

# Consumer Protection Act could

The act will affect insurers both directly and indirectly. BY DONALD DINNIE

**The Consumer** Protection Act 2008 will come into operation incrementally. This article concentrates on the direct effects. For the most part, the provisions of the act will take effect on 24 October 2010.

## THE AMBIT OF THE ACT

The act is lying in wait for the unwary insurer. At first glance, the act does not apply to insurers. However, this is not necessarily the case.

The act applies to the promotion or supply of any services within the Republic of South Africa. It does not apply where the services are promoted or supplied to the state or where the consumer is a juristic person whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold value still to be determined by the minister.

Service includes: "the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act or is regulated in terms of the Long-Term Insurance Act ... or the Short-Term Insurance Act ..."

Schedule 2 provides, however, 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 this act within a period of eighteen months from the commencement of this act, failing which, the provisions of this act will apply."

Under the circumstances, insurers' exclusion from the ambit of the act is not a done deal. That is very much dependent on the extent to which the service is regulated by

the insurance acts and whether these acts are aligned with the consumer protection provided for in the act.

## NO BLANKET EXCLUSION

The act does not provide a blanket

exclusion to the insurance industry from the ambit of the act.

What the industry will need to do, as soon as possible, is to engage in a review of the provisions in the insurance acts as well as the regulations, and analyse to what extent those provisions are aligned with the consumer protection measures of the act. Where they are not, the decision needs to be made as to whether or not to lobby for amendments to the insurance acts and their regulations to align them with consumer protection to provide substantially similar relief.

## THE ACT'S PROTECTIONS

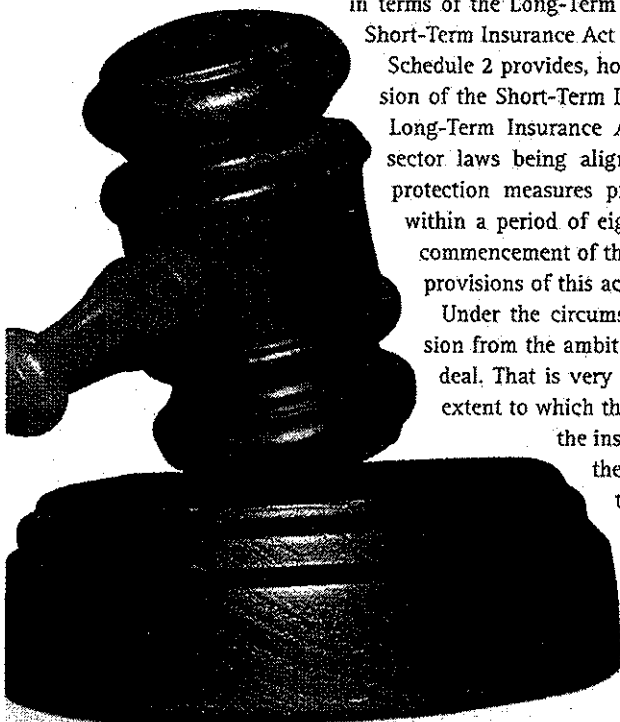
The act gives content to consumer protection. Among other things:

- protection against discriminatory marketing (Section 8)
- the right to restrict unwanted direct marketing (Section 11)
- the regulation of time for contacting consumers (Section 12)
- the consumer's right to a cooling-off period after direct marketing (Section 16)
- the right to information in plain and understandable language (Section 22)
- the disclosure of the price of services (Section 23)
- various rights to fair and responsible marketing; part E of chapter 2 deals with general standards for marketing of services, bait marketing, negative option marketing, direct marketing to consumers and promotional competitions
- the prohibition against unfair and unjust contract terms (Section 48)
- the need for written consumer agreements (Section 50)
- prohibited transactions, terms or conditions (Section 51).

Some of those issues are dealt with in part in the insurance acts or the regulations such as the Policyholder Protection Rules as well as under the Financial Advisory and Intermediary Services Act (FAIS).

## SHORT TERM

The Policyholder Protection Rules, for example, deal with the general format of personal lines policy



# waylay insurers

provisions and require that an insurer will make certain that a policy is only issued if the provisions are:

- recorded as regards the layout, letter types and spacing in an easily readable manner
- if the wording of every provision of the policy has a reasonably precise ascertainable meaning.

Those provisions are not necessarily, however, aligned with the plain language provisions of, for example, Section 22 of the act which provides that a document is in plain language if:

- it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant services, could be expected to understand the content, significance and import of the document without undue effort, with regard to:
  - the context, comprehensiveness and consistency of the document
  - the organisation, form and style of the notice of the document
  - vocabulary, usage and sentence structure
  - the use of any illustrations, examples, headings or aids to reading and understanding.

