

Sweeping changes to the  
South African legislative landscape  
Is your organisation prepared?

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2. the multi-disciplinary skills throughout Deloitte;
3. their global network of Deloitte Legal offices and associated companies.

The ultimate goal is to provide excellent legal services with a specific focus on doing so within a business reality. Every effort is made to identify potential business value and synergy on all assignments.

The niche areas within which Deloitte Legal operate are:

- commercial law
- competition law
- consumer protection law
- contract management and optimisation
- data privacy and protection of personal information
- due diligence
- labour law
- legal e-learning
- legislative compliance programmes
- mergers and acquisitions
- records management
- share schemes
- technology law

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# The Competition Act

# Non-compliance is a gamble

Competition Law compliance is essential for all companies and, even though corporate governance, board responsibility and risk management processes may be in place, the directors or managers need to be empowered to look at the company and know whether a contravention of the law is taking place.

The stated purpose of the Competition Act is to promote and maintain competition in South Africa in order to promote the efficiency, adaptability and development of the economy; provide consumers with competitive prices and product choices; promote employment and advance the social and economic welfare of South Africans; expand opportunities for South African firms' participation in world markets and recognise the role of foreign competition in the South Africa; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Furthermore, the Act is focussed on providing for markets in which consumers have access to, and can freely select the quality and variety of goods and services they desire. Importantly, the Act also aims to create greater capability and an environment for South Africans to compete effectively in international markets. Specifically the Act endeavours to restrain particular trade practices which undermine a competitive economy and regulate the transfer of economic ownership in keeping with the public interest. The Act has established independent institutions to monitor economic competition; and give effect to the international law obligations of the South Africa.

The Act applies to all economic activity within, or having an effect within South Africa. The only exceptions relate to collective bargains and agreements, as well as conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

The Competition Act established three competition authorities, each with distinct functions and independent of one another. These three authorities are as follows:

- The Competition Commission generally has an investigative and prosecuting function, although it may make determinations relating to exemption applications, as well as small and intermediate mergers.
- The Competition Tribunal is an adjudicative body, making determinations on prohibited practices, including interim relief and consent orders, large mergers and referrals regarding small and intermediate mergers.
- The Competition Appeal Court reviews decisions of and considers appeals against decisions of the Competition Tribunal. The Court has the status of the High Court and is constituted by a group of judges hearing cases outside their regular duties.

In summary the Competition Act mandates the Competition Commission to investigate and prosecute, and the Competition Tribunal to adjudicate on conduct prohibited under the Act.

### **What does the Act require in relation to merger and acquisitions?**

The Act makes provision for a mandatory merger notification process where a change of control takes place as well as when the respective acquiring entity and target entity meet certain turnover and asset value figures as announced from time to time by the competition authorities, based on audited financial statements. Failure in notifying the competition authorities of a merger or acquisition transaction can result in the Competition Tribunal ordering divestiture of certain business interests or parties to the transaction can be exposed to a fine levied by the Competition Tribunal not exceeding 10% of the annual turnover within South Africa.

### **What does the Act prohibit?**

In particular, the Act prohibits the following restrictive practices:

- An anti-competitive agreement, arrangement or practice between competitors unless pro-competitive gains are attributable to and outweigh the anti-competitive effect.
- An agreement between competitors that involves fixing prices or other trading conditions, dividing markets or collusive tendering.
- An anti-competitive agreement between a firm and its suppliers or customers, unless pro-competitive gains are attributable to and outweigh the anti-competitive effect.
- The practice of minimum resale price maintenance, save that a supplier or producer may recommend a minimum resale price.

The Act also prohibits the following abuses by firms that are deemed to be dominant:

- Charging an excessive price to the detriment of consumers.
- Refusing to give a competitor access to an essential facility.
- Unless there are attributable and outweighing pro-competitive gains:
  - Impeding or preventing a firm entering into or expanding within a market;
  - Requiring or inducing a supplier or customer to not deal with a competitor;
  - Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
  - Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
  - Selling goods or services below their marginal or average variable cost; and
  - Buying-up a scarce supply of intermediate goods or resources required by a competitor.

The Act also prohibits dominant firms from engaging in price discrimination unless this only makes allowance for cost differences, meets competition or responds to market changes.

