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The Consumer Protection Act

The remaining portions of this Act are due to come into force at the end of March and although the Act and its impact on the insurance industry has received considerable press coverage, from queries we have received there is an obvious need for more information on this piece of legislation. This note will provide further information under the following headings:

1. Introduction

2. The impact on Public liability insurance and the adequacy of our cover

3. Important parts of the Act that will impact the most on liability insurance

4. What cover is / will be available to protect our business policyholders

Where appropriate the relevant section number of the Act that applies has been documented to allow for easy identification should you wish to read the relevant legislation.

1. Introduction

The Act is very comprehensive providing extensive protection to consumers against a wide range of issues arising out of their dealings with suppliers but restricted to transactions between customers and suppliers occurring in the Republic of South Africa (refer section 5.1.a of the Act) irrespective of whether the supplier resides or has its principal office within the Republic (refer section 5.8.a of the Act). Amongst other things the Act is there to protect consumers of goods and services against:

- inferior products or services whether or not harm is caused by such goods or services
or
- any unfair business practices of those businesses that sell or market those goods or services.

The Act is there to protect the general public (you and me as consumers) and not big business. There is a provision in the Act (refer section 5.2.b of the Act) to say that any business entity with an annual turnover above a certain amount will not be considered to be a consumer in terms of the Act and will not enjoy any protection provided by this Act (the idea being that big business have the expertise and financial resources to look after themselves). The turnover mentioned above has been set at R 3 million. The plain language provisions of the Act will apply to commercial / engineering policies, etc where the annual turnover or asset value of the particular business entity (policyholder) is less than R3 million.



Other methods of legal assistance / bodies besides the traditional courts are now available to consumers (e.g. National Consumer Tribunal & the National Consumer Commission) making it easier for consumers to enforce their legal rights and one could therefore expect an increased claims frequency. Class actions are also permitted.

2. The impact on Public liability insurance and the adequacy of our cover:

There is a lot of panic out there in the insurance market that has unfortunately been aggravated by media reports and certain other communications / presentations. Whilst the Act provides extensive protection to consumers with a resulting increased exposure to insurers that underwrite liability covers, it is important to know that:

- Most of the Act and the protection provided to consumers under the Act will not result in liability claims under our liability policies as they do not fall under the coverage provided by insurance policies (including wide covers such as our Umbrella Liability section and specialist Broadform liability covers offered by specialist UMA's). Most of the protection offered by the Act is simply not the subject of insurance cover (e.g. bad service, the return / exchange of goods, undesirable marketing practices, consumers right to cooling off periods etc etc).
- A fair amount of the protection now documented under the Act already exists in terms of our common law and precedent set in terms of previous court judgements (i.e. it is not all new or additional protection).
- The basic Claims Made or Losses Occurring sections of our Multisure product provide substantial coverage against a lot of the losses that will arise out of the Act (the exposure created by section 61 of the Act mentioned below can to a large extent be covered by the standard Products Liability extension). When our Umbrella Liability section is taken out in conjunction with the above sections the protection offered to our policyholders is extensive and very competitive when compared to our competitors (including certain broadform policies).

3. Important parts of the Act that will impact the most on liability insurance

3.1 Contracting out of liability, Disclaimers, Standard Trading Terms and Contracts etc drafted by or on behalf of the supplier:

Often businesses will contract out of liability through disclaimers or through their standard trading conditions and we as insurers have relied on these disclaimers or have insisted on certain disclaimers before insuring a risk.

Even before the Consumer Protection Act such documents would be interpreted against the drafter (i.e. the supplier) if there was ambiguity (contra proferentum rule) and had to be brought to the consumer's attention. This meant that such disclaimers did not guarantee that the supplier would not be liable (and that we would not be liable for any claim) but if done correctly it did mean that the supplier could successfully contract out of liability.

The Act covers this topic in a number of places and now formally states that:



- Any ambiguity in such documents will be interpreted in favour of the consumer (refer section 4.4.a of the Act) – nothing new here.
- Any restriction, limitation, exclusion or deprivation of a consumer’s legal rights in such documents shall be limited to the extent that a reasonable person would ordinarily have expected such document to contain such a limitation - this will be determined taking into account the content of the document, the way the document was drafted and presented and the circumstances of the specific transaction or agreement (refer section 4.4.b of the Act) – this could depending on the circumstances result in some claims for us that we may have previously not paid (but only if we were relying on such limitation or exclusion and only if such term is now found to be unacceptable). Only time will tell if this becomes a problem for us (at this stage it is not anticipated that this in isolation will have a major impact).
- The supplier may not require a consumer to:
 - Waive any rights;
 - Assume any obligation;
 - Waive any liability of the supplier;

on terms that are unfair, unreasonable or unjust to the consumer (refer section 48.1.c of the Act).

A term will be considered unfair, unreasonable or unjust if:

- It is one-sided against the consumer;
- It is inequitable to the consumer;
- Such term was not specifically drawn to the consumers attention (refer section 48.2 of the Act)

As with the previous point this could possibly impact on our claims experience (again only if we were relying on such term and only if such term is found to be unacceptable).

- Any term that:
 - Limits the liability of the supplier,
 - Results in the consumer assuming risk or liability;
 - Requires that the consumer indemnify the supplier

must be drawn to the attention of the consumer in the following manner:

- It must be in plain language as defined in the Act;
- It must be drawn to the attention of the consumer in a conspicuous manner that is likely to attract the attention of the consumer;
- It must be drawn to the attention of the consumer before the transaction / activity begins, before the consumer enters the facility, before payment is made and the consumer must be given time to read and understand the terms beforehand. (Refer to section 49.3, 49.4 and 49.5 of the Act).

