

LEPPARD LEGISLATION WATCH

JANUARY 2019

As has been the case for a number of years, a large amount of proposed legislation was published just before or during the annual festive break, when most businesses are closed and cannot react to calls for comment. So much for adequate consultation as in many instances the comment deadline was the end of January 2019! In any case, here are some of the highlights (?) of the legislation that one will need to consider in our business going forward.

Legislation for YOU

Draft Conduct of Financial Institutions Bill

The Draft Bill presents the next phase of South Africa's reform of financial sector regulation towards a Twin Peaks model approved by Cabinet in 2011. The first phase involved the development, adoption and implementation of the Financial Sector Regulation Act (FSRA).

The FSRA created the two top regulators for the financial services sector:

- (i) The Prudential Authority, responsible for the safety and soundness of financial institutions so that these institutions are and remain able to make good on financial commitments to customers; and
- (ii) The Financial Sector Conduct Authority (Conduct Authority), responsible for the conduct of financial institutions and the fair treatment of financial customers; financial education; and the efficiency and integrity of the financial markets.

The current Draft Bill aims to deal with the second of the Twin Peaks by putting in place a single comprehensive law for the regulation of market conduct in the financial sector. It will be administered by the Conduct Authority.

Application

The provisions of the Draft Bill apply across the financial sector to all entities providing financial products and services. Instead of separate conduct rules and procedures for different kinds of financial institutions, requirements and regulation will apply to activities, irrespective of the nature of the entity that engages in such an activity.

Provision is made for flexibility to exempt or exclude providers that pose low conduct risk and therefore do not have to be subjected to unnecessarily onerous regulatory compliance requirements. Furthermore, the Conduct Authority will be required to set standards, develop and implement its supervisory approach, and enforce requirements, in a manner that is proportionate to the nature, size, scale and complexity of the risks associated with a type of activity or institution and which is proportionate to achieving the purpose of the requirement.

Licensing

The Draft Bill proposes a new licensing framework for financial institutions. The current variety of registrations and authorisations in the financial sector is to be replaced by a single market conduct licence from the Conduct Authority. Such licences could have different authorisation categories, depending on the financial activities carried out by the institution that is licensed.

Chapter 2 sets out licensing requirements, while schedule 2 contains a list of activities requiring a licence. It is envisaged that the Conduct Authority will follow a phased approach of converting existing registrations into licences under the new system.

Culture and governance

Chapter 3 sets out the general principles and the requirements for fit and proper management, governance and operational matters. Requirements related to transformation and compliance with the Broad-based Black Economic Empowerment Act are included in this chapter.

Financial products

The provisions in chapter 4 require institutions to have clear procedures and procedures in place regarding the design of financial products they market and sell. Minimum requirements related to product performance are also dealt with.

Financial services

Chapter 5 provides for requirements on the provision of financial services. It allows for specific and tailored requirements and conduct standards to be set on the activity of financial services provision, particularly in those cases where no financial products are provided.

Miscellaneous

The Draft Bill also contains provisions dealing with:

- (i) Promotion, marketing and disclosure;
- (ii) Distribution, advice and discretionary investment management;
- (iii) Post-sale barriers and obligations;
- (iv) Safeguarding assets, and operational requirements;
- (v) Reporting;
- (vi) Remedial actions for financial customers; and

(vii) General provisions (including application of Act in relation to other laws, review, savings, spacing for institutional form, and spacing for activities of representatives.

The following Acts are proposed to be repealed by this Bill:

Collective Investment Schemes Control Act; Financial Advisory and Intermediary Services Act; Financial Institutions (Protection of Funds) Act; Long-term Insurance Act; Short-term Insurance Act.

Legislation for YOU and YOUR CLIENT

Employment Services Act: draft regulations

These Regulations seek to regulate the employment of foreign nationals (a long process needs to be completed before a work or corporate visa will be provided), and a skills transfer plan to a South African citizen must be in place.

In addition, the Regulations make provision for the registration of work seekers. Only SA citizens may register and it will be a prerequisite for claiming UIF benefits to register as a work seeker. The Department of Labour will seek to match work seekers with available employment opportunities and failure to attend or respond to these opportunities could lead to the deregistration as a work seeker (and presumably the payment of UIF benefits). Sounds like the old Labour Exchange and dole as illustrated in Andy Capp cartoons!