### **Exemptions from the Act**

On application by a company, the Competition Commission may exempt prohibited conduct that contributes to the maintenance or promotion of exports, the promotion of the ability of small businesses (or firms controlled or owned by historically disadvantaged persons) to become competitive, change in productive capacity necessary to stop decline in an industry, or the economic stability of any industry designated by the Minister of Trade and Industry (after consulting the Minister responsible for that industry). The Commission may also exempt prohibited conduct that relates to the exercise of intellectual property rights.

### **What if the Competition Tribunal rules that a firm contravened the Act?**

A contravention of the prohibited practices provisions of the Act can result in the Competition Tribunal making various orders, including interdicting a prohibited practice, ordering the reasonable supply or distribution of goods or services to end a prohibited practice, imposing an administrative penalty of up to 10% of a firm's annual turnover in South Africa, declaring conduct to be a prohibited practice for the purposes of civil actions for damages, declaring the whole or part of an agreement to be void, and ordering reasonable access to an essential facility. Furthermore, in terms of the Competition Amendment Act, 2009 individuals can be sentenced to jail terms of up to 10 years.

In addition to the above, the Act also provides for various other criminal offences, including for disclosing confidential information, hindering the administration of the Act, failing to properly attend when summoned, failing to answer fully or truthfully, in various ways undermining any investigation or adjudication, and contravening or failing to comply with an interim or final order of the Competition Tribunal or the Competition Appeal Court.

### **We have listed ten questions which identify areas where companies need to focus their attention with respect to fully understanding their competition law risk:**

1. Do you have agreements with competitors to agree on prices or on trading conditions?
2. Do you have agreements with competitors not to deal with firms that supply other firms in their market?
3. Do you agree with other firms on which firm will make the low bid for contracts, and what that bid will be?
4. Do you belong to an industry association?
5. Do you specify a minimum price at which products may be resold?
6. Do you specify that the retailer or distributor may not resell outside of a defined territory?
7. Do you sell bundled or packaged goods without such items also being available individually?
8. Do you require that a customer must buy 100% of its supply from one distributor?
9. Do you charge a price that bears no relation to the economic value of a product or service?
10. Do you not deal with a customer and are you able to offer an objective business justification?



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“The true benefit of understanding the competition law environment is to reduce the risk of competition law contraventions occurring in your business, and not to enable organisations that commit such contraventions to escape punishment for them.”

Compliance programmes provide the necessary guidelines which a company needs to manage its legal obligations. A competition law programme may stand alone or be part of a company’s overall corporate and compliance risk management strategy to assess and minimise risk. The need for an effective corporate compliance policy has never been more evident than now. During the past year, the competition authorities have imposed a significant number of fines totalling millions of Rands on companies in South Africa. Several of these companies have paid more than 8% of their annual turnover towards fines - This has a major impact on the financial performance of companies. The implementation of a compliance programme is of crucial importance to ensure compliance with competition law.

It is crucial to understand what impact the Act can potentially have on a business in order to prevent competition law contraventions. Competition law offences can expose a company to large fines and potential damages claims as well as jail terms for directors and managers.

Understanding the environment can reduce the risk of this exposure. Therefore, every company’s first objective in terms of understanding the environment should be to prevent wrongdoing. A second important objective is to detect wrongdoing as early as possible, while the damages are still small.



Early detection of competition law contraventions will give a company a head start in the race against the competition authorities. Equally important, it will enable a company to end the wrongdoing before the damages become so large that they would be material to the company’s bottom line.

**For more information**

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# The Deloitte Competition Law Compliance Programme

The Deloitte Competition Law Compliance Programme aims to assist clients to identify their Competition Law risk areas and create a culture of compliance

## The challenge

Official announcements by the Competition Commission in the first few months of 2009 have included the following:

- Investigations into the supermarket chains and wholesalers, the bicycle industry, the piped gas industry and the pre-cast concrete industry.
- A search and seizure raid on PPC, Lafarge, AfriSam and NPC.
- Administrative penalties levied against Aveng (R46 277 000 - 8% of turnover of a division of one of its subsidiaries), Sasol (R250 680 000 - 8% of the turnover of its Sasol Nitro subsidiary), Tiger Brands (8% of the turnover of one of its subsidiaries), Dismid (6% of its turnover), Thusanong (5% of its turnover) as well as a proposed fine of 10% of turnover on all participants in the PVC and HDPE pipe products cartel.

The Competition Commission has substantially increased its focus on prohibited practices. In addition its whistle blowing provisions are resulting in increased admissions of cartel activity.

Compliance is essential for all companies. The challenge however is that the Competition Act is difficult to interpret, especially considering the array of “catch all” provisions it contains, and even more difficult to apply to daily business activities.

