

THE CONSUMER PROTECTION BILL AND RETIREMENT FUNDS

ROUTLEDGE MODISE

In association with



EVERSHEDS

RETIREMENT FUND INDUSTRY

- Industry currently highly regulated by Pension Funds Act, 1956, Financial Services Board and Income Tax Act, 1962.
- Pension Fund-backed loans are provided for under National Credit Act, 2005 & Pension Funds Act.
- Until Minister makes regulations, it is not clear how Consumer Protection Bill will apply to retirement fund industry.

ROUTLEDGE MODISE

In association with



EVERSHEDS

PURPOSES OF THE BILL

To promote and advance the social and economic welfare of consumers by :

- a) Establishing national norms and standards for consumer protection;
- b) Improving standards of consumer information;
- c) Prohibiting unfair working and business practices;
- d) Promoting responsible consumer behaviour;
- e) Promoting consistent legislative and enforcement frameworks relating to consumer transactions and agreements;
- f) Improving consumer awareness and information and promoting consumer confidence empowerment.

ROUTLEDGE MODISE

In association with



EVERSHEDS

REPEAL OF LAWS

- Currently consumers are not protected by a separate act.
- Various pieces of legislation, incidental to consumer protection, regulate consumer issues.
- Once Consumer Protection Act is passed the following laws will be repealed :
 - a) Consumer Affairs (Unfair Business Practices Act), 1988;
 - b) Sales and Service Matters Act, 1964;
 - c) Business Names Act, 1969;
 - d) Businesses Act, 1991;
 - e) Price Control Act, 1964;
 - f) Sections 2 – 13 & 16 – 17 of Merchandise Marks Act, 1941;
and
 - g) Section 54 of Lotteries Act, 1997 and related regulations.

ROUTLEDGE MODISE

In association with



EVERSHEDS

INTERPRETATION

- Bill is intended to provide a general, default system of consumer protection.
- Bill is not intended to override more specific schemes or consumer protection established in terms of any industry specific law (Section 2).
- The Act must be interpreted to give effect to the purposes.

ROUTLEDGE MODISE

In association with



EVERSHEDS

CONFLICT OF LAWS

- Bill dictates specific methodology on interpretation.
- In the event of conflict between Act and any other law protecting consumers, the laws must, as far as possible, be enforced concurrently.
- If concurrent enforcement is not possible then law providing greatest degree of protection for consumers will prevail.
- Thus, in the event of any conflict between the Pension Funds Act and this Act, the act which is more favourable to the consumer would be applied.

ROUTLEDGE MODISE

In association with



EVERSHEDS

APPLICATION OF THE BILL

Subject to certain exceptions (which await the promulgation of the regulations for clarification), the Bill will apply to :

- a) Most transactions in the ordinary course of business within the Republic;
- b) Promotion of goods and services that could lead to transactions being concluded; and
- c) The goods and services themselves once the transaction has been completed.

ROUTLEDGE MODISE

In association with



EVERSHEDS

EXCEPTIONS

The Bill will *not* apply to transactions when :

- a) Consumer is the State or any organ of the State; or
- b) Transaction is between two parties who are part of the “*supply chain*” (i.e. a distributor selling goods to retailer) if value of such transaction falls above threshold to be set by regulations.

ROUTLEDGE MODISE

In association with



EVERSHEDS

EXEMPTION APPLICATION

- Regulatory authority may apply to Minister for industry wide exemption from provisions of Act if :
 - provisions overlap or duplicate a regulatory scheme administered by regulatory authority in terms of any other national legislation (Section 5).
- Such exemption only granted if Consumer Commission believes this specific industry scheme offers at least as much protection for consumers as they would have under Bill.

ROUTLEDGE MODISE

In association with



EVERSHEDS

POSSIBLE RETIREMENT FUND INDUSTRY EXEMPTION

- Retirement fund industry already highly regulated.
- Therefore, application may be made to Minister for industry exemption once Act is in effect – if the Act is applicable and to the extent that it is.
- Provided Consumer Commission is satisfied consumers will receive same protection as they would have under this Bill.

