

CONSUMER PROTECTION MEASURES IN NON-LIFE INSURANCE CONTRACTS: A SOUTH AFRICAN AND AUSTRALASIAN TREND?

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SUMMARY

Consumer protection has gained prominence in many different industries worldwide. In South Africa, the consumer protection trend was first identified in the promulgation of the National Credit Act and the Consumer Protection Act. Extending protection to the insurance industry has not been far behind. In recent years, South Africa has promulgated new legislative measures specifically aimed at the protection of consumers in relation to insurance contracts (policyholders). This trend is fast becoming a worldwide phenomenon with both Australia and New Zealand also recognising the importance of consumer protection measures in their insurance legislation. This article considers the position in South Africa, Australia and New Zealand with regard to consumer protection measures in insurance legislation within the non-life insurance sphere.

1 INTRODUCTION

The insurance industry is renowned for typically being one-sided. The insurers, as the drafters of the policies, are generally in the more favourable position. Insurance policies generally tend to work more in favour of the insurer than the policyholder. However, this position is changing. Consumer protection laws are becoming more prevalent in both South Africa and international jurisdictions. There has been a strong move in recent years towards the protection of consumers as a whole. In South Africa, we have seen the implementation of the Consumer Protection Act (CPA)¹ in April 2011 and the National Credit Act (NCA)² in June 2007. Both of these Acts are aimed at protecting consumers from unscrupulous suppliers and credit providers, respectively. However, these two noteworthy Acts are not applicable to the insurance industry.³ They do, however, demonstrate the move towards the protection of consumers in general.

¹ 68 of 2008.

² 34 of 2005.

³ See heading 2 1 below.

The insurance industry is no stranger to controversy when it comes to policies being one-sided and generally drafted in favour of the insurer. Policyholders, as consumers, are taken advantage of by insurance companies. Many policyholders are not aware of numerous onerous provisions contained in the policy and are therefore put in an unfair position by the insurer. However, this is changing slowly but surely. The insurance industry in South Africa is becoming more pro-policyholder (or consumer) with the introduction of new insurance legislation and rules. The Policyholder Protection Rules (PPRs),⁴ in particular, are playing a vital role in bringing insurance legislation into line with pro-consumer movements.

This article considers the movement of insurance legislation in South Africa to a more pro-consumer dispensation.⁵ The article looks at the various pieces of legislation enacted in recent years that are specifically aimed at ensuring consumer/policyholder protection. A comparison with Australian and New Zealand laws is also undertaken to determine ultimately whether consumer protection in the insurance industry is a trend we are witnessing in these regions.

2 SOUTH AFRICAN INSURANCE

2.1 Introduction to legal framework

The current legal framework of the South African insurance industry is rather complicated and in a state of disarray, having seen the introduction of new legislation and the repeal of certain sections in older legislation.⁶ This means that the current legal framework is fragmented and difficult to navigate. Within the context of non-life insurance policies, the Short-Term Insurance Act (STIA),⁷ the Policyholder Protection Rules (PPRs),⁸ the Financial Advisory and Intermediary Services Act (FAIS Act),⁹ the newly enacted Insurance Act¹⁰ and lastly, the soon-to-be-promulgated Conduct of Financial Institutions (COFI) Bill¹¹ must all be considered in light of their relevant provisions aimed at consumer protection mechanisms.

Consumer protection measures in other industries and statutes, such as the CPA and NCA, are paving the way for this fairly “new” phenomenon. As was mentioned previously, both the CPA and the NCA are not applicable to

⁴ As promulgated in terms of s 55 of the Short-Term Insurance Act 53 of 1998. The PPRs were most recently amended in September 2018. The new, updated version contains provisions on micro-insurance. The micro-insurance provisions are strongly in line with consumer protection measures.

⁵ This article focuses only on short-term insurance policies (that is, non-life insurance).

⁶ The recent introduction of the Insurance Act 18 of 2017 and new PPRs have had a significant impact on the insurance industry.

⁷ 53 of 1998.

⁸ As amended in terms of GN 996 in GG 41928 of 2018-09-28 and which came into effect on 1 October 2018.

⁹ 37 of 2002.

¹⁰ 18 of 2017.

¹¹ This Bill will work together with the Financial Sector Regulation Act (FSRA) 9 of 2017.

the insurance industry.¹² The introduction of the CPA created confusion as to whether insurance products and services were to be regulated by the Act. At first, it appeared not to be the case since the definition of “service” given in the Act expressly excluded any advice provided for in terms of the FAIS Act or in terms of the Long-Term Insurance Act (LTIA)¹³ and the STIA. But this exclusion was subject to an important condition, contained in item 10 of Schedule 2 of the Act, which stipulated that the insurance industry had to align its consumer protection measures with those of the CPA “within a period of 18 months from the commencement of this Act, failing which, the provisions of this Act will apply.”¹⁴ Apart from the fact that financial products are by nature complex and intangible, it would have been unattainable to have two regulators responsible for the regulation of one industry. Section 28 of the Financial Services Board Act¹⁵ was therefore amended with the result that section 28(2)(b) currently stipulates as follows:

“Without derogating from the generality of paragraph (a), the Consumer Protection Act, 2008 (Act No. 68 of 2008), does not apply to—

- (i) any function, act, transaction, goods or services that is or are subject to Financial Services Board legislation; or
- (ii) the board or a registrar referred to in Financial Services Board legislation.”

The result is therefore that there is a clear distinction between financial products and other products, and the CPA is not applicable to the former.¹⁶ It is now necessary to consider the relevant statutes in the non-life insurance industry and the relevant provisions within these statutes aimed at the protection of policyholders.

2.2 The Short-Term Insurance Act (STIA)¹⁷

The insurance legislative framework used to consist of the STIA and the LTIA, therefore differentiating between short-term and long-term insurance.¹⁸ Certain sections of these two Acts have since been repealed by the Insurance Act – for instance, the provisions relating to misrepresentation and which aspect is now regulated by the 2018 PPRs.

The STIA was enacted to provide for the substantive matters of insurance. These substantive matters included the prudential regulation and the overseeing of the market conduct of financial service providers (FSPs). The

¹² The NCA only deals with credit life insurance matters. This falls outside the scope of this article.

¹³ 52 of 1998.

¹⁴ Millard *Modern Insurance Law* (2013) 6–7.

¹⁵ 97 of 1990.