The Competition Commission has recommended that every company undertakes a Competition Law Compliance Programme. Accordingly ignorance will not be a defence. In addition, the President has recently signed an amendment into law, which amendment introduces criminal sanction for directors of companies breaching the Act’s provisions.

## The Deloitte solution

Deloitte Legal has implemented its Competition Law Compliance Programme at a number of our key listed and private clients.

The Compliance Programme follows a phased approach beginning with a Risk and Compliance Review involving a complete assessment of the current practices, policies, agreements and arrangements the client is party to. The outcomes report is then utilised to action remedial steps.

The third phase is the development of a Competition Law Compliance Policy and a Dawn Raid Policy.

The fourth phase relates to training of the various levels of staff. Executives are usually trained on a face-to-face level, while all other staff or trained via our e-learning tool. This tool is developed and owned exclusively by Deloitte, and is accessed through the web following the purchase of licenses.

Following completion of the initial phases we assist with developing record keeping and ongoing monitoring processes.

## Competition Law Compliance Programme



## Interested?

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# The Consumer Protection Act

# Is your company at risk?

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Consumer protection has increasingly become a focus of the legislature and the Consumer Protection Act is aimed at implementing principles which level the playing fields between big business and the average consumer.

The Consumer Protection Act (the “Act”), the ground breaking legislation which came into effect on 1 April 2011, imposes varying levels of obligations on suppliers, importers, distributors and manufacturers, all participants in the supply chain should take note. Although the consumer rights under the Act only came into effect on 1 April 2011, organisations should be aware that certain of the provisions affect all goods supplied from 24 April 2010 onwards.

Broadly, the Act seeks to protect consumers who are natural persons and small businesses whose annual turnover or asset value is below R2 000 000. The wide definitions of the terms “goods” and “transactions” in the Act are clearly intended to provide significant protection to the “man in the street” and small businesses. The Act does have certain exclusions related to goods or services supplied to the State, under credit agreements in terms of the National Credit Act (“NCA”), services under an employment contract, collective bargaining agreements and most financial services governed by FAIS and insurance services.

The Act, has broad themes running through it, each dealing with specific issues consumers might face, what follows is a brief explanation of the most consequential for consumer business.

**Limited Exclusions:** Parts and goods which may be supplied under an excluded transaction (such as a credit agreement) are still covered by the Act, it is merely the provision of the service during the entering into of the agreement (such as the actual credit agreement and its entering into) which is excluded, not the good supplied/sold.

**Strict Liability:** Probably the most dramatic aspect of the Act is the strict liability and warranty provisions which the Act brings about in respect of goods sold to consumers and which have far reaching financial and stockholding implications for all organisations involved in supply chain. The liability for damages caused by faulty goods is based on strict liability, meaning a consumer will not have to prove any element of negligence to succeed in its claim. In addition, the new Act now provides that an affected consumer can claim economic loss in receipt of damage to them or their property. This can no longer be excluded by contract.

**Automatic Warranty:** The Act introduces an automatic six month warranty on all goods supplied and an automatic warranty of three months on all parts and services. Practically, this means that every good supplied has a legally imposed warranty of at least six months and three months, respectively, (irrespective of what any contact between the parties says where this period is shorter). The nature of the warranty is even more interesting, as it allows the consumer the choice of having the goods replaced, repaired or refunded. This warranty will have significant implications for business.

**Extension of Obligations:** Certain provisions, such as the warranty and liability provisions of the Act are even more onerous on the business world in that these provisions are jointly and severally applicable to each of the retailer, importer, distributor and manufacturer. No party to the supply chain is free of liability when it comes to dealing with the consumer.

**Direct Marketing:** Direct marketing must be strictly managed, with a register of those consumers who do not want to receive such marketing and the regulations to the Act have prescribed times during and days on which marketing may not be sent to consumers. All marketing must have a method by which the consumer can indicate that they no longer want to receive such direct marketing. Consumer's may not be charged in any way for opting out of receiving direct marketing material. Also, agreements arising out of certain types of direct marketing have an automatic cooling off period of five days during which the consumer is entitled to cancel the transaction.

**Fixed Term Contracts and Contractual Content:** Between 80 and 40 days before the expiry of a fixed term agreement, a notice must be sent to the consumer advising them of this and indicating the implications of renewal of the agreement. All agreements are now also terminable by the consumer on 20 days notice. Business models based on security of income resulting from fixed term agreements will have to be revisited.