ROUTLEDGE MODISE

In association with



EVERSHEDS

DEFINITIONS

The concepts to which the Bill refers are widely defined and widen the net of application which will then be tempered by regulations, exemptions and conflicting legislation.

ROUTLEDGE MODISE

In association with



EVERSHEDS

- The definition of “*consumer*” includes :
 - a) A person to whom particular goods or services are marketed in the ordinary course of the supplier’s business;
 - b) A person who has entered into a transaction with the supplier in the ordinary course of the supplier’s business, unless such transaction is exempt;
 - c) If applicable, a user of those particular goods or a recipient or beneficiary of this particular services, irrespective whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services.

eg. Employer and fund enter into an agreement for a general employee pension/retirement fund – employees are beneficiaries of retirement fund.

ROUTLEDGE MODISE

In association with



EVERSHEDS

The definition of "service" includes :

- a) Any banking services, or similar financial services, except to the extent that any such service:
 - i) constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediaries Services Act, 2002; or
 - ii) is regulated in terms of the Long-Term Insurance Act, 1998 ("LTIA") or the Short-Term Insurance Act, 1998.

A "supplier" means a person who markets any goods or services.

ROUTLEDGE MODISE

In association with



EVERSHEDS

A "transaction" includes, in respect of a person acting in the ordinary course of business :

"an agreement between or among that person and one or more other persons for the supply or potential supply of services in exchange for consideration".

A "*consumer transaction*" would fall within the ambit of the Bill where :

- a) It is an interaction or agreement to interact between a consumer and supplier in the ordinary course of business;
- b) There is an exchange of consideration (anything of value given and accepted in exchange for services);
- c) The interaction concerns the supply or potential supply of services to or at the direction of the consumer.

ROUTLEDGE MODISE

In association with



EVERSHEDS

FUNDAMENTAL CONSUMER RIGHTS

The fundamental consumer rights that this Bill seeks to address are :

- a) Equal access to the consumer market;
- b) Privacy;
- c) Choice;
- d) Disclosure of information;
- e) Fair and responsible marketing;
- f) Honest and fair dealing;
- g) Fair, just and reasonable terms and conditions;
- h) Accountability to consumers by suppliers; and
- i) Right to be heard and obtain redress.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO EQUAL ACCESS

- Consumers may not be subject to unfair discrimination.
- Section 9 of the Constitution, which allows for differential treatment of consumers of a particular sex, age or gender, states that those practices are not to be construed as unfair discrimination if the conduct is reasonable.
- This aspect of the Bill will permit suppliers to target and market to specific population groups to the extent that it is reasonable, having regard to the services being offered.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO PRIVACY

- Includes right to accept, refuse or block any approach by a supplier for purpose of direct marketing. (Setting up of a register)
- Regulations may specify days, dates and times during which it is prohibited to contact consumers for promotional purposes.

ROUTLEDGE MODISE

In association with



EVERSHEDS

COOLING-OFF PERIOD AFTER DIRECT MARKETING

- The consumer is entitled to notify the supplier in writing of his intention to rescind a transaction within 5 business days after date transaction or agreement was concluded.
- No reason needs to be given by consumer.
- No penalty may be charged by supplier.
- Direct marketing includes approaching a person, directly, by mail or via electronic communication, to promote or offer to supply any services to that person.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO CHOOSE

- The Bill sets out a number of provisions aimed to assist consumers in selection of services based on the consumers having examined such services and compared prices.
- Includes the right to decide whether to continue a transaction or agreement during the course thereof and the expiry.
- The Bill entitles the consumer to cancel a fixed term agreement, limits the rights of suppliers to impose cancellation charges, and sets rules which govern the expiry of such an agreement.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO DISCLOSURE AND INFORMATION

- Consumers must be able to :
 - understand the terms and conditions of transactions or agreements they enter into; and
 - make informed choices about products and services.
- Section 26 of the Bill sets out Disclosure requirements that intermediaries, who are not regulated under another law, must comply with (e.g. commissions earned). The Minister may prescribe the information or records that intermediaries or categories of intermediaries must keep.
- All documentation must be in plain language.