To some degree some of these requirements already existed but there is no doubt that this now places a greater obligation on suppliers of goods or services that wish to rely on such disclaimers.

- In addition to the above, the Act requires that if any of the above terms involves an activity, facility or premises that is subject to any risk to the consumer:
 - Of an unusual character or nature;
 - That a consumer could not be reasonably expected to be aware of or notice;
 - “Or” that could result in death or serious injury;



then the supplier must specifically draw the risk and possible effect of such risk to the consumers attention. It is a requirement of the Act that the supplier is to ensure that the consumer signs a document confirming that he / she is aware of the risk (and possible consequences). (Refer sections 49.2 and 58.1 of the Act)

The use of the word “or” as opposed to “and” under bullet point 3 above means that a number of facilities or premises would now have to implement such documentation requiring the consumer to sign such document as acknowledgement and acceptance of the risk (examples that come to mind would include adventure activities and theme parks such as Gold Reef City). Of course this new requirement does not necessarily increase our exposure as any death or injury may have been a valid claim anyhow – if anything this may depending on the circumstances limit our liability exposure (or make our defence easier).

- The supplier is not permitted to contract out of gross negligence (refer section 51.1.c.i of the Act).

There has always been debate over whether one can contract out of gross negligence.

Certainly in the past certain judgements have in fact allowed for the contracting out of gross negligence but now any transaction falling under the ambit of the Consumer Protection Act will not permit such contracting out of gross negligence.

In summary therefore one can still contract out of liability (not for gross negligence) and liability insurers would therefore still benefit from such limiting contractual terms of their policyholders but the requirements to satisfy the legality of such exclusionary terms has become that much more difficult to comply with.

It is important to note that if we wish that one of our policy holders contract out of liability precedent to us providing any liability cover (generally this will only be the high risk industries as mentioned in the U/W guides), then no M & F staff member should draft the disclaimer for the policyholder (or comment on the acceptability thereof). What we should rather require is that such disclaimer be referred to and approved by the policyholder’s own attorneys. After obtaining sight of any such disclaimer (which we are entitled to request) we can still refuse to insure the risk if we are not happy with the adequacy of the disclaimer or contract conditions (any queries in this regard should be referred to IOS in the first instance who will refer such disclaimer wordings to legal where appropriate).

3.2 Strict liability for goods sold or supplied:

Prior to the Act, if any goods sold or supplied caused death, injury, illness or damage, a consumer would have to prove negligence on the part of the retailer, wholesaler, importer or manufacturer.

There was therefore an onus on the consumer (or the consumer’s legal representative) to first prove that there was negligence and which entity was negligent.

The Act now makes these entities (including a service provider of services such as a plumber or electrician that as part of these services installs any product or goods) liable for such damage, death etc arising out of the said goods irrespective of whether there was any negligence or not on the part of these entities (refer sections 61.1 & 61.2 of the Act).

As negligence is no longer a requirement for liability the consumer may hold any one of the entities in the supply chain (or a number of them jointly) liable. The anticipated result of this is that retailers (i.e.



the ones at the end of the supply chain that the consumer dealt with) will be the ones that will probably experience increased products liability legal actions against them.

Although this strict liability exists, in terms of section 61.4 of the Act there are still defences available to the entity being held liable. The full list of these defences have not been included but the more important ones are:

- Liability of a particular person does not arise if the alleged unsafe product defect did not exist in the goods at the time it was supplied by that person (refer section 61.4.b.i of the Act).
- A distributor or retailer shall not be liable if it is unreasonable to expect the distributor or retailer to have discovered the unsafe defect bearing in mind the distributor or retailers role in the supply chain (refer section 61.4.c of the Act).

Even if there is an available defence, the difference now is that the consumer merely has to hold any one of the entities in the supply chain liable and it is then the responsibility of the relevant entity to prove that they are not liable using one of the available defences. Where the effort and initial expense previously rested with the consumer in proving negligence, the initial effort and expense now rests with the party being held liable to prove that they are not liable by using one of the legislated accepted defences.

What is important now is that where in the past perhaps retailers did not take out Products Liability cover (because the chance of them being proved to be negligent was remote in view of their role in the supply chain), now there is a definite need for this cover and brokers should be advising their clients to take out this cover.

4. What cover is / will be available to protect our business policyholders

- As mentioned above the conventional Claims Made or Losses Occurring liability section provides quite extensive coverage.
- Without any doubt if the policyholder supplies any product or goods (including entities like plumbers and electricians that install goods purchased from another supplier) then the Products Liability extension is a must and does to a large extent satisfy the liability created by Section 61.
- Our Umbrella Liability section which provides very wide coverage (both in terms of limits and the actual extent of cover) at really minimal premium is also a must. As mentioned above this cover is wide and does compete very well with certain broadform covers.
- Unfortunately in terms of our treaty restrictions our Umbrella Liability cover cannot be offered for certain industry types or for certain clients that exceed a certain size / premium income (refer to the U/W guidelines for more details). In view of this, in conjunction with Camargue (our liability UMA) we will be offering broadform as a section to our Multisure product. This broadform cover will not however cover specialist covers such as Products Recall (there is an increased need for this in view of section 60 of the Act).
- Where a policyholder requires wider covers like Products Recall then a separate policy can be purchased via his broker directly through Camargue.



We hope the above provides a better understanding on the important parts of the Act.