

REGULATORY COMPLIANCE MANAGEMENT RISK IN THE AFTERMATH OF THE POPI ACT

Presented at the McNaughton events POPI
Act Symposium held at the Hilton Hotel,
Sandton, on 29 August 2017
Prepared By Prof. Tshepo Mongalo
29.08.2017



REGULATORY COMPLIANCE MANAGEMENT RISK IN THE AFTERMATH OF THE POPI ACT



PROF. TSHEPO HERBERT MONGALO, B.Proc (*Summa cum Laude*), LLB (Natal), LLM (Cambridge), Cert. in Legal Writing (UCT), Cert. in Law, Social Thought & Global Governance (Brown), Cert. in Economic Policy & Social Justice (Harvard), PhD (UCT)

Head: Department of Law, Monash South Africa

Tel: +27 11 950 4147

Cel: +27 82 410 9427

Email: Tshepo.Mongalo@Monash.edu

- Objectives of the presentation

- To outline the impact of the Protection of Personal Information Act on regulatory framework risk management in the context of company law and competition law;
- To set out regulatory framework compliance changes of the Companies Act, 2008 and the Competition Act 1998 (as amended) having an impact on the application of the POPI Act; and
- To make recommendations on how regulatory compliance management risks posed by these legislative enactments can be mitigated.

• Outline of the Presentation:

- DEFINITION OF PERSONAL INFORMATION HAVING AN IMPACT ON THE CORPORATE & COMMERCIAL LAW & POLICY
- RELEVANT SECTIONS OF THE COMPANIES ACT, 2008, HAVING AN IMPACT ON PERSONAL INFORMATION OF THE DATA SUBJECT.
- RELEVANT SECTIONS OF THE COMPETITION ACT, 1998, HAVING AN IMPACT ON PERSONAL INFORMATION OF THE DATA SUBJECT.
- THE NEED FOR THE PROTECTION OF THE RELEVANT INFORMATION UNDER THE COMPANIES ACT AND THE COMPETITION ACT
- CONCLUSIONS AND OBSERVATIONS

- DEFINITION OF PERSONAL INFORMATION HAVING AN IMPACT ON THE CORPORATE & COMMERCIAL LAW & POLICY:
 - The definition of personal information with the potential to include information regulated under corporate & commercial law & policy is as follows:
 - “(e) the personal opinions, views or preferences of the person...”
 - (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.”

- RELEVANT RIGHTS OF DATA SUBJECTS:
 - Section 5, dealing with the rights of data subjects, provides, inter alia, that ‘[a] data subject has the right to have his, her or its personal information to be processed in accordance with the conditions for the lawful processing of personal information as referred to in Chapter 3 (of the Act), including the right –
 - (a) to be notified that personal information about him, her or it is being collected as provided for in terms of section 18 (notification of data subject when collecting personal information); or
 - (b) his or her or its personal information has been accessed or acquired by an unauthorized person as provided for in terms of section 22 (notification of security compromises).
 - In the context of both the Companies Act and the Competition Act, the Company secretary (as the custodian of corporate information), working with the DPO, may find himself with an obligation to ensure the realization of the rights above by data subjects, who are, usually, corporate directors.

- RELEVANT SECTIONS OF THE COMPANIES ACT, 2008, HAVING AN IMPACT ON PERSONAL INFORMATION OF THE DATA SUBJECT.
 - With the enactment of certain sections imposing liability failing to vote against certain corporate transaction, the Companies Act, 2008, effectively authorizes the collection of personal information regulated by the POPI Act.
 - These sections include:
 - S77(3)(b) - ‘acquiesced in reckless trading in contravention of s 22 despite knowing this
 - S77(3)(c) – being a party to an act or omission calculated to defraud creditors, employees or shareholders of the company
 - S 77(3)(d) – signed, consented to, or authorized the publication of untruthful financial statements or prospectus
 - S 77(3)(e) – failing to vote against (i) the issuing of any unauthorised shares; (ii) the issuing of any authorised securities in contravention of s 41; (iii) the granting of unauthorised options to any person; (iv) the provision of financial assistance to any person in contravention of s 44; (v) the provision of financial assistance to a director or prescribed officer in contravention of s 45; (vi) a resolution approving a distribution in contravention of s 46; (vii) the acquisition by the company of any of its shares (or of its related company) in contravention of ss 46 and 48; (viii) an allotment by the company of its securities contrary to Chapter 4.

- RELEVANT SECTIONS OF THE COMPETITION ACT, 1998, HAVING AN IMPACT ON PERSONAL INFORMATION OF THE DATA SUBJECT.
- Where, in terms of s 4(3), a director, member or trustee seeks to establish that a particular practice was a normal commercial response to conditions prevailing in that market and was not a prohibited restrictive horizontal practice having the effect of substantially preventing, or lessening, competition in a market.

- THE NEED FOR THE PROTECTION OF THE RELEVANT INFORMATION UNDER THE COMPANIES ACT AND THE COMPETITION ACT.
 - Record imperative for avoiding liability under s 77 of the Companies Act and firm liability under s 4 of the Competition Act
 - Director liability for anti-competitive conduct in terms of the Competition Amendment Act can also be minimized if records exist exonerating the relevant director from prohibited conduct
 - S18(1) of POPI Act requires notification to data subject when collecting personal information.
 - S22 (1) requires notification of security compromises.

– CONCLUSIONS AND OBSERVATIONS

- It is questionable whether the requirement for the notification of data subject by responsible party is unnecessary as it may be in compliance with an obligation imposed by law in terms of s 18(4)(c) of the POPI Act.

THE REASONING BEHIND AND SUITABILITY OF ORIGINAL (RATHER THAN DERIVATIVE) BOARD POWERS'

THANK YOU

