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Consumer Protection Act 68 of 2008

The Consumer Protection Act No 68 of 2008 ("the Act") was assented to by the President on 24 April 2009, published in Government Gazette No 32186 and was initially expected to into effect on the 24th of October 2010. However, on the 23rd of September 2010, the Minister of Trade and Industry announced that the general implementation date has been deferred to the 31st of March 2011. It is however expected that the Regulations to the Act are to be issued shortly for comment.

The Act seeks to promote and advance the social and economic welfare of consumers through the establishment of a legal framework for fair and accessible consumer markets. It identifies vulnerable consumers including low income persons, those living in remote communities, minors, seniors and aims to reduce the disadvantages they may experience.

The objectives of the Act are to:

Promote:

- a fair, accessible and sustainable market place for consumer products and services responsible consumer behaviour; and

- a consistent enforcement framework relating to consumer transactions and agreements.

Prohibit:

- Certain unfair marketing and business practices.

Provide:

- improved standards of consumer information;
- harmonisation of laws relating to consumer transactions and agreements; and
- establishment of the National Consumer Commission.

In essence the Act is consistent with fundamental rights entrenched in the Constitution and broadens the scope of common law.

Applications of the Act

The Act applies to all transactions within the Republic unless they are exempted either:

- in terms of goods or services promoted or supplied to the State;
- in instances where the consumer is a juristic person whose asset value or annual turnover exceeds a certain threshold value;

In instances where the transaction falls within an exemption granted by the Minister. In terms of the third instance above, a regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the Act. The Minister may grant the exemption only to the extent that the relevant regulatory scheme ensures achievement of the purposes of the Act.

Important definitions to note

The definitions of the Act include “service” which reads:

“...any banking service or related or similar financial services or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service –

1. *constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (“FAIS Act”); or*
2. *is regulated in terms of the Long-term Insurance Act 52 of 1998 (“LTIA”), or the Short-term Insurance Act 53 of 1998 (“STIA”).*

Taking into account the definition of “service” above and also the provision made with respect to regulatory authorities being afforded to the opportunity to seek exemption, it is expected that the Act should not apply to the insurance industry.

However, this is contingent on the relevant sector laws for which the Financial Services Board (“FSB”) is the regulatory authority first being aligned with the consumer protection measures provided for in the Act within the 18 month period from the date the Act was signed by the president. The laws referred to include the FAIS Act, LTIA and the STIA all of which fall under the auspices of the FSB.

Regardless of whether it is the Act itself or via alignment of the FAIS Act, LTIA and STIA, it is advisable that insurers familiarize themselves with the provisions of the Act.

Furthermore in many instances, insurers and the various parties involved in the distribution and servicing of insurance products including intermediaries, administrators etc may provide other non-insurance related services and or transact with products that would nevertheless be subject to the Act.

This of course is especially true with

respect to many of our clients that have cell facilities through which they provide insurance offerings as an ancillary to their core businesses.

Chapter 2 of the Act comprises various parts that provide details of various consumer rights. Below is a high level summary of some of the rights:

- **Right to Privacy:** (Sec. 11 – 12) Personal and confidential information must be used only for purposes permitted or required in terms of the Act.
- **Right to Choose:** (Sec. 13) recognises the consumer’s right to select suppliers, further deals with the continuation of the transaction, expiry or cancellation of fixed term agreements (Sec. 14) and limits rights of suppliers to impose cancellation charges.
- **Cooling-off period after direct marketing:** (Sec. 16) Consumer has 5 working days to cancel the transaction without having to provide reason or having penalties imposed.
- **Right to information** (Sec. 22) Right to information in plain and understandable language.
- **Disclosure of price of goods or services** (Sec. 23) sets out all required disclosures.
- **Disclosure by intermediaries** (Sec. 27) Intermediaries must disclose all prescribed information to any person whom they solicit or agrees to represent and keep the prescribed records of all relationship and transactions.
- **Fair & Reasonable Marketing** (Part E). Prohibits misleading, fraudulent and deceptive marketing mechanism such as “bait marketing, negative options and referral selling” etc.

Another important aspect is Section 49 which deals with notices. The Act does not prohibit notices or disclaimers, but it does assist consumers to challenge the impact of such notices where they do not comply with the provisions of the Act. The simpler the wording of a disclaimer, notice, term, condition, etc, the more effective it could be.

Liability for damage caused by goods

Although this section also emanates out of Chapter 2, we will deal with it separately as it warrants highlighting.

Strict liability is imposed by the Act in Section 61 which states that **any** "supplier" in the supply chain **will be liable** for harm caused by the supply of unsafe goods; or product failure; or a defect or hazard: or inadequate instructions or warnings on goods sold to a consumer.

Supply chain means "the collectivity of all suppliers who directly or indirectly contribute to the ultimate supply of goods or services to the consumer, whether as producer / manufacturer, importer, distributor or retailer.

The consumer does not have to prove negligence, all that is needed to establish liability is to show a **causal link** between the harm and the "defective product".

Conclusion

One thing from the Act is clear, any restrictive terms, including disclaimers, indemnities and the like contained in business contracts or trading conditions will need to be clear and concise and specifically pointed out to the party signing these.

The legal liability landscape within the market is likely to evolve, making clear contractual terms contained in trading conditions more essential than ever. If correctly constructed, it can be the most effective method of managing and controlling potentially devastating and even frivolous liability claims.