**Customer Loyalty Programmes:** There are stringent information requirements around what must be communicated to members of such customer loyalty programmes. Benefits claimed using the programme must now be equal to those products or services which can be purchased for cash, except for a total of 90 days during a calendar year on which differentiation is permitted.

**Franchise Agreements:** Remarkable protection is afforded to those entering into franchise arrangements as franchisees. Significant information must be provided to the franchisee at the time that the agreement is entered into, the franchisee is afforded a cooling off period during which the cancellation of the transaction is permitted. The franchisor/franchisee relationship is exempt from certain provisions of the Act.

**Return of Goods:** Provision is made that any return of goods occasion by any reason other than a fault on the part of the consumer or exercise of the cool-off period, must be paid for by the supplier of those goods. In addition, if goods are delivered to the incorrect address or an address other than agreed, at a time other than that agreed, ownership in those goods may pass to the person to whom they were delivered. This means that, missing agreed delivery times and dates should be strictly managed to avoid goods from becoming "unsolicited goods", for which there are significant consequences.

**Unsolicited Goods:** This includes "demo" goods which sales people may leave with a consumer. The management of such goods will have to be stringent since, if no payment is arranged at the time that the goods are left, and clear steps are not taken by the supplier of the goods to reclaim such goods, ownership of these goods could pass to the consumer.

To enforce the Act, the National Consumer Commission (the “NCC”) has been formed. The NCC has been given aggressive investigative powers to ensure that it too can investigate practices which appear to be contrary to the spirit of the CPA, despite a consumer not yet reporting such practices.

The offences listed in the CPA are numerous and the penalties for non-compliance are substantial. The Act imposes fines of up to a R1 000 000 or 10% of turnover for each offence. The wide reach of the provisions means that the possibility of frequent offences is high and thus the amount of fines which an organisation could be liable for, could be considerable.

It will be imperative for organisations to take the

first step to determine the extent to which the Act applies to them so that the new business risks which the Act creates can be determined and mitigated. The solution will have to be organisation wide, working through each of the organisation’s functional areas so as to standardise compliance while optimising business productivity and the operational requirements of the organisation.

**We have listed ten questions which identify areas where companies need to focus their attention. We believe that companies have an average to above-average risk in respect of the provisions of the CPA if they answer “Yes” to more than three of the following questions:**

1. Do you market through any direct, catalogue or mail marketing?
2. Are there sometimes discrepancies in respect of prices displayed and prices which are charged to customers?
3. Do you offer customers the option to repair, refund or replace a defective good if it is returned for warranty within six months of purchase?
4. Do you operate a customer loyalty programme?
5. Is your warranty period on all goods at least six months?
6. Do you provide clients with vouchers, store credits and/or allow prepayments?
7. Do you sell bundled or packaged goods without such items also being available individually?
8. Do you have any consumer fixed-term contracts?
9. Do any of your legal contracts contain complicated legal concepts or Latin wording?
10. Do you clearly label all items which are reconditioned or grey market goods as such?



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“The wide reach of the provisions means that the possibility of frequent offences is high and the amount of fines which an organisation could be liable for could be considerable.”

Experience has shown that compliance with new legislation is not always taken up immediately by organisations since they don't see the immediate cost benefit. However, studies have shown that compliance becomes more costly (in both monetary terms and reputational harm) the longer it is delayed.

Deloitte has conducted extensive research to determine what companies have to do to comply with the new Consumer Protection Act (parts of which will be enforced from April 2010 and the bulk of which came into force from April 2011), the implications for non-compliance and the benefits if they comply.

Deloitte has developed a comprehensive compliance solution in respect of the Act and will provide organisations with a GAP analysis in respect of its level of compliance with the Act, along with options in order to mitigate risk where business operations do not permit strict compliance and solutions on how to achieve compliance where business operations allow for this.



**For more information**

If you are interested in finding out more about the Deloitte Consumer Protection Act Solution, please contact:

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# The Deloitte Consumer Protection Act Solution

The Deloitte Consumer Protection Act Solution aims to assist clients in understanding the implications of the Consumer Protection Act on the way they are currently doing business, identifying the gaps and implementing optimised business processes to align their current trade practices to be efficiently compliant.

## The challenge

The Consumer Protection Act ("the Act") was signed into law on 24 April 2009. The Act has been phased in, allowing businesses 24 months to implement procedures to comply with the Act.

The Act constitutes an overarching framework for consumer protection with one of its purposes being preventing exploitation or harm to consumers. The implications for business are significant.

