satisfaction of the Registrar; or
>
> *(c)* were it then to apply for registration in terms of section 9, would not be able to satisfy the Registrar as to the matters referred to in of section 9(3)*(b)*(i), (iii) or (iv),
>
> the Registrar may give notice to the short-term insurer of the Registrar's intention, and of the reasons therefor, to prohibit that short-term insurer, with effect from a date specified in the notice, from carrying on the short-term insurance business specified in that notice.

[††††] Section 15(1)(e) and (f).

(2) When the Registrar has given notice to a short-term insurer in accordance with subsection (1), and has allowed that insurer at least 30 days in which to make representations to the Registrar in respect of the matter, the Registrar may, by notice to the short-term insurer—

(a) withdraw the first-mentioned notice;

(b) act in accordance with section 11; or

(c) if it is appropriate and if the Minister has authorised the Registrar in writing to do so, prohibit the short-term insurer from carrying on such short-term insurance business, as the Registrar may specify in the notice, and which has been specified in the first-mentioned notice.

(3) When the Registrar has, in accordance with subsection (2), prohibited a short-term insurer from carrying on certain short-term insurance business, the Registrar may thereafter—

(a) withdraw the prohibition by notice to the short-term insurer;

(b) act in accordance with section 11(1) and thereupon, by notice to the short-term insurer, withdraw the prohibition and authorise the short-term insurer to carry on the short-term insurance business, subject to the conditions determined by the Registrar, specified in the new certificate of registration referred to in section 11(2); or

(c) act in accordance with section 13(2)(*c*), 40(2) or 41(2), according to whichever provision the Registrar deems most appropriate in the circumstances and in the interests of the policyholders of the short-term insurer.

These circumstances in s 12 of the Insurance Acts describing when the Registrar may act, albeit short in detail, are fairly 'clearly defined' (to use the Treasury's words). And as the Treasury says, a decision of the Registrar is administrative action subject to judicial review, and can be taken on appeal to the FSB Appeal Board.

The Bill would amend s 12 of both Insurance Acts, as follows (words in bold in square brackets are deletions, words underlined in bold are insertions):

Amendment of section 12 of Act 53 of 1998

118. Section 12 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

''(b)**[(i)]** has made a material misrepresentation to members of the public in connection with the short-term insurance business carried on by it;

[(ii) has failed to comply with a material condition subject to which it is registered or deemed to be registered as a short-term insurer; or

(iii) has contravened or failed to comply with a material provision of this Act,

and has thereafter, within a period determined by the Registrar, failed to remedy such conduct to the satisfaction of the Registrar; or]'';

(b) by the insertion in subsection (1) after paragraph (b) of the following paragraphs:

''<u>(bA) no longer meets the conditions under which it was registered;</u>

<u>(bB) has failed to comply with any other condition imposed under this Act;</u>

<u>(bC) has failed to comply with any directive issued under this Act;</u>

<u>(bD) is in the opinion of the Registrar not managed in accordance with sound corporate governance principles, or is owned or managed by persons who are not fit and proper;</u>

<u>(bE) has contravened or failed to comply with a provision of this Act; or</u>'';

(c) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

''(c) were it then to apply for registration in terms of section 9, would not be able to satisfy the Registrar as to the matters referred to in section 9(3)**[(b)(i), (iii) or (iv)]**,'';

(d) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

''When the Registrar has given notice to a short-term insurer in accordance with subsection (1), and has allowed that insurer**[at least 30 days]** <u>a reasonable period</u> in which to make representations to the Registrar in respect of the matter, the Registrar may, by notice to the short-term insurer—''; and

(e) by the substitution in subsection (2) for paragraph (c) of the following paragraph:

‘‘(c) **[if it is appropriate and if the Minister has authorised the Registrar in writing to do so,]** prohibit the short-term insurer from carrying on such short-term insurance business as the Registrar may specify in the notice, and which has been specified in the first-mentioned notice.’’.