Draft Expropriation Bill

This piece of proposed legislation is highly contentious as being the vehicle for 'Expropriation Without Compensation'. Comment deadline 60 days from 21 December 2018. Everyone who has property should be aware of at least the following proposals contained in the Draft Expropriation Bill:

Duties that apply to an expropriating authority

An expropriating authority:

- (i) Must meet the transitional arrangements;
- (ii) May not expropriate property arbitrarily; (*Property is defined by reference to the Constitutional Right to Property - it is not limited to immovable or tangible property. Parameters are not provided for what may be considered to be arbitrarily expropriating property so that such actions will be left to often subjective interpretation.*)
- (iii) May only expropriate for a public purpose, or in the public interest; (*Public purpose is not defined other than to include any purpose connected with the administration of any of the 500+ and growing laws, and no guiding parameters are set. Public interest is not defined other than to include land reform, and reforms to bring about equitable access to all South Africa's natural resources in order*

to redress the results of past racial discriminatory laws or practices, and no guiding parameters are set.)

(iv) Must first attempt to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition thereof on reasonable terms, and only if unsuccessful consider expropriation; *(Despite the above, provision is made for urgent expropriation, as decided by an expropriating authority);*

(v) Must gather information when considering the expropriation of property, including, amongst others;

- Getting access when given by court order, owner or occupier;
- Requiring, to the extent known, the names and addresses of all persons holding unregistered rights in respect of the property and particulars of such rights, within 20 days; and
- Limiting the time and manner in which an affected person can claim compensation for damage to property caused by the information gathering exercise to a written demand, and possible legal proceedings to time limits stated in the Institution of Legal Proceedings Against Certain Organs of State Act; *(The Draft Bill does not require the expropriating authority to make affected persons aware of these rights and/or time limits);*

(vi) Must publish a notice of intention to expropriate if it is considering expropriation, and a notice of expropriation if it decides to proceed with expropriation - in both instances the information required by the Draft Bill must appear in the notices. *(Urgent expropriation, as decided by an expropriating authority, may override the duty to state the amount of compensation offered);*

(vii) Must verify unregistered rights in an expropriated property if, after the date of expropriation, a person claims to have held an unregistered right in the expropriated property for which that person has not been compensated - and must comply with the provision for consequences of expropriation of unregistered rights and duties.

The Minister responsible for public works can expropriate property or allow another state of organ to expropriate, and can delegate powers and duties to others.

Effect of an expropriation of property

Expropriation will mean that:

(i) Ownership of the property described in the notice of expropriation vests in the expropriating authority or in the person on whose behalf the property was expropriated, on the date of expropriation;

(ii) All unregistered rights in such property are simultaneously expropriated on the date of expropriation, unless expropriation thereof is specifically excluded in the notice of expropriation or those

rights, or were granted or exist in terms of the Mineral and Petroleum Resources Development Act;

(iii) In the case of a right to use a property temporarily, the expropriating authority or the person on whose behalf the property was expropriated may as from the date of expropriation exercise that right;

(iv) The property remains subject to all registered rights in favour of third parties, with the exception of a mortgage bond, with which the property has been burdened prior to expropriation, unless or until such registered rights are expropriated from the holder thereof;

(v) Possession is deemed to have passed on the date stated in the notice of expropriation or such other date as may be agreed upon between the expropriating authority and the expropriated owner or holder; *(An expropriated owner or holder in possession of the property will still have a duty to take care of and maintain the property until the date the expropriating authority takes possession. The expropriating authority may recover the amount of depreciation if the expropriated owner or holder wilfully or negligently fails to take care of and maintain the property and as a result thereof the property depreciates in value. The expropriating authority must compensate the expropriated owner or holder for costs necessarily incurred after the date of expropriation in respect of such care and maintenance.*

(vi) Provision is made for an expropriated owner or holder to try and put the expropriating authority in possession sooner than the dates stated above; and

(vii) Provision is made for an expropriated owner or expropriated holder, during possession, to remain entitled to the use of and the income from the expropriated property and liable for municipal property rates and other charges, if applicable, and normal operating costs and maintenance as if the property had not been expropriated.

Compensation for expropriation

The amount of compensation must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or holder, having regard to all relevant circumstances except those relevant circumstances listed in the Draft Bill as only to be considered in (undefined) exceptional circumstances, including:

(i) The current use of the property;

(ii) The history of the acquisition and use of the property;

(iii) The market value of the property;

(iv) The extent of direct state investment and subsidy in the acquisition and beneficial capital

improvement of the property; and
(v) The purpose of the expropriation.

Various complex time limits and requirements are placed on the expropriated owner or holder that wishes to claim interest on overdue compensation, or compensation itself.

Other matters

Provision is also made for:

- (i) Mediation and determination by court with a specific proviso added that a dispute on the amount of compensation alone does not preclude clause 9 expropriation; and
- (ii) Withdrawal of expropriation.

Many concerns remain with regard to this proposed legislation, so if you are concerned or affected, please make comments before the deadline.

*Leppard Legislation Watch is a monthly newsletter providing selected updates on legislation which could have an impact on the business of Leppard Underwriting and its clients. **Leppard Legislation Watch** is not intended as legal or professional advice and is published for general information purposes only. This newsletter is not a substitute for legal or other professional advice.*