The focus of any business should be to address the potential liability exposure through effective risk management.

Contract terms should be professionally drafted and all terms and conditions contained therein drawn to the consumer's attention when they sign the document.

Protection of Personal Information Bill of 2009

It was announced, by the Parliamentary Sub-Committee Meeting held on the 13th of August 2010 that the Protection of Personal Information Bill ("**the Bill**") will be promulgated into law by no later than December 2010.

Currently the right to privacy is protected by the common law and Section 14 of our Constitution. Whilst common law protection may be enforced under the laws of delict, the constitutional right to privacy is not absolute and therefore may be limited in terms of a law of general application and may be balanced with other rights also entrenched in the Constitution.

The Bill seeks to balance a person's constitutionally protected right to privacy against the rights, freedoms and interests of others and it also aims to regulate the collection and processing of personal information by private and public bodies.

Applicability of the Bill

The Bill is intended to apply to the processing of personal information entered in a record by or behalf of a responsible party domiciled or used in the country provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof.

Section 4 of the Bill lists a number of instances where the provisions of the Bill shall not be applicable including the processing of personal information in the course of a purely personal or household activity.

Some important definitions

The definitions of the Act include:

- **Personal Information:** means "*information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person*" including but not limited to information relating to the education, medical, financial, criminal or employment history.
- **Data subject:** means "the person to whom personal information relates".
- **Information Protection Officer:** in relation to a private body, means the head of a private body as defined in Section 1 of the Promotion of Access to Information Act.
- **Operator:** means "a person who processes personal information for a responsible party in terms of a contract or mandate, without coming under the direct authority of that party".
- **Processing:** means "any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including:
 - (a) The collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
 - (b) Dissemination by means of transmission, distribution or making available in any other form; or
 - (c) Merging, linking, as well as blocking, degradation, erasure or destruction of information."
- **Regulator:** means "the Information Protection Regulator established in terms of the Bill".

- **Responsible Party:** means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

Information Protection Principles

The Bill sets out eight information protection principles which shall be applicable in regards to the processing of personal information:

Principle 1:

Accountability (Sec. 7)

The Responsible Party must ensure compliance with the information protection principles set out in the Bill including those measures that give effect to such principles.

Principle 2:

Processing Limitation (Sec. 8-11)

Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject.

May only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive.

Must be collected directly from the data subject and consent must be provided by the data subject. However, there are exceptions including if the information is contained in a public record or where the data subject has deliberately made it public.

Principle 3:

Purpose specification (Sec. 12-14)

Personal information must be collected for a specific, explicitly defined lawful purpose related to a function or activity of the responsible party and the data subject must be made aware of the purpose of the information collection.

Personal information records must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed unless in certain instances set in Section 14 (1) including where the law prescribes or authorises specific retention.

Responsible parties are obliged to destroy, delete or de-identify records of personal information as soon as practicable after the retention period.

Principle 4:

Further Processing Limitation (S.15)

Further processing of personal information must be compatible with the purpose for which it was initially collected and the responsible party must take into account certain factors in this respect that are set out in Section 15 (2).

Principle 5:

Information Quality (Sec. 16)

The responsible party is obliged to take reasonable practicable steps to ensure that the personal information collected and processed, is complete, accurate, not misleading and is updated where necessary.

Principle 6:**Openness** (Sec. 17)

Personal information may only be processed by a responsible party that has notified the Regulator in accordance with Chapter 6 of the Bill.

In addition, the responsible party is required to take reasonable steps to ensure the data subject is aware of the information being collected including; the name and address of the responsible party; the purpose for which the information is collected; and the consequences of failure to provide the information.

Principle 7:**Security Safeguards** (Sec. 18-21)

The underlying theme of this principle is that the responsible party is obligated to ensure that personal information in its possession is kept secure against the risk of loss, unauthorised access, interference, modification, destruction or disclosure and in addition that any operator that it has mandated also observes establishes and maintains appropriate security measures to ensure compliance.

Principle 8:**Data subject participation** (S. 22-24)

A data subject is entitled to request access to the particulars their personal information held by the responsible party, as well as the identity of any person that has access to such information. The data subject is also entitled to request the correction or deletion of any personal information held by or in the control of a responsible party in certain instances including where it's inaccurate, irrelevant, incomplete or misleading.

Processing of special personal information (Part B)

The processing of "special personal information" is dealt with in terms of Sections 25 to 32 and refers to personal information concerning a child who is subject to parental control in terms of the law or information relating to a number of items relating to a data subject including religious or philosophical beliefs, race or ethnic origin, trade union membership etc. The Bill generally prohibits the processing of special personal information lists a number of instances where exemptions apply.

Supervision

Chapter 5 (Sec. 35-49)

This chapter deals with the establishment of an Information Protection Regulator ("the Regulator"), the constitution of the office of the Regulator, the powers and duties of the Regulator etc. Furthermore it also sets out the duties and responsibilities of the information protection officers.

Codes of conduct

Chapter 7 (Sec. 57-65)

Empowers the Regulator to issue codes of conduct that will prescribe how the information protection principles are to be applied and or compliance thereto.

Enforcement, Offences and Penalties

Chapters 10 and 11 (Sec. 70-100)

Chapter 10 deals with enforcement and Chapter 11 with offences and penalties.

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