¹⁶ When it comes to the operation of funeral parlours, it is interesting to note that a funeral parlour as a service provider is regulated under the CPA. However, the funeral insurance policy still falls under the ambit of the Long-Term Insurance Act and the FAIS Act. This is an interesting development in the industry and the overlap is not always clear but it is evident that when it comes to funeral parlours, the policy is not subject to the CPA although the service itself is.

¹⁷ 53 of 1998.

¹⁸ This has since changed due to the implementation of the Insurance Act 18 of 2017. The Insurance Act now differentiates between life and non-life insurance.

South African National Treasury then enacted the FAIS Act to deal directly with the conduct of FSPs and, more specifically, intermediaries and advisors to ensure that advice rendered by a registered FSP was in line with legislation and not prejudicial to the consumer. The FAIS Act is discussed below.¹⁹

With the recent enactment of the new IA and the PPRs, as well as the much-anticipated COFI Bill, the insurance legislative framework will change significantly. The STIA will no longer be as important as it once was.

With regard to consumer protection measures in the STIA, section 55 is the most important provision. It deals specifically with the protection of policyholders. It enables the registrar of short-term insurance to draft policyholder protection rules to protect policyholders where the Act does not contain explicit protection. The expedient process of promulgating rules allows for quick action where there is the possibility of a miscarriage of justice. Quick and pro-active action by the legislature in promulgating and updating the rules better protects policyholders.²⁰ This then leads us to the PPRs and the significance of these rules.

2 3 The Policyholder Protection Rules

The PPRs in terms of the STIA were first published in 2004²¹ in order to provide for issues such as direct marketers,²² void provisions,²³ and general rules²⁴ regulating the agreement between the insurer and the policyholder. These rules were promulgated in order to provide for the notion of fairness in relation to certain issues surrounding the relationship between insurer and policyholder. Since the rules were promulgated in 2004, there have been some significant reforms. The most noteworthy reform was with regard to time-bar clauses in 2010, following the decision of the Constitutional Court in *Barkhuizen v Napier*.²⁵ The outcome of the case led to an amendment of the PPRs at that time in terms of both the LTIA and the STIA to ensure more manageable time frames for the institution of claims against insurers.

The PPRs recently underwent further amendments in September 2018 with the inclusion of micro-insurance provisions.²⁶ The new rules on micro-

¹⁹ See heading 2 4 below.

²⁰ See heading 2 3 below.

²¹ Policyholder Protection Rules 2004.

²² Rule 4 of the 2004 PPRs.

²³ Rule 5 of the 2004 PPRs.

²⁴ Rule 6 of the 2004 PPRs.

²⁵ 2007 7 BCLR 691 (CC). The case saw the incorporation of rule 7.4 of the PPRs, which entered into force on 1 January 2010 and which states that any time-limitation provision may not include the 90-day period within which the insured may make representations to the insurer, and must provide for a period of not less than six months after the expiry of the 90-day period for the institution of legal action.

²⁶ See GN 996 in GG 41928 of 2018-09-28. Specifically, rule 2A of the PPRs deals with micro-insurance. Micro-insurance is insurance for low-income earners. The Insurance Act defines the concept of "microinsurance business"; see the definition as contained in section 1 of the Act. According to Churchill, it can be defined as "a financial arrangement designed to protect low-income people against specific perils in exchange for regular premium

insurance are strongly centered on the protection of consumers who purchase micro-insurance policies. The PPRs are aimed at bringing the insurance industry into line with consumer protection measures and therefore the rules are generally aimed at policyholder protection. Importantly, Rule 1 of the PPRs sets out the rules pertaining to the fair treatment of policyholders. The rule provides as follows:

- “1.1 For purposes of this rule, ‘policyholder’ includes a potential policyholder and ‘member of a group scheme’ includes a potential member of a group scheme, where appropriate to the context.
- 1.2 An insurer, at all times, must act with due skill, care and diligence when dealing with policyholders.
- 1.3 An insurer must–
- (a) in any engagement with a policyholder, and in all communications and dealings with a policyholder, act honourably, professionally and with due regard to the fair treatment of the policyholder; and
 - (b) at the start of any engagement initiated by the insurer clearly explain the purpose thereof.
- 1.4 An insurer must have appropriate policies and procedures in place to achieve the fair treatment of policyholders. The fair treatment of policyholders encompasses achieving at least the following outcomes:
- (a) policyholders can be confident that they are dealing with an insurer where the fair treatment of policyholders is central to the insurer's culture;
 - (b) products are designed to meet the needs of identified types, kinds or categories of policyholders and are targeted accordingly;
 - (c) policyholders are given clear information and are kept appropriately informed before, during and after the time of entering into a policy;
 - (d) where policyholders receive advice, the advice is suitable and takes account of their circumstances;
 - (e) policyholders are provided with products that perform as insurers or their representatives have led them to expect, and the associated service is both of an acceptable standard and what they have been led to expect; and
 - (f) policyholders do not face unreasonable post-sale barriers to change or replace a policy, submit a claim or make a complaint.”

Rule 1 focuses on the protection and fair treatment of policyholders by insurers. The entire rule is aimed at ensuring that consumers to an insurance contract are treated in a fair manner, thus promoting the protection of these parties. It is evident that the PPRs have always been the correct platform from which to introduce measures aimed at the protection of consumers.

There are various other rules in the PPRs that also promote consumer protection – in the product design phase,²⁷ the advertising phase,²⁸ claims management²⁹ and complaints management,³⁰ as well as disclosure

payments proportionate to the likelihood and cost of risk involved”. See Churchill *Protecting the Poor: A Microinsurance Compendium: Vol. II* (2007) 573–593.

²⁷ Rule 2.

²⁸ Rule 10.

²⁹ Rule 17.

³⁰ Rule 18.

requirements.³¹ Importantly, all the rules as contained in the PPRs promote consumer protection as a whole. The PPRs are therefore used to address and include consumer-protection measures. These types of issue generally relate to the relationship between insurer and policyholder, and are known as market-conduct issues. Although market-conduct regulation is dealt with under the FAIS Act,³² this Act is limited and only deals with the responsibilities of intermediaries and advisors. The FAIS Act does not address product issues such as exclusions, fair claims procedures and other onerous clauses in insurance contracts.³³

2 4 The Financial Advisory and Intermediary Services (FAIS) Act³⁴

The purpose of the FAIS Act is to regulate the rendering of certain financial advisory and intermediary services to clients.³⁵ As a result, any aggrieved consumers will be able to seek redress by proving that they have been misled by a representative or financial services provider. To this end, section 20 of the FAIS Act provides for an ombud, known as the FAIS Ombud.³⁶

The FAIS Act has an impact on the way in which an FSP conducts business and interacts with consumers; it directs consumers in their day-to-day dealings with their chosen FSP. It also regulates the activities of all FSPs who give advice or provide intermediary services to consumers of certain financial products. The FAIS Act also requires that FSPs must be licensed³⁷ and it creates a professional code of conduct with specific enforcement measures.³⁸ All FSPs must ensure that they comply with the legislation,³⁹ as well as with fit-and-proper requirements³⁹ as stipulated in the Act.⁴⁰

The FAIS Act is applicable to insurance policies as these are financial products as described in section 1 of the Act.⁴¹ It is vital that these FSPs are able to understand the content of insurance contracts and are able to advise policyholders accordingly.