The Act protects a wide range of consumers including natural persons and small companies to whom services or goods are promoted or supplied as well as the actual users of the goods or the recipients or beneficiary of the services.

The Act covers any agreement, arrangement or understanding between two parties. In respect of consumers and users of goods, the Act applies irrespective of whether or not they were made in South Africa, provided that the transaction occurs within South Africa.

South African consumers are now amongst the most protected consumers in the world. Accordingly, non-compliance by suppliers can mean hefty fines, serving a jail sentence or both.

## The Deloitte solution

Some of the business areas that will almost certainly be affected are:

- Supply chain management in that stock levels will have to be managed differently due to the obligation to replace defective goods within six months at the election of the consumer.
- Legal contracts in that the wording and content of contractual arrangements with customers must be worded in plain language and pitched at the level of the consumer which is being targeted.
- Information technology systems in that the supplier will be obliged to maintain more detailed records of interactions with consumers and be able to report thereon to the commission.

Deloitte Legal has designed a Consumer Protection Act Solution aimed at gearing your business to be compliant with the Act through the implementation of optimised solutions in each of your business areas which are affected.

Our Solution follows a phased approach:

- The first phase involves an As-Is Review of your current business processes and practices to determine the extent to which your business is not compliant with the Act.
- Flowing from the first phase is the design of a tailor made solution for your business to achieve compliance with optimal impact on the business.
- The third phase involves the mobilisation of the design through the creation of an implementation roadmap.

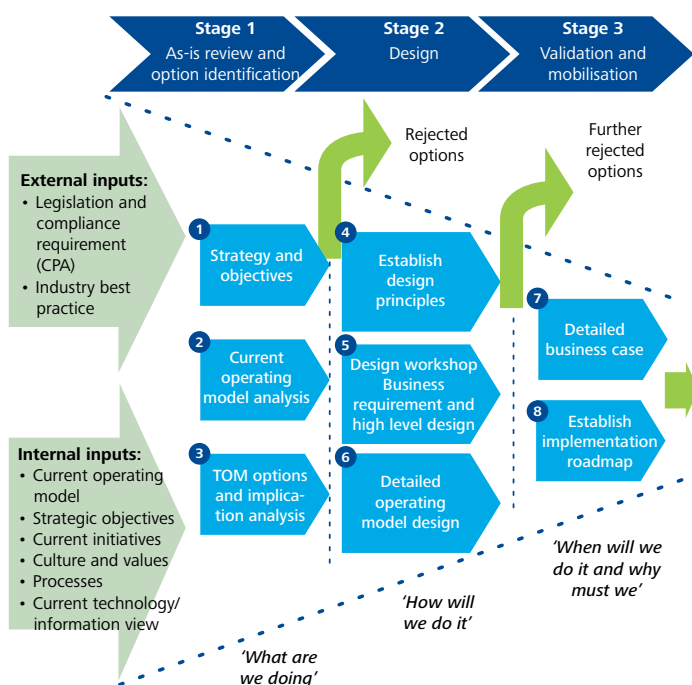
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## Consumer Protection Act Solution



Records  
Management  
Legislation

# Records Management

**South African has no consolidated records management law, meaning compliance is hugely challenging as a significant number of individual laws need to be analysed to consolidate the compliance requirements. So why go to the trouble?**

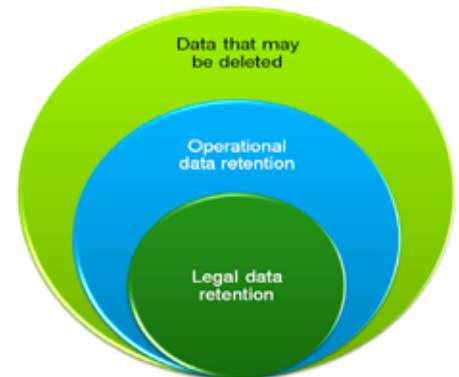
**There are four very good reasons.**

**First...** it goes without saying that all entities concerned with corporate governance must comply with the law. All South African entities are regulated by in excess of 100 different laws. Almost every piece of legislation contains a number of record retention obligations, dictating what records need to be retained for what period of time.

Deloitte have developed retention schedules for entities in a variety of industries, and every retention schedule is unique. These schedules are developed by analysing every piece of applicable legislation, and extracting all record retention obligations. Each schedule reflects not only the record or document to be retained, but also the period it needs to be retained and the format in which it needs to be retained. This schedule then forms the basis for an entity's rules around record retention going forward.