Guidelines may be published for methods of assessing whether a document satisfies those requirements.

Of course, the hurdle of plain language is more easily cleared in the case of the insured in the higher LSMs. Many policies are, however, aimed at an unsophisticated market, which would not pass the plain language test contemplated in the act. And the provision only relates to personal lines policies.

Whether the legislature elects to align the insurance acts with the consumer protection provisions of the act, or subject insurers to the provisions of the acts itself, insurers would do well to ensure that their practices, policy documents and policy wordings conform with the provisions of the act, where the insured consumers are persons other than the state or those juristic persons whose asset value and annual turnover equals or exceeds the determined threshold value.

## UNFAIR, UNREASONABLE AND UNJUST TERMS

The prohibition against unfair, unreasonable or unjust contract terms will be particularly problematic and could give scope to the challenge of many policy terms and

provisions. In terms of Section 48(1)(a), for example, a supplier must not enter into an agreement to supply any services on terms that are unfair, unreasonable or unjust. Without limiting that generality, a transaction or agreement, term or condition is unfair, unreasonable or unjust if:

- it is excessively one-sided in favour of any person other than the consumer or other person to whom services are to be supplied
- the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.

A court, in considering whether a term is unfair, unreasonable or unjust must consider, among other things:

- the nature of the parties to the transaction or agreement
- the relationship to each other
- their relative capacity, education, experience, sophistication and bargaining position
- the circumstances of the transaction or agreement that existed or, where reasonably foreseeable, at the time the transaction occurred or agreement was made
- the conduct of the supplier and consumer
- whether there was any negotiation

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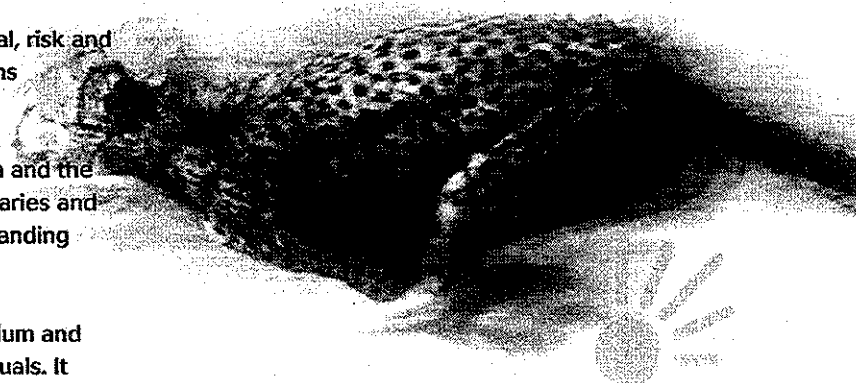
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between the parties and the extent of that negotiation

- the extent to which any document relating to the transaction or agreement complied with the plain language provisions of the act
- whether the consumer knew, or ought reasonably to have known, of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, regarding the custom of trade and any previous dealings between the parties
- the amount for which the consumer could have acquired identical or equivalent services from a different supplier.

New challenges to provisions such as time bars and notification provisions, reverse onus clauses and exceptions not causally related to the loss, can be anticipated.

The provisions obviously provide ammunition, particularly having regard to the equity test, which Section 48(2)(b) introduces, for challenges to coverage provisions and exclusions.

#### LIMITATION OF RISK

Section 49(1) provides that any provision or consumer agreement that purports to limit the risk or liability of the supplier in any way must be drawn to the attention of the consumer in writing and in plain language. The fact, nature and effect of

the provision must be drawn to the attention of the consumer:

- in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, regarding the circumstances
- before the time that the consumer enters into the agreement, or is required or expected to offer consideration for the agreement
- the consumer must be given adequate opportunity to receive and comprehend the provisions as contemplated.

This is particularly problematical in the context of insurance, where the majority of the provisions inherently limit the risk or liability of the supply by way of exclusions and exceptions, notification and time bar claim provisions as well as claim cooperation clauses.

While the provisions of the General Code under FAIS require fairly detailed information to be disclosed about financial services rendered, that again is in the context of the financial services provider and not the product supplier, the insurer. Of course, those obligations also arise under FAIS and not under insurance legislation that is contemplated in Schedule 2. The answer to that dilemma is to include, under Schedule 2, an appropriate reference to FAIS so that where all the appropriate disclosures are made by financial services providers, the disclosures as contemplated by Section 49 of the act may be made by the financial services provider and would constitute compliance by the insurer with their disclosure obligations under the act. <sup>35</sup>

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