³¹ Rule 11.

³² See heading 2 4 below.

³³ This is where the PPRs come in as they regulate these issues. See paper delivered by Millard "COFI and T(CF): Further Along the Road to Twin Peaks" at the Annual Banking Law Update (ABLU) (2017).

³⁴ 37 of 2002.

³⁵ See the "purpose" of the FAIS Act as set out on page 2 of the Act.

³⁶ The FSRA, which came into effect in August 2017, stipulates that under the Twin-Peaks system there will be an office for the Financial Services Providers and an office for the adjudicator; see also Millard and Hattingh *The FAIS Act Explained* (2016) 180.

³⁷ S 7(1) of the FAIS Act provides that no one may act or offer to act as a "financial services provider" unless he or she has been issued with a licence to do so under the Act.

³⁸ Ss 15 and 16 of the FAIS Act.

³⁹ S 8A of the FAIS Act; see also Millard "Bespoke Justice? On Financial Ombudsmen, Rules and Principles" 2011 *De Jure* 16.

⁴⁰ Ss 8, 9, 11 and 12 of the FAIS Act; see also Millard 2011 *De Jure* 16; see also Botha, Rossini, Geach, Goodall and Du Preez *Fundamentals of Financial Planning* (2017) 35.

⁴¹ See s 1, which defines the term "financial product" and refers specifically to a "short-term insurance policy/contract under (c): a long-term or a short-term policy, as defined in s 1(1) of the Long-term Insurance Act and s 1(1) of the Short-term Insurance Act, respectively".

Regarding contractual aspects and the fair treatment of policyholders, the General Code of Conduct (GCC) is key. On the theme of consumer protection, it is essential to take cognisance of section 7(1)(c)(vii) of the FAIS GCC, which deals with so-called onerous clauses.⁴² This section of the GCC states that an advisor or intermediary (anyone who is an FSP) “should provide a client, at the earliest possible opportunity, with full and appropriate information of, *inter alia*, concise details of any special terms or conditions, exclusions of liability, waiting periods, loading, penalties, excesses or circumstances in which benefits will not be provided”.

Section 8(1) of the GCC places an obligation on a provider other than a direct marketer to take reasonable steps prior to the rendering of advice: the provider is tasked with seeking appropriate and available information regarding the client’s financial situation, financial product experience and objectives and with conducting an analysis and identifying financial products appropriate to the client’s risk profile and financial needs.⁴³ Section 8(2) further states that a provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision. This duplication is expected to disappear when the new COFI Bill becomes law.

There can be no doubt that the GCC places a definite duty on intermediaries and advisors to ensure that prospective policyholders are aware of onerous clauses in insurance contracts. This provision is in line with consumer protection measures as it requires intermediaries and advisors to inform consumers of any onerous provisions contained in the policy before the policy is entered into.

The GCC highlights that providers are under the general duty to act at all times when rendering financial services with due skill, care and diligence and such services must be rendered honestly and fairly in the interests of clients.⁴⁴ The purpose of the GCC is to align the conduct of FSPs during the rendering of financial services with the fair treatment of clients and consumer protection.

It is evident that the purpose of the FAIS Act is to protect consumers from dishonest insurers or their representatives as defined in the STIA and the LTIA. In addition, the Act requires that a specific needs analysis for consumers be conducted by the insurer or its representatives when completing an insurance contract for a prospective policyholder. Together with the STIA, LTIA and PPRs, the FAIS Act has highlighted a need to disclose basic policy-related information to consumers to enhance their knowledge, which then leads to informed decision-making.

The new insurance dispensation in South Africa will repeal the FAIS Act and replace it with the COFI Bill in order to address matters related to insurance.⁴⁵

⁴² S 15 of the FAIS Act provides for the establishment of the GCC for authorised financial service providers and their representatives.

⁴³ S 8(1) of the FAIS GCC; see also Millard and Maholo “Treating Customers Fairly: A New Name for Existing Principles” 2016 THRHR 594 601–602.

⁴⁴ See Part II, s 2 of the GCC.

⁴⁵ See heading 2 6 below.

2 5 The Insurance Act⁴⁶

The Insurance Act came into effect on 1 July 2018. The purpose of the Act is to set out a legal framework within which insurers and insurance groups can be regulated and supervised. The supervision and regulation must be in line with the Twin-Peaks system established by the Financial Sector Regulation Act (FSRA).⁴⁷ The FSRA was enacted to pave a way for the Insurance Act by establishing two authorities – namely, the Prudential Authority and the Financial Sector Conduct Authority (FSCA).⁴⁸

The Twin-Peaks system comprises the Prudential Authority and the FSCA and these entities are entrusted with the regulation and supervision of financial services and products, as well as the regulation and supervision of the providers of those services and products. The FSCA was established to improve market-conduct-related issues among FSPs in order to protect financial services consumers. The Prudential Authority, on the other hand, was established in order to determine the financial soundness or liquidity of FSPs as a means of protecting consumers and the financial services industry as a whole. The Insurance Act, in line with the FSRA mandate, has repealed all prudential requirements required under the STIA and the LTIA.

The Insurance Act brings a noteworthy change to both the STIA and the LTIA, as well as to the PPRs. Most importantly, the Act has introduced the most current amendments to the PPRs, which contain detailed provisions on micro-insurance. Rule 2A of the updated PPRs is focused on micro-insurance and these provisions will have a significant impact on consumers in South Africa. The Insurance Act and the PPRs provide for regulatory and supervisory frameworks that will make it easier for low-income earners to access quality insurance products.⁴⁹

The PPRs will also see that products are designed so as to support an improved consumer understanding of the different insurance products.⁵⁰ The product design rules are set out in Rule 2 and are aimed at protecting consumers by stipulating that insurance products be designed in a fair manner and for specific consumers' needs. This means that a large portion of the South African population will now have better and equal access to both life and non-life insurance.