This schedule facilitates compliance with the legislated records retention obligations of all laws applicable to the entity. Not only does this entrench good corporate governance, but it ensures the entity avoids incurring penalties for non-compliance.

**Second...** effective record retention management usually translates into a significant cost saving. For the most part, South African entities save and archive significantly more records and data than is required by law. This archiving occurs in both hardcopy and softcopy. The expense incurred in archived records is significant in most entities. Consider the cost of servers, IT staff and outsourced warehousing of hardcopy data.



Our estimates are that in excess of 30% of stored records are not required to be retained by law, and have no real operational benefits, thus it can freely be deleted. Herein lies the cost saving, the reason for which can best be explained diagrammatically:

Practically, these cost savings are achieved by creating a retention schedule as discussed above, thereby identifying which records need to be retained by law (as indicated by the dark green inner circle). This schedule can then be supplemented by adding those further records which the entity believes have operational value (as indicated by the blue circle). The remainder of the records currently being saved can be deleted (as indicated by the light green circle).

**Third...** the Protection of Personal Information Bill (“Bill”) is likely to be passed into law early in 2011. This Bill places significant obligations on entities in respect of the processing of personal information.

These obligations include the following:

- only collecting and processing personal data with the consent of the data subject;
- being able to provide data subjects with reports on what personal data of the data subject the entity holds;
- ensuring all personal data retained is secure;
- deleting all personal data once the reason for receiving such data has passed; and
- deleting data in a manner which makes restoration of the data impossible.

The second last obligation listed above is particularly onerous, as it requires deletion of data, and effectively prohibits archiving of personal data. The one exception to this rule is that personal data can be retained, and not destroyed, where retention is required by law. An understanding of this exception will take us back to the retention schedule discussed earlier.

The last obligation is also significant, in that it requires a more onerous (and probably costly) method of destruction of data. Accordingly, from both a timing, effort and cost perspective, undertaking records management prior to the enactment of the Bill, will significantly reduce the difficulty involved in complying with the Bill.

**Finally...** as the world becomes smaller and use of electronic means of doing business grows, the value and importance of data increases. Business is more and more reliant on data, and less and less reliant on subjective reasons of business leadership. The analysis of data is also becoming a more valuable business tool as the amount of data in circulation increases dramatically. The massive increase in the use and application of data analytics speaks volumes for the value this sort of analysis can add to business. There are countless examples of data analysis having solved complex business problems, won legal battles, created new business, realised significant savings and identified development areas.

If one accepts that there is business value in data, a co-ordinated approach to collecting and retaining data places entities in a position to effectively analyse data. Many entities struggle to maximise the potential benefits of data analytics because they have massive amounts of data, stored in a completely unstructured manner.

**We have listed ten questions which will help identify whether your entity would benefit from a records management programme.**

1. Is your entity certain of all of its legislated record retention obligations?
2. Do you ever feel as though your outsourced warehousing costs are high?
3. Can you easily locate data you require within your entity?
4. Does your entity have a considered plan around compliance with the Protection of Personal Information Bill?
5. Would you find it difficult to provide an individual with a complete report of all the data your entity holds on him/her?
6. Is there a structured records retention programme in effect within your entity?
7. Is your IT department’s data destruction process compliant with all your entities legal retention obligations?
8. Would a 30% - 40% reduction of your warehousing and server costs matter to your entity?
9. Does your entity have a clear understanding of which Regulators (in South Africa and globally) have the authority to request records from your entity?
10. Does your entity have a records retention schedule?

#### **For more information**

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# The Deloitte Email and Records Management Solution

The Deloitte Email and Records Management Solution aims to ensure legal compliance, management of email risks and good records governance.

## The challenge

More than 25 laws of general application require businesses to retain certain records for certain periods in specific formats.

In industries like mining, insurance, financial services, health, retail, public sector and energy even more such laws apply.

Generally businesses retain records for the following reasons:

- In order to ensure legal compliance (prescribed retention periods range from three months to 30 years)
- Retain evidence (the use of email and evidence in disciplinary hearings and litigation have increased dramatically over the last few years)
- For operational reasons

Chapter III of the Electronic Communications and Transactions Act 25 of 2002 now allows businesses to retain records in electronic format (subject to certain conditions). The ECT Act also governs the admissibility and evidential weight of electronic records.

Failure to retain records subject to retention requirements may expose businesses to criminal fines, civil liability and reputational harm.