ROUTLEDGE MODISE

In association with



EVERSHEDS

FAIR AND RESPONSIBLE MARKETING

- The Bill sets standards for fair and responsible marketing and generally prohibits misleading, fraudulent or deceptive marketing.
- A number of specific marketing and selling practices are prohibited :
 - i.e. bait marketing, negative options and referral selling.
- The Bill specifies criteria for suppliers who engage in direct marketing.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO HONEST AND FAIR DEALING

- The following are prohibited regarding any marketing, supply or negotiation of services to consumers :
 - force;
 - coercion;
 - undue influence;
 - pressure; or
 - harassments, unfair tactics or conduct (unconscionable conduct).

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS

- A supplier must not :
 - supply any services at a price that is or on terms that are manifestly unfair, unreasonable or unjust; or
 - market any services, or negotiate, enter into or administer an agreement for the supply of any services in a manner that is unfair, unreasonable or unjust; or
 - require a consumer to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.
- A consumers attention must be drawn to any provisions that aim to limit the supplier's liability.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO FAIR VALUE, GOOD QUALITY AND SAFETY

Aimed at safeguarding the safety of consumers and establishing a regime of product liability, irrespective of negligence on the part of any one in the supply chain.

It is therefore unlikely that this section of the Bill will be applicable to retirement funds.

ROUTLEDGE MODISE

In association with



EVERSHEDS

ACCOUNTABILITY TO CONSUMERS BY SUPPLIERS

Suppliers will be held accountable to consumers for any money or other property belonging to the consumer but held by the supplier under any agreement, including advance payments for services to be supplied at a later date.

ROUTLEDGE MODISE

In association with



EVERSHEDS

RIGHT TO BE HEARD AND OBTAIN REDRESS

- The Bill aims to make redress accessible to consumers and to protect them from victimisation if they enforce their rights.
- A consumer may :
 - refer the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 - approach a court;
 - refer the matter directly to the Tribunal, if applicable;
 - refer the matter to alternative dispute resolution; or
 - make a complaint to the National Consumer Commission,Each of which may record agreement as an order which must be confirmed by the court.

ROUTLEDGE MODISE

In association with



EVERSHEDS

INDUSTRY REGULATION

- The Bill establishes a scheme for the development of industry codes of conduct relating to consumer matters.
- The Act may therefore permit industry-specific codes of conduct to be set out for the retirement fund industry.

ROUTLEDGE MODISE

In association with



EVERSHEDS

ENFORCEMENT OF THE ACT

- The Act will be enforced by the National Consumer Commission.
- Courts are responsible for :
 - Adjudication of all matters relating to alleged offences in terms of the Act;
 - Interpretation of law; and
 - Issuing of declaratory orders and consent orders.

ROUTLEDGE MODISE

In association with



EVERSHEDS

INCREMENTAL INTRODUCTION OF THE BILL

- Enable suppliers and regulators to adjust their practices and systems to accommodate the requirements of the Act. The periods are:
 - 1 (one) year from the time the Bill is signed and promulgated until the provisions establishing the new National Consumer Commission come into effect; and
 - further 6 (six) months for the remaining provisions to take effect and the old laws repealed in their entirety.
- However, the Minister is entitled to defer, for an additional 6 (six) months, the effect of any specific provision if required.

ROUTLEDGE MODISE

In association with



EVERSHEDS

CONCLUSION

- Retirement fund industry is currently highly regulated.
- Regulations may specify whether Act will apply to retirement fund industry.
- Retirement funds may be required to adhere to the requirements of the Act in terms of :
 - advertising;
 - promotion; and
 - marketing of retirement fund services offered to consumers.

ROUTLEDGE MODISE

In association with



EVERSHEDS

- The will also be subject to the consumer's right to change his mind having regard to the cooling-off period as well as the right to exit a fixed term contract at any time during the course of that agreement.
- It is once again noted that the regulations require promulgation in order to :
 - Properly assess its affect on any particular supplier; and
 - On any business practice presently in practice.
- In this regard it would not make sense to panic at this stage or to change any business practices or processes.
- It would also be premature to make any statement of law which is meaningful to the industry as a whole, other than in respect of the general purpose of the Bill which will be pervasive in judgment of any business practices to which the final Act will apply.

ROUTLEDGE MODISE

In association with



EVERSHEDS