2 6 The Conduct of Financial Institutions Bill

As was mentioned above, the FAIS Act will be repealed and replaced by the Conduct of Financial Institutions (COFI) Bill. The repealing of the FAIS Act comes as a result of its failures to deal effectively with various aspects of the conduct of FSPs. The FSCA noted that the COFI Bill will be a risk-based and

⁴⁶ 18 of 2017.

⁴⁷ 9 of 2017.

⁴⁸ See schedule 2 of the FSRA as well as s 30 of the FSR Act.

⁴⁹ See Rule 2A of the updated 2018 PPRs.

⁵⁰ *Ibid.*

proportionate piece of market-conduct law.⁵¹ The Bill will be infused with the Treating Customers Fairly (TCF) initiatives outcomes, in contrast to the FAIS Act, which was only concerned with the conduct of FSPs.

The general discomfort and apparent failure of the common law, the STIA and the FAIS Act to bring about a dispensation where insurance contracts are fair to both parties paved the way for the introduction of the TCF regime. The concept of treating customers fairly stems from the broader legislative reform known as the Twin-Peaks model.⁵² The Twin-Peaks model has been implemented in the FSRA, which also encompasses the TCF principles. TCF has also been embedded in the PPRs.⁵³

The TCF model as a fundamental set of values in the Twin-Peaks system is based around the product life cycle.⁵⁴ Any financial product that is being sold to a consumer will have to adhere to the TCF outcomes and these outcomes (which are discussed hereunder) are all relevant to the different stages or phases of the product life cycle. TCF is one of the outcomes-based regulatory and supervisory approaches in terms of the Twin-Peak model that is specifically designed to ensure that specific, clearly expressed fairness outcomes for financial services consumers are delivered by regulated financial firms. The aim of TCF is thus consumer protection.⁵⁵

The TCF framework uses a combination of market-conduct principles and explicit rules to drive the delivery of clear and measurable fairness outcomes.⁵⁶ These outcomes aim to ensure that customers are confident that they are dealing with firms where the fair treatment of customers is central to the firm culture and that customers are treated fairly at all stages of the financial product lifecycle, from product design, marketing and advice through to claim or benefit realisation stage.⁵⁷

⁵¹ Faurie "A New Playing Field with the Introduction of the FSCA" (2018) <http://www.fia.org.za/blog/a-new-playing-field-with-the-introduction-of-the-fsca/> (accessed 2019-03-02).

⁵² The Twin-Peaks model recognises two separate regulators in terms of market-conduct regulations and prudential regulations. The FSRA and the COFI Bill will manage these two separate regulators.

⁵³ See Rattue "Has TCF Made the FAIS Act Superfluous?" 2015 *Money Marketing* 10.

⁵⁴ From product design, marketing and advice through to claim or benefit realisation stage.

⁵⁵ The reason for the implementation of TCF is that there is generally an imbalance between customers of financial products and the financial providers themselves in terms of information and bargaining positions. See Millard and Hattingh *The FAIS Act Explained* 8–9. It is due to this imbalance that these financial services customers are vulnerable to market-conduct abuses; see also Reinecke "Treating Customers Fairly" 12(2) *The Law of South Africa (LAWSA) Insurance Part 2* par 360; see also Millard and Maholo 2016 *THRHR* 595. The risk is especially aggravated in the case of insurance policies because these products are often complex and cumbersome. Even though the TCF framework has been received with some reservation, it is the way in which the entire industry seems to be moving forward; see further Millard "Through the Looking Glass: Fairness in Insurance Contracts – A Caucus Race?" 2014 *THRHR* 547 548–549.

⁵⁶ LAWSA "Treating Customers Fairly" par 360; see also *Margaret Lilian Posgate v D Risk Insurance Consultants CC and Deeb Raymond Risk* (case nr FAIS 09479/10-11/GP1).

⁵⁷ *Schroeder v Central Retirement Annuity Fund* [2015] 1 BPLR 94 (PFA); see, for more detail, the Financial Service Board publication available on the Financial Service Board website www.fsb.co.za entitled "Treating Customers Fairly – The Roadmap" (31 March 2011), and the references to the Treating Customers Fairly regime in the policy documents referred to earlier in this paragraph; see Millard and Maholo 2016 *THRHR* 597.

The six TCF outcomes are the following:

- Customers can be confident they are dealing with firms where TCF is central to the corporate culture.
- Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly.
- Customers are provided with clear information and kept appropriately informed before, during and after point of sale.
- Where advice is given, it is suitable and takes account of customer circumstances. This outcome is particularly important to insurance brokers.
- Products perform as firms have led customers to expect, and service is of an acceptable standard and as they have been led to expect.
- Customers do not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint.

Evidently, the COFI Bill will have a meaningful impact on the protection of consumers. The infusing of the TCF outcomes in the Bill is the strongest driver in the consumer protection area of this Bill.

2 7 Evaluation

It is evident from the above paragraphs that the new insurance dispensation in South Africa is strongly aimed towards the protection of consumers, with the PPRs being the strongest role player in this regard. The updated PPRs contain numerous provisions aimed at protecting policyholders from the design phase, to the advertising phase and even to the claims stage. The new provisions on micro-insurance are laudable in terms of their effect on the accessibility of insurance to low-income earners in South Africa. The provisions are strongly aimed at protecting these more vulnerable consumers.

The concept of TCF⁵⁸ has been introduced into the new PPRs as well as the COFI Bill and these principles are an example of how consumer protection mechanisms are being incorporated into current legislation.⁵⁹ Insurers have to comply with the TCF principles⁶⁰ as these principles are embedded in the PPRs.⁶¹

⁵⁸ As discussed above.

⁵⁹ Millard states that when first published on the Financial Services Board's website, insurers and individuals were faced with what was essentially two distinct streams of regulation – namely, the insurance statutes and FAIS Act on the one hand, and TCF on the other; see Millard 2014 *THRHR* 547–566. That means that before the promulgation of the 2018 PPRs on 1 January 2018, insurers were encouraged to take cognisance of TCF but could not be forced to comply with TCF as a separate set of rules.

⁶⁰ See paper delivered by Millard “COFI and T(CF): Further Along the Road to Twin Peaks” at ABLU (2017).