Although no law directly prescribes the retention of email, legislation and common law provisions indirectly require businesses to archive all outgoing email for at least three years.

## The Deloitte solution

The Deloitte Email and Records Management Solution includes the following modules:

- GAP Analysis Report
- Training
- Records Management Policy
- Retention Schedule (a document detailing all retention legislation applicable to a business, records subject to retention requirements, retention periods and prescribed formats)
- Email Archiving Policy
- Electronic Evidence Policy
- Public Information Disclosure Policy
- Policy maintenance and updates
- Technology advice on compliance solutions



## For more information

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# The Protection of Personal Information Bill

# What does it mean for your company?

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The South African Constitution grants individuals a right to privacy, yet there is no law in place to give effect to this. The Protection of Personal Information Bill has been introduced by the legislature to address this and related issues. All companies deal with some level of personal information, and accordingly the practical implications of the Bill are complex and pervasive.

The Protection of Personal Information Bill ("Bill") is likely to be passed into law toward the end of 2010. Companies will be granted a grace period within which to become compliant, but many companies have realised how onerous the compliance obligations are, and have already commenced compliance steps. In terms of the Bill, companies will be required to implement significant changes in the manner in which they process personal information.

Personal information relates to data (regardless of whether it is hardcopy or softcopy) related to a particular person (known as the "data subject"), such as identity numbers, telephone numbers, addresses, fingerprints, gender, political affiliation and blood type. All and any such data being processed by a company will need to be dealt with in accordance with the principles set out in the Bill. The term "process" refers to almost any activity in respect of personal information, including collection, storage, analysis, distribution, transmission and deletion.

The aim of regulating the processing of personal information is largely twofold. Firstly, from a global perspective South Africa lacks the data privacy laws most first world countries have in place. This makes transmission of personal data between South Africa and territories such as the United Kingdom, the European Union, Australia and Canada, who have data privacy laws, very cumbersome and challenging. Enactment of the Bill will allow free transmission of personal information between such countries. Secondly, from a South African perspective, the Constitutional right to privacy has not been given effect to in any legislation. This has resulted in people's personal information being distributed and traded in a completely unrestricted manner. One of the knock on effects of this has been a tidal wave of unsolicited, and often unwanted, direct marketing. The Bill is looking to significantly restrict such activities.

The first principle to be adhered to is that **personal information must only be processed with the consent of the data subject**. There are certain limited exceptions to this, including processing personal information to achieve compliance with a legal obligation, but generally speaking, specific and express consent will be required from the data subject for any aspect of processing the data subjects information to be permissible. Due to the requirement that the consent be specific and express, a general consent may well be inadequate, so all potential processing aspects should be clearly set out and individually approved in the consent. Retaining these consents will clearly be necessary.

The second principle is that once a data subject's consent has been obtained, his/her **personal information must only be processed in accordance with the consent given**. This will require careful recording of the ambit of the consent, and continual monitoring of the processing occurring to ensure it does not exceed the bounds of the consent.

The third principle is that **personal information should only be retained for so long as it's required** by the processor to complete the function for which it was collected, and for so long as may be dictated by the records retention requirements set out in any other piece of legislation. Accordingly, personal information no longer required should be deleted or destroyed. In this regard it must be noted that personal data must be deleted or destroyed in such a manner that it cannot be recreated. Should a company elect to retain any personal information beyond the necessary period for statistical, historical or research reasons, heightened security will be required unless the information is aggregated or de-identified.

The next principle is that **personal information must be held in a secured environment**.

Companies will need to assess their risks to personal data, including loss of data, theft, hacking and destruction. Steps will then need to be taken to protect against these risks. The aim clearly being to ensure that where a company legally holds personal information, that it is not a risk to the privacy of the data subject.

The fifth principle is that **a company must be able to report on the personal information it is processing**. A data subject is entitled to ask not only whether a company is processing any his/her personal information, but also where it is, what is being done with it and who has access to it. The Regulator, which is being established through the Bill, can also ask a company for reports. In addition, in the event of any loss or unauthorised access of personal information, the company concerned will not only have to report such to the Regulator, but also to the data subjects whose information was part of the lost or accessed data.

Finally, the company will need to take reasonable steps to **ensure that all personal information being processed is current and accurate**.

Considering the massive amounts of personal data that most companies hold, this is potentially an extremely onerous obligation. It may be adequate to simply provide a process through which data subjects can give effect to an updating of their information, even if that was to suffice, it would require an effective and fully operational process which reached all of a companies personal information.

