



FAnews spoke to Carel Nolte, head of People and Brand at Etana, to find out what the CPA means for the insurance industry.

# Consumer Protection

## Are you ready?

**T**he Consumer Protection Act (CPA) of 2008 was signed into law by the President on 24 April 2009. The entire Act comes into effect on 24 October 2010 and will significantly expand upon and improve the rights and remedies available to local consumers in respect of the provision of goods and services.

### Insurance excluded, for now

At first glance insurers, both short and long-term, will receive some respite from the legislation. It specifically excludes services which involve the undertaking, underwriting or assumption of any risk by one person on behalf of another to the extent such services are already regulated in terms of the Long-term Insurance Act 52 of 1998 or the Short-term Insurance Act 53 of 1998.

"This exclusion is subject however to those laws being aligned with the consumer protection measures provided for in the CPA, within a period of 18 months from the effective date of the Act, being 24 October 2010," observes Nolte. In other words, the terms and provisions will eventually apply in some shape and form. Nolte expects that the insurance industry Regulator will be responsible for 'steering' the existing insurance legislation in the right direction and industry roleplayers, such as insurers, will have to play a major role in the process of alignment between the CPA and the current insurance legislation.

The industry escaped the immediate attentions of the CPA due to a number of recent pro-consumer initiatives, including Policyholder Protection Rules (PPR) and the introduction of industry watchdogs such as the Long-term and Short-term insurance ombudsmen. But that doesn't mean insurers can rest on their heels. Simone Monty of Evershed writes: "While the insurance industry may not [yet] be directly subject to the provisions of the CPA, it will [definitely] affect the industry in respect of insurable risk!"

### Increased risks

The main impact of the CPA on the business of marketing and underwriting insurance could relate to the increased risk that the suppliers of goods or services will face under the Act and, crucially, how insurers will assess their clients' increased risk. If you insure a product supplier, for example, the chance of them having to recall goods, or face a class action suit, increases under the new law. In addition, one of the most significant provisions of the Act is section 61 (liability for damage caused by goods) which introduces the notion of strict liability on producers, importers, distributors or retailers of goods.

Establishing negligence will no longer be a requirement in order for a consumer to establish a liability on the part of the supplier. It will be sufficient to show a link between the harm suffered and the defective product. "Etana has always placed a huge emphasis on risk management because buyers of insurance cannot be expected to accurately assess and evaluate their own risk," says Nolte. "Even though our focus is business insurance, we don't expect even the most sophisticated and informed business people to tell us what their risks are and what protection they need. That is our job and our duty – irrespective of legislation."

Nolte believes insurance companies and brokers will have to dig deeper when it comes to helping clients manage risk after 24 October. One of the important tasks will be to eliminate industry jargon and phrases that are not 'described' in everyday language. "Insurers will also need to deliberately highlight any exclusions and policy conditions that may restrict or exclude cover provided to a consumer," he says.

### Implications

Important implications for Insurers, subject to any amendments ultimately made to the Short and Long-term Insurance Acts, include:



# Act (CPA)



- Equity will now be enforced through the courts and not only the ombudsman's office.
- The contract needs to be in plain language that the consumer can understand and also be in a legible font.
- Section 49(1) provides that any provision or consumer agreement which claims 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 consumer must be given adequate opportunity to receive and comprehend the provisions.
- Full disclosure of the price of services (FAIS).
- Marketing must be fair and responsible and not misleading in any way (FAIS).
- The consumer has a right to a cooling off period (five days) after direct marketing.
- Where telephone sign ups are done, this can be construed as direct marketing and a cooling off period will be enforced, as well as full disclosures and explanations.
- The consumer has the right to calmly consider what is being marketed and what response to make to such marketing.
- There is prohibition against unfair, unreasonable or unjust contract terms and where a tribunal or a court feels that the terms of the contract are particularly one-sided or unfair the consumer will have the right to strike those clauses out of the contract, even if the contract has been signed.

## The demise of disclaimers?

Section 49 (1) introduces a number of challenges. The Act is ruthless when dealing with disclaimers and indemnities that are not written in plain English, or are deemed unfair, unreasonable or unjust. Disclaimers are all around us. If you

loiter in any public place, parking lot or auto repair facility, you'll notice boards 'absolving' owners from liability. They warn members of the public that the proprietors will not be held responsible for any theft, loss of goods or damage incurred on their premises. Will these disclaimers survive the CPA? And does fine print still offer protection?

Donald Dinnie, Director at law firm, Deneys Reitz Inc, has written extensively on the subject. He says the Supreme Court of Appeal has repeatedly debunked the myth that disclaimers are out of place in today's consumer environment. In *Jacobs v Imperial Group* (judgement 1 December 2009), for example, Imperial relied solely on the owners' risk disclaimer notice to escape liability, which right the court confirmed! The service centre in question prominently displayed a sign, in two languages, reading: "Vehicles are left at owners' risk!"

Section 49 (1) of the CPA could impact the court's ruling in this regard. The Act references both substance and form of disclaimers and indemnities – in particular prohibiting disclaimers and indemnities in respect of gross negligence. Consumers will be able to challenge disclaimers and indemnities based on their substance.

## Uncertainty remains

What does this mean for short-term insurers? The 'plain language' provision is going to raise a few eyebrows, though this requirement has largely been addressed in the PPR mentioned earlier.

Will policy exclusions be lumped together with indemnities and disclaimers? And how will the Act interpret the numerous exclusions contained in everyday insurance policy wordings? "Until such time as the regulations to the CPA are published, and the Short and Long-term Insurance Acts are amended, we are unable to say exactly what impact will be

had on insurance contracts generally, or on what tests will be applied to insurance exclusions in particular," comments Nolte. These issues will be the focus of numerous debates and discussion among industry stakeholders in the 18-months after implementation.

## Altering policy wordings

But these debates could be in vain. Section 49 (1) clearly states that any notice or provision of a consumer agreement which aims to limit the risk or liability of the supplier must be written in plain language and must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer. The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the notice or provision.

Nolte says this section will have some bearing on the insurance industry in the future. He is also certain that – technicalities aside – there will be a requirement for short-term insurers to alter policy wordings where exclusions are concerned. "Certain insurance wordings might as well be written in Greek as far as the average person is concerned – all industry jargon has to be removed and put into plain speech," he says.

## Adapting to change

Insurers, insurance brokers and other product providers in the financial services industry will have to adapt their practices to accommodate provisions in the CPA. "At Etana we challenge ourselves on a daily basis to 'keep it simple'," says Nolte. "We are prepared and ready for October 2010!"

Insurers and brokers who wait until the last minute will be under tremendous pressure, because rewriting policy wording to deliver complete clarity is a time-consuming business, and not something that can be rushed. ■