⁶¹ See *Forge v Old Mutual* (case number FAIS 03558/16-17 KZN 4). For a discussion of the determination, see Millard 2017 20(2) *Juta's Insurance Law Bulletin* 43–47. The ombud pronounces with great conviction that “Financial Services Providers (FSPs) respondents are

Evidently, consumer protection measures in non-life insurance contracts are becoming the norm. All the amendments and changes to the insurance legislation are aimed at providing a fairer dispensation between insurer and insured. This part of the article has considered the South African position. Australia and New Zealand's insurance dispensation are highlighted next with specific reference to consumer protection measures.

3 AUSTRALIAN INSURANCE

3.1 Introduction to legal framework

Consumer protection is a key concept in insurance policies today. The general law in Australia (which consists of both statute and common law) contains a number of consumer protections in relation to contracts of insurance.⁶² The most significant statute governing consumer protection is the Australian Consumer Law under the Competition and Consumer Act 2010.⁶³ This Act, however, does not apply to insurance contracts.⁶⁴ The Insurance Contracts Act (ICA) 1984 and the Corporations Act 2001 do, however, contain certain provisions aimed at the protection of policyholders. The Australian Securities and Investments Commission (ASIC) Act 2001 is also applicable to the insurance industry as it regulates financial services organisations and professionals who deal and provide advice on insurance.⁶⁵

3.2 The ICA

Section 37 of the ICA places an obligation on the insurer to inform the policyholder of any unusual terms contained in the policy.⁶⁶ The section goes on to state that the insurer will not be allowed to rely on the provision unless it had informed the policyholder in writing of the consequences of such provisions. This section is therefore aimed at informing the policyholder of

bound by the 'Treating Customers Fairly' (TCF) principles, which have now been accepted within the entire financial services industry".

⁶² There is Australian consumer protection and fair trading legislation enacted at both federal and state government levels.

⁶³ This can be likened to the CPA in South Africa.

⁶⁴ Take note that in South Africa, the CPA is also not applicable to insurance contracts. Similar consumer protection legislation in respect of financial services is to be found in the Australian Securities and Investments Commission Act 2001 (ASIC Act).

⁶⁵ Take note that a proposal paper put forward by the Commonwealth Treasury in June 2018 is now proposing that the provisions on unfair terms as contained in the ASIC must now apply to insurance contracts. Prior to this proposal, the ICA 1984 provided that a contract of insurance that is subject to the Insurance Contracts Act is not capable of being made the subject of relief under any other legislation, and so the unfair contract terms that are implied in other financial services contracts under the ASIC Act are not applicable to contracts of insurance.

⁶⁶ S 37 provides as follows: "An insurer may not rely on a provision included in a contract of insurance (not being a prescribed contract) of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer clearly informed the insured in writing of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise)."

the consequences of any “unusual” term in the contract. The term “unusual” is not defined in the Act but it is submitted that it includes provisions that differ from the standard terms of the prescribed contract. The term “prescribed contract” means “a contract of insurance that is included in a class of contracts of insurance declared by the regulations to be a class of contracts in relation to which this Division applies.” Therefore, it is not entirely clear what would be considered an “unusual” term but it appears that it would include provisions that are not common in insurance contracts.

Another protection afforded to policyholders is that any provision in a contract of insurance that permits an insurer to vary the contract unilaterally to the prejudice of a person other than the insurer is void.⁶⁷ An insurer is also not permitted to “contract out” of the provisions of the ICA to the extent that it would have the effect of excluding or restricting the operation of the Act to the detriment of a person other than the insurer.⁶⁸

Section 52 provides as follows:

“Contracting out” prohibited (1) Where a provision of a contract of insurance (including a provision that is not set out in the contract but is incorporated in the contract by another provision of the contract) purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void. (2) Subsection (1) does not apply to or in relation to a provision the inclusion of which in the contract is expressly authorized by this Act.”

Section 54 of the ICA can also operate in favour of the policyholder by preventing an insurer from relying on a contractual breach by a policyholder or an exclusion in the insurance policy to the extent that the relevant act or omission by the policyholder has not caused or contributed to loss claimed by the policyholder under the policy.⁶⁹

⁶⁷ S 53 of the ICA: “Where a provision included in a contract of insurance (other than a contract of insurance that is included in a class of contracts declared by the regulations to be a class of contracts in relation to which this section does not apply) authorizes or permits the insurer to vary, to the prejudice of a person other than the insurer, the contract, the provision is void.”

⁶⁸ S 52 of the ICA.

⁶⁹ S 54 reads as follows: “Insurer may not refuse to pay claims in certain circumstances. (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer’s liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer’s interests were prejudiced as a result of that act. (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim. (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act. (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act. (5) Where: (a) the act was necessary to protect the safety of a person or to preserve property; or (b) it was not reasonably possible for the insured or other person not to do the act the insurer may not refuse to pay the claim by reason only of the act. (6) A reference in

Section 57 of the ICA is a further provision that provides a certain degree of protection to policyholders. The section provides for interest penalties to be applied to any claim that the insurer fails to pay within a reasonable time. Interest at the rate prescribed by regulation may be incurred and in certain circumstances, the insurer's outstanding payment can become the subject of compound interest.⁷⁰ Therefore, there are strict requirements on the insurer to pay within a certain period and, if the insurer does not abide by this rule, section 57 comes into operation and entitles the insured to a certain amount of interest.

The circumstances in which an insurer is able to cancel or avoid a contract of insurance are limited to those prescribed in the Insurance Contracts Act 1984.⁷¹ This, therefore, offers policyholders certain protection from insurers attempting to cancel a policy for any reason whatsoever. Section 60 thus limits the rights of an insurer to cancel a policy. An insurer is unable to cancel a contract of general insurance except in the circumstances outlined by section 60 of the ICA.⁷² These are the following: a breach of the

this section to an act includes a reference to: (a) an omission; and (b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.”

⁷⁰ S 57 provides as follows: “Interest on claims (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section. (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days: (a) the day on which the payment is made; (b) the day on which the payment is sent by post to the person to whom it is payable. (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations. (4) This section applies to the exclusion of any other law that would otherwise apply. (5) In subsection (4): *law* means: (a) a statutory 7.6.2.2 law of the Commonwealth, a State or a Territory; or (b) a rule of common law or equity.”

⁷¹ See s 60 of the ICA.