It is also worth noting that any outsourcing to a third party which involves giving the service provider access to personal information must be regulated by a written agreement. It also remains the responsibility of the company to ensure that the outsourced service provider applies adequate security to the personal information provided by the company.

The law will also require every company that is processing personal information to appoint a Privacy Officer. This appointee will be responsible for the company's compliance with the law, and will also be the contact point with the Regulator.

The Regulator shall be entitled to issue an enforcement notice in the event of discovering an aspect of non-compliance within a company. Should the company fail to adhere to the instructions therein, criminal liability and/or fines will result.

It will be imperative for organisations to take the first step to determine the extent to which the Bill applies to them so that the new business risks which the Act creates can be determined and mitigated. The solution will have to be organisation wide, working through each of the organisation's functional areas so as to standardise compliance while optimising business productivity and the operational requirements of the organisation.

**We have listed ten questions which identify areas where companies need to focus their attention. We believe that companies have an above-average risk in respect of the provisions of the Protection of Personal Information legislation if they answer "Yes" to more than three of the following questions.**

1. Can your HR people access employee details on the company systems?
2. Do you have lists of existing or target clients, with a contact name and telephone number or email address?
3. Do your finance people have a record of clients addresses for invoicing purposes?
4. Does your company engage in any direct marketing?
5. Does HR ever give third parties references on employees?
6. Does your company operate any customer credit facilities or customer loyalty programmes?
7. Are the contact details of your directors and/or shareholders recorded somewhere within your organisation?
8. Do any of your employees ever have personal information of any clients on any mobile devices such as laptops, mobile phones or flash sticks?
9. Do you outsource any HR or IT elements of your business?
10. Are the access rights of your employees to the company servers strictly limited on the basis of "need to access"?



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## “All companies deal with some level of personal information, and accordingly the practical implications of the Bill are complex and pervasive.”

Experience has shown that compliance with new legislation is not always taken up immediately by organisations since they don't see the immediate cost benefit. However, studies have shown that compliance becomes more costly (in both monetary terms and reputational harm) the longer it is delayed.

Deloitte has conducted extensive research to determine what companies have to do to comply with the new Protection of Personal Information Bill, part of which includes ongoing interaction with or EU offices data privacy experts.

Deloitte has developed a comprehensive compliance solution in respect of the Bill. The solution is multi-disciplinary and involves a phased approach. The solution involves implementing certain process and policy framework structures before embarking on staff training and data analysis. The solution is also unique in that it offers a structured records retention exercise which can not only reduce your efforts in complying with the Bill, but also offer a potential significant cost savings. Compliance can also have significant business benefits, and our consulting offerings maximise this.



### For more information

If you are interested in finding out more about the Deloitte Protection of Personal Information Solution, please contact:

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# The Deloitte Protection of Personal Information Solution

**The Deloitte Protection of Personal Information Solution aims to ensure legal compliance with the provisions of the POPI Bill.**

## **The challenge**

In October 2005 the South African Law Commission finalised its investigation into privacy protections and recommended a whole new law to deal with the protection of private and personal data. The recommended Protection of Personal Information Bill 2009 is now before Parliament for final approval.

The Bill applies to all businesses that process personal information like names, addresses, email addresses, ID numbers, employment history, health data and the like.

According to section 2 the purposes of the Bill are to:

- Give effect to the Constitutional right to privacy
- Regulate the manner in which personal information may be processed
- Provide persons with rights and remedies in order to protect their personal information
- Establish the Information Protection Regulator

In adoption of the EU model, the Bill lists nine so-called information protection principles and details no less than 37 compliance duties and nine data subject rights.

The Bill also establishes an Information Protection Regulator and provides for the regulation of spam (unsolicited communications).

Businesses will also have to appoint Information Officers to monitor compliance.

Non-compliance with the provisions of the Bill may result in criminal fines, civil liability and complaints to the Regulator.

In order to comply with the provisions of the Bill, businesses will have to implement new policies, procedures and controls.

## **The Deloitte solution**

The Deloitte Protection of Personal Information Solution includes the following modules:

- GAP analysis report
- Privacy and data protection strategy
- Privacy and data protection policy
- Training and awareness
- Training of Information Officers
- Building up an organisation-wide inventory and classification map of personal data
- Compliance with law enforcement requests
- Privacy governance procedures
- Cross border data transfers
- Building privacy controls into IT projects

## **Interested?**

To find out more about the Deloitte Protection of Personal Information Solution please contact:

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