This means that the Registrar will be able, after allowing the insurer concerned a chance to be heard, to prohibit an insurer from carrying on business if it no longer meets the conditions under which it was registered or has contravened or failed to comply with a provision of the Act or any condition imposed or directive issued under it, or is in the opinion of the Registrar not managed in accordance with sound corporate governance principles or is owned or managed by persons who are not fit and proper.

The Bill deletes the right to remedy the misconduct.

Whether or not an insurer is managed in accordance with sound corporate governance principles, or owned or managed by persons who are not fit and proper, will now be determined ‘in the opinion of the Registrar’.

In contrast to this subjective criterion, another provision of the same (Short-term Insurance) Act, also dealing with whether managers are fit and proper, is stated in more objective terms: It says that an application for registration as an insurer must not be granted by the Registrar if a director or managing executive of the applicant ‘is not’ fit and proper to hold the office.[‡‡‡‡]

The Collective Investment Schemes Control Act, 2002 (for example) already allows the Registrar to form his own opinion. It says if the Registrar after investigation or inspection ‘considers’ that the interests of investors of a collective investment scheme or of members of the public so require, he may exercise certain powers (some of these have been mentioned above).

The Bill seeks ‘to provide for increased supervisory capabilities, to rationalise and align supervisory functions’

The Bill says it is a measure to amend and update the affected statutes in order ‘to close regulatory gaps, to effect improvements to certain provisions, to provide for increased supervisory capabilities, to rationalise and align the supervisory functions afforded to the Registrar,’ and other things.

The Bill’s Explanatory Memorandum says the Bill amends the eleven financial-sector statutes to ‘address legislative gaps highlighted after the 2008 financial crisis’ and align these laws with other legislation. The proposed amendments address the more urgent legislative gaps and the removal of inconsistencies in current legislation. (Amendments to legislation to introduce the twin peaks model are expected to be published in 2013.)[§§§§]

[‡‡‡‡] Short-term Insurance Act s 9(3)(b)(ii). The Bill does not amend s 9.
[§§§§] Bill, Explanatory Memorandum para 1.2.

It is therefore difficult to challenge the Bill's clauses that confer more sweeping powers on the Registrar. The Treasury can answer that the Registrar already has such capabilities in some of the statutes, and all that is being done is aligning other statutes with them.

Remove Insurance Act amendments from the Bill?

The LRP contention's other main argument against the Bill's insurance clauses has more weight: The justification for the proposed legislative changes on the basis of the global financial crisis is flawed; the 2007 crisis was a banking not a short-term insurance crisis, and the current crisis is caused by government deficits; there is no factual link or rational reason to impose draconian and unconstitutional legislation on the insurance market.

So arguably on that ground the Bill's clauses amending the Insurance Acts should all be removed from the Bill.

A separate Insurance Laws Amendment Bill 2013 has recently been tabled.

Perhaps a better argument in favour of removing the clauses amending the Insurance Acts from the Bill is that those clauses could instead be incorporated into the separate new Insurance Laws Amendment Bill [B 16—2013] that was tabled some months ago.

(At the least a rearguard delaying action can be fought against all this increasing regulation.)

This is a Bill to amend the Long-term Insurance Act, 1998 and the Short-term Insurance Act, 1998 so as to define certain terms; to state the objects of insurance regulation; to extend the powers of the Registrar; to extend the provisions relating to the licensing of insurers; to provide for explicit governance, risk management and internal control requirements of insurers; to provide for the supervision of insurance groups; to clarify certain market conduct matters; to make consequential amendments to other Acts; and to provide for matters connected therewith.[*****]

This Bill provides for matters not covered in the Financial Services Laws General Amendment Bill [B29–2012].

Brian's arguments could also be used

Brian's arguments could be used, against decline into grey uniformity as in Germany and now in the U.K., and about 'Twin peaks' and 'Treating Customers Fairly' being under review in the U.K. now.

Care should be taken checking facts.

———oooOooo———

[*****] Long title.