⁷² S 60 reads as follows: “Cancellation of contracts of general insurance (1) Where, in relation to a contract of general insurance: (a) a person who is or was at any time the insured failed to comply with the duty of the utmost good faith; (b) the person who was the insured at the time when the contract was entered into failed to comply with the duty of disclosure; (c) the person who was the insured at the time when the contract was entered into made a misrepresentation to the insurer during the negotiations for the contract but before it was entered into; (d) a person who is or was at any time the insured failed to comply with a provision of the contract, including a provision with respect to payment of the premium; or (e) the insured has made a fraudulent claim under the contract or under some other contract of insurance (whether with the insurer concerned or with some other insurer) that provides insurance cover during any part of the period during which the first-mentioned contract provides insurance cover; the insurer may cancel the contract. (2) Where: (a) a contract of general insurance includes a provision that requires the insured to notify the insurer of a specified act or omission of the insured; or (b) the effect of the contract is to authorize the insurer to refuse to pay a claim, either in whole or in part, by reason of an act or omission of the insured or of some other person; and, after the contract was entered into, such an act or omission has occurred, the insurer may cancel the contract. (3) A reference in subsection (2) to an act or omission of the insured includes a reference to an act or omission of the insured that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter. (4) Where a contract of insurance is: (a) a contract that is in force by virtue of section 58; or (b) an interim contract of general insurance, the insurer may at any time cancel the contract.”

duty of utmost good faith; a breach of the duty of disclosure; a misrepresentation; a breach of a provision of the contract (including, non-payment of premium); a fraudulent claim under the contract; and an act or omission of the insured that is required to be notified to the insurer or the occurrence of which gives rise to a right to refuse to pay a claim. A general insurer wishing to cancel a policy of insurance must follow the procedure outlined in section 59 of the ICA, which provides for the giving of written notice.⁷³

3 3 The Corporations Act

A contract of insurance can also be subject to the disclosure requirements of the Corporations Act 2001, in terms of which an insurer is required to satisfy additional obligations for product disclosure statements that contain the details, key terms and conditions and risks associated with the insurance contract.⁷⁴ A person who issues a product disclosure statement must ensure that the document is clear, concise and effective in order to aid a consumer's understanding of the insurance contract that they are purchasing.⁷⁵

3 4 The ASIC Act

The ASIC Act is a very interesting Australian statute. The Act contains provisions relating to consumer protection and specifically regulates unfair terms.⁷⁶ On 27 June 2018, the Commonwealth Treasury released a proposal paper that will now recognise the unfair term provisions in the ASIC Act as being applicable to all standard form insurance contracts.⁷⁷ Prior to this, the ASIC Act provisions on unfair terms⁷⁸ did not apply to insurance contracts

⁷³ S 59 provides for the cancellation procedure: "(1) An insurer who wishes to exercise a right to cancel a contract of insurance shall give notice in writing of the proposed cancellation to the insured. (2) The notice has effect to cancel the contract at whichever is the earlier of the following times: (a) the time when another contract of insurance between the insured and the insurer or some other insurer, being a contract that is intended by the insured to replace the first-mentioned contract, is entered into; (b) whichever is the latest of the following times: (i) 4 pm on the applicable business day; (ii) if a time is specified for the purpose in the contract—that time; (iii) if a time is specified in the notice—that time. (2A) In subparagraph (2)(b)(i): applicable business day means: (a) in respect of a contract that is not a contract of life insurance: (i) if the contract is in force because of section 58, the fourteenth business day; or (ii) otherwise, the third business day; or (b) in respect of a contract of life insurance, the twentieth business day; after the day on which the notice was given to the insured. (3) This section does not apply to a contract of life insurance if the life policy that is constituted by the contract may be forfeited in accordance with subsection 210(5) of the *Life Insurance Act 1995*." Where a general insurer is in liquidation, it can cancel a contract of insurance at any time (s 61, Insurance Contracts Act 1984).

⁷⁴ See s 949A of the Corporations Act 2001.

⁷⁵ See s 949B of the Corporations Act 2001.

⁷⁶ See s 12BF and s 12BH of the ASIC Act for a comprehensive list of unfair terms.

⁷⁷ Commonwealth Treasury "Extending Unfair Contract Terms Protections to Insurance Contracts" Proposal Paper June 2018 https://static.treasury.gov.au/uploads/sites/1/2018/06/t284394_UCT_Insurance_Contracts_Proposals_Paper_Aug.pdf (accessed 2019-03-31).

⁷⁸ According to s 12BH of the Act, "unfair terms" includes the following:

"(1) Without limiting section 12BG, the following are examples of the kinds of terms of a contract referred to in subsection 12BF(1) that may be unfair:

because section 15 of the ICA did not allow other laws offering relief to policyholders to apply to a contract of insurance if the ICA applied.⁷⁹ The proposal paper thus contains an amendment to section 15 of the ICA that would allow the current unfair contract terms laws in the ASIC Act to apply to insurance contracts regulated by the Insurance Contracts Act; and tailors the unfair contract terms laws in the ASIC Act to accommodate specific features of insurance contracts.⁸⁰

The protections offered by the ASIC Act on unfair contract terms will be significant when applied to insurance contracts. These provisions will provide substantial protection to policyholders by protecting them from any unfair terms contained in insurance policies.

3 5 Evaluation

It is evident from the above that there are many provisions within the ICA as well as the Corporations Act that are aimed at the protection of policyholders. These provisions are vital to prove that there is definitely a move towards a fairer balance between insurers and policyholders. It is no longer all about insurers only protecting their own interests. Rather, legislation in Australia has shown a strong movement toward creating a fairer balance between insurer and insured.

-
- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
 - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
 - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
 - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
 - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
 - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
 - (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;
 - (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
 - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
 - (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
 - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
 - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
 - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
 - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations."

⁷⁹ See s 15 of the ICA.

⁸⁰ Commonwealth Treasury https://static.treasury.gov.au/uploads/sites/1/2018/06/t284394_UCT_Insurance_Contracts_Proposals_Paper_Aug.pdf.

The fact that the Treasury has proposed that the ASIC Act's unfair terms provisions should apply to insurance contracts is noteworthy. This will have a significant impact on policyholders and is a move in the right direction towards protecting consumers from unfair terms in insurance policies.

4 NEW ZEALAND INSURANCE

4.1 Introduction to legal framework

Insurance laws in New Zealand are generally antiquated and fragmented. The insurance legislation consists of the Marine Insurance Act 1908, the Insurance Law Reform Act 1977 and the Insurance Law Reform Act 1985 and they are all generally outdated. The objective of the New Zealand Law Commission is to consolidate and update New Zealand's insurance laws. In 2008, the Insurance Contracts Bill (IC Bill) was drafted. However, this Bill is yet to be passed.⁸¹ The Bill is aimed at the reform of two key areas in insurance law: the duty of disclosure⁸² and the agency status of insurance intermediaries.⁸³ In terms of consumer protection measures in insurance contracts, New Zealand has the Fair Insurance Code (FIC),⁸⁴ which requires its members to act ethically and to be financially sound.⁸⁴ This code of practice is of significance to policyholder protection. In addition, insurers are subject to the consumer protection provisions in the Consumer Guarantees Act 1993⁸⁵ and the Fair Trading Act 1986.⁸⁶ These two Acts are specifically

⁸¹ In 2017, the new Prime Minister of New Zealand stated that there was an urgent need for reform in insurance contracts and that the reason the IC Bill had not been passed yet was that resources were being used elsewhere. However, with all the insurance contract disputes arising since the Christchurch earthquakes in 2011, the need for this Bill to be passed was becoming dire. See Gates and Leman "New Zealand Insurance Law Reform Begins" (2008) <http://www.mondaq.com/NewZealand/x/58990/Insurance/New+Zealand+Insurance+Law+Reform+Begins> (accessed 2019-03-02).

⁸² Which is still based on the common-law position. See s 18 of the Marine Insurance Act, 1908.

⁸³ In terms of insurance intermediaries, the proposal was to move away from commission entitlements as a way of determining agency, and instead rely on the existence of written appointments. The insurance intermediary was the agent of the party who appointed him or her in writing. Where no written appointment was in place, the default position was that the intermediary was the agent of the insured. See also Gates and Leman <http://www.mondaq.com/NewZealand/x/58990/Insurance/New+Zealand+Insurance+Law+Reform+Begins>.

⁸⁴ See the ICNZ "Fair Insurance Code" <http://www.icnz.org.nz/for-consumers/your-rights/fair-insurance-code/> (accessed 2017-11-10). This has been introduced by the Insurance Council of New Zealand (ICNZ).

⁸⁵ S 1A Purpose "(1) The purpose of this Act is to contribute to a trading environment in which— (a) the interests of consumers are protected; and (b) businesses compete effectively; and (c) consumers and businesses participate confidently. (2) To this end, the Act provides that consumers have— (a) certain guarantees when acquiring goods or services from a supplier, including— (i) that the goods are reasonably safe and fit for purpose and are otherwise of an acceptable quality; and (ii) that the services are carried out with reasonable care and skill; and (b) certain rights of redress against suppliers and manufacturers if goods or services fail to comply with a guarantee." The word "services" includes (without limitation) "the rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier under any of the following classes of contract: (iii) a contract of insurance, including life assurance and life reinsurance."

aimed at the protection of consumers. The Fair Trading Amendment Act 2013 contains provisions on unfair contract terms in standard form contracts.⁸⁷ It is important to note that the provisions only apply to insurance contracts entered into on or after 18 March 2015. Therefore, they do not apply to insurance contracts entered into before 18 March 2015, or variations or renewals of insurance contracts entered into before 18 March 2015, regardless of when the variation or renewal takes place.⁸⁸

4 2 Specific statutes aimed at the protection of policyholders

Despite New Zealand's failure to update insurance legislation, the last two decades has seen a strong trend towards policyholder protection in relation to insurance contracts. The legislature is aware that insured parties are usually in a much more vulnerable position than insurers and may therefore be subject to abuse by them in the form of unfair treatment. Many policyholders are not aware of their rights in terms of disclosures and fair treatment by insurers and therefore lack knowledge about policyholder protection rules. Through education, this is changing. The legislature is drafting codes of good practice that insurers must abide by and they are also drafting legislation that is primarily aimed at policyholder or consumer protection. It is interesting to note that New Zealand does have a significant amount of consumer protection legislation; how this affects insurance law is discussed below.

4 2 1 The Fair Trading Act 1986 and The Fair Trading Amendment Act 2013

The first noteworthy statute is the Fair Trading Act 1986.⁸⁹ This Act prevents a person in trade from engaging in misleading and deceptive conduct. Recent amendments to the Act in 2013 introduced restrictions on unfair terms in standard-form consumer contracts.⁹⁰ It is worth noting that the

⁸⁶ See s 1A of the Act which sets out the purpose. Subsection 1 states that the interests of consumers are protected by the Act and subsection 2 prohibits certain unfair conduct, promotes fair conduct and provides for the disclosure of consumer information relating to the supply of goods and services.

⁸⁷ See s 46J–M of the Fair Trading Amendment Act 2013.

⁸⁸ See s 26A of the Fair Trading Amendment Act 2013.

⁸⁹ The Act has recently undergone amendments in the form of the Fair Trading Amendment Act 2013.

⁹⁰ S 26A provides: "Unfair contract terms in standard form consumer contracts (1) If a court has declared, under section 46I, that a term in a standard form consumer contract is an unfair contract term, a person must not— (a) include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or (b) apply, enforce, or rely on the unfair contract term in a standard form contract. (2) The prohibitions in subsection (1) do not apply to any contract entered into before this section comes into force; but if the contract is varied or renewed on or after this section comes into force, the contract must be treated as a new contract for the purposes of subsection (1). (3) However, in the case only of a contract of insurance (as defined in section 7 of the Insurance (Prudential Supervision) Act 2010) entered into before this section comes into force, the prohibitions in subsection (1) do not apply to— (a) the

legislation recognises that there are some terms that are necessary to protect the insurer and that will therefore not be considered “unfair” – such as provisions that identify the subject matter or risk insured; impose obligations of good faith; specify the sum insured; or describe the basis on which claims are settled.⁹¹

As mentioned above, the Amendment Act contains numerous examples of terms that are considered to be unfair contract terms. Section 46M sets out specific examples of unfair contract terms:⁹²

“Without limiting section 46L, the following are examples of the kind of terms that, if in a consumer contract, may be unfair contract terms:

- “(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price (as defined in section 46K(2)) payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether a contract has been breached or to interpret its meaning;

contract; or (b) any variation of the contract; or (c) any new contract that has the effect of operating as a renewal of the contract, and any subsequent renewal.”

⁹¹ S 46L reads as follows: “(4) For the purpose of subsection (1)(b), and despite anything in section 46M, in relation to contracts of insurance only, the following terms must be taken to be terms that are reasonably necessary in order to protect the legitimate interests of the insurer; (a) a term that identifies the uncertain event or that otherwise specifies the subject matter insured or the risk insured against; (b) a term that specifies the sum or sums insured or assured; (c) a term that excludes or limits the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; (d) a term that describes the basis on which claims may be settled or that specifies any contributory sum due from, or amount to be borne by, an insured in the event of a claim under the contract of insurance; (e) a term that provides for the payment of the premium; (f) a term relating to the duty of utmost good faith that applies to parties to a contract of insurance; (g) a term specifying requirements for disclosure, or relating to the effect of non-disclosure or misrepresentation, by the insured. (5) In subsection (4), “contract of insurance” has the meaning given in section 7 of the Insurance (Prudential Supervision) Act 2010 “premium” has the meaning given in section 6 of the Insurance (Prudential Supervision) Act 2010 “uncertain event” has the meaning given in section 7 of the Insurance (Prudential Supervision) Act 2010.”

⁹² See New Zealand Law Commission “*Unfair Contracts: A Discussion Paper* (Preliminary Paper No 11, 1990) 7 <http://www.nzlii.org/nz/other/lawreform/NZLCPP/1989/11.html> (02-03-2019): “The principle of [equity] setting aside unfair transactions (using unfair in its active sense) was thus clearly established 100 years ago”; see also Nahan and Webb “Unfair Contract Terms in Consumer Contracts” in Malbon and Nottage (eds) *Consumer Law & Policy in Australia & New Zealand* (2013) 129 131; see also Sims “Unfair Contract Terms: A Dawn in Australia and New Zealand” 2013 *Monash University Law Review* 739.

- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.⁹³

These provisions apply to standard form consumer contracts and include insurance contracts entered into after 18 March 2015. These provisions are based on protecting the consumer from unfair terms in an insurance policy.⁹⁴

4.2.2 *The Consumer Guarantees Act*

The Consumer Guarantees Act 1993⁹⁵ provides that certain guarantees are implied into contracts for the supply of goods and services to customers.⁹⁶ Under this Act, specifically part 4 of the Act, insurance contracts must be drafted with reasonable skill and care, be fit for their purpose and sold for a reasonable price.⁹⁷

⁹³ See Tokeley "Introducing a Prohibition on Unfair Contractual Terms into New Zealand Law: Justifications and Suggestions for Reform" 2009 *New Zealand Universities Law Review* 419 421–422; see also Sims 2013 *Monash University Law Review* 739.

⁹⁴ See Sims 2013 *Monash University Law Review* 739.

⁹⁵ This Act is similar to South Africa's CPA. However, it is worth noting that in South Africa the CPA does not apply to insurance contracts, whereas the Consumer Guarantees Act does apply to insurance contracts.

⁹⁶ This Act does apply to insurance contracts. The definition of service under the Act reads as follows: "services (b) includes (without limitation) the rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier under any of the following classes of contract: ... (iii) a contract of insurance, including life assurance and life reinsurance."

⁹⁷ S 28 provides for the guarantee of reasonable care and skill. Subject to s 41, where services are supplied to a consumer, there is a guarantee that the service will be carried out with reasonable care and skill. S 32 reads as follows: "Options of consumers where services do not comply with guarantees Where a service supplied to a consumer fails to comply with a guarantee set out in any of sections 28 to 30, the consumer may, (a) where the failure can be remedied, (i) require the supplier to remedy it within a reasonable time; (ii) where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time, (A) have the failure remedied elsewhere and recover from the supplier all reasonable costs incurred in having the failure remedied; or (B) subject to section 35, cancel the contract for the supply of the service in accordance with section 37(1) (b) where the failure cannot be remedied or is of a substantial character within the meaning of section 36, (i) subject to section 35, if there is a contract between the supplier and the consumer for the supply of the service, cancel that contract in accordance with section 37; or; (ii) obtain from the supplier damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the consumer for the service; (c) in addition to the remedies set out in paragraphs (a) and (b), obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the product of the service) which was reasonably foreseeable as liable to result from the failure."

At common law, a court will not give effect to an unreasonably onerous or unusual contract term, unless it was made clear to the other party. This is in line with fairness towards policyholders; onerous clauses must be brought to the attention of the policyholder and, as a result, the policyholder cannot claim that they were not aware of the existence of such an onerous clause.

4 2 3 The Fair Insurance Code

The Insurance Council of New Zealand recently published a revised version of the Fair Insurance Code 2010.⁹⁸ These revisions came into effect on 1 January 2016. The Code generally sets out the responsibilities of both insurer and insured towards one another before the contract is entered into as well as during the contract and includes specifics dealt with at claims stage. Some of the key changes in the new, updated Code are enhanced communication responsibilities when describing to the policyholder what their disclosure obligations are; commitments by insurers to act reasonably when faced with a policyholder who has not met all of their disclosure obligations; and specific time frames set in place for acknowledging claims and determining whether to accept claims. The Code is set out to create a better and fairer balance between the rights of policyholder and insurer.

The new Code sets a high threshold for insurers so that the public has confidence when dealing with insurers. Interestingly, the Code sets out what is expected by both insurer and policyholder. It provides a detailed guideline as to the information insurers require from the policyholder and also spells out the procedures to be followed by the insurers in order to satisfy policyholders' claims.

4 3 Evaluation

Although New Zealand's insurance laws have remained rather stagnant for many decades, rules on consumer protection have developed slightly. This is interesting especially where the general laws have not been updated. The fact that consumer protection measures are still being included and updated in the insurance industry is proof that these types of measures are important. Consumer protection is clearly developing in the realm of insurance contracts in New Zealand, despite generally antiquated insurance laws.

5 CONCLUSION

Protecting consumers, as a general concept, has become a trend in many jurisdictions and industries. The insurance industry worldwide appears to be keeping up with this trend. In South Africa, the PPRs are the main rules regulating consumer protection in the advertising, product design, and selling of insurance products. The rules are constantly undergoing amendments to bring the rules into line with the ever-developing insurance industry. It is evident that the inclusion of the TCF principles in the soon-to-

⁹⁸ The new version came into effect on 1 January 2016.

be-enacted COFI Bill will also have a significant impact on the protection of consumers with regard to financial products. South Africa appears to be keeping up with its international counterparts when it comes to the protection of consumers in insurance contracts.

In both Australia and New Zealand, the importance of protecting consumers in insurance contracts is being recognised. Provisions affecting the rights of policyholders are being included in legislation as well as being updated. This demonstrates the prominence of consumer protection as a trend in these jurisdictions. Consumers are finally being treated with the importance that they require; no longer can insurers treat them in a manifestly unfair manner.