momentum

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LEGAL UPDATE FAW 6/2009: SUMMARY OF INSURANCE LAWS AMENDMENT ACT

The Insurance Laws Amendment Act, No. 27 of 2008, came into effect on 15 December 2008.The Act amends a number of sections of the Long Term Insurance Act. Below appears an executive summary of the impact of the Act for insurers. Where there is doubt or ambiguity about any provision, one must have regard to the actual wording in the Act.

The change to the definition of 'Health Policy' and the inclusion of a new section 72(2A) is of significance to BenefitsAtWork as a product house in that it paves the way for the development of 'gap cover' products which was previously the domain of insurers registered in terms of the Medical Schemes Act. The remaining changes relate mostly to regulatory and enforcement provisions of the FSB over insurers, as well as provisions for the statutory actuary to play a more active role in the affairs of the insurer. The extent of the changes is more comprehensively fully explained below.

Amendment to definitions

(a) A new definition of "Auditing Professions Act" has been added. To put this into perspective the Public Accountants' and Auditors Act has been replaced by the Auditing Professions Act (AFA), and the proposed changes are merely to regulate the change.

(b) The definition of "fair value" is replaced by "fair value of an asset" and now has a meaning assigned to it in terms of financial reporting standards (currently in terms of the South African Statements of Generally Accepted Accounting Practice).

(c) Two new definitions "financial reporting standards" and "financial statements" are added, which will have the same meaning attached to them in the Companies Act. The auditor will therefore have to refer to the Companies Act.

All of the above changes regulate long term insurers more in terms of legislation rather than in terms of "generally accepted accounting practice"!

(d) Paragraph (d) has been deleted from the definition of "Fund". This paragraph relates to former benefit (c) funds, and is deleted for the sake of completeness, as benefit (c) funds are no longer in operation.

(e) The **definition of "Health Policy"** has been changed significantly. This follows a case involving Guardrisk Insurance Company and the Council for Medical Schemes. The case revolved around the interpretation in the Medical Schemes Act of "doing the business of a medical scheme". Guardrisk had been selling policies which offered "gap cover" which would pay a fixed amount for certain items not covered by the medical scheme. The Council believed that Guardrisk was in breach of the Medical Scheme's Act. Initially Guardrisk was found to be in breach, but won on appeal to the Supreme Court of Appeal.

The changes to the definition of "Health Policy" has significant impact for long term insurers, as it paves the way to include "any contracts identified by the Minister by regulation under section 72(2A) as a health policy".

Section 72 is accordingly amended by inclusion under a new subsection, namely section 72(2A) which gives the Minister of Finance (after consultation with the Minister of Health) to make regulations which would identify the kind, type or category of contract as a health policy, and may prescribe matters relating to the design and marketing of such contracts/products. This paves the way for long term insurers to design and market "gap cover" products. However, there will be restrictions under which approval will be given to long terms insurers, as the new section states that the Minister will only give approval to such products if it does not affect the sustainability of Medical Aid Schemes, nor prevents access to health care services, nor places limitations on the liability undertaken by medical aid schemes.

Amendment of section 4 (Special provisions concerning Registrar and his / her powers)

A new section 4(a) has been added which gives the Registrar of Long Term Insurance additional powers of enforcement such as to issue directives to any company or individual to ensure compliance with the Act and to prevent contraventions of insurance laws. A directive issued will have the full force of the law.

Subsection 7 of section 4 is amended by the addition of 2 new provisions giving the Registrar powers to identify certain classes or categories of contracts to be regarded as health policies, and for such policies to be subject to the provisions of the Long Term Insurance Act only.

Amendment of section 7 (Registration of Long Term Insurers)

Changes to this section relate to updating of outdated references and to improve the wording.

Amendment of section 10 (Conditions of Registration)

This section now provides that there is increased regulatory enforcement that insurers comply with new measures in terms of section 29 1), which will effectively ensure that a long term insurer maintains a financially sound condition. Refer to the changes under section 29(1) below.

Amendment of section 19 (Auditor)

Changes to this section makes it a requirement that auditors must be appointed in terms of the provisions of the Companies Act.

Auditors must now inform the Registrar and board of directors of the insurer "without delay" in writing of any matter relating to the affairs of the long term insurer which the auditor became aware of, as well as provide a description of the matter and other particulars which the auditors consider appropriate.

Amendment of section 20 (Statutory Actuary)

Changes to this section places the following obligations on the statutory actuary:

(a) To inform the board of directors and the Registrar "without delay", and "in writing", of any matter which came to the attention of the actuary which in the actuary's opinion may prejudice the long term insurer's ability to comply with the Long Term Insurance Act. Such report must further give a description of the matter and must include such other particulars as the statutory actuary considers appropriate.

(b) To attend and speak at a general meeting of an insurer.

(c) A new paragraph (c) in subsection (8) has been added and the statutory actuary is entitled to speak at any meeting of the board of directors of an insurer, and is also entitled to receive notices and other communications relating to any meeting which an ordinary board member receives.

The above changes mean that the statutory actuary will now play or is expected to play a more active role in the affairs of, for example, Momentum. This is a significant change as it may mean that FAS (for example) can take on a peer responsibility for the (proper) functioning of individual business units. The Registrar needs to be informed of problems at an insurer before that insurer becomes financially unsound or runs into other difficulties. The statutory actuary is close to the financial affairs of an insurer and the statutory actuary is therefore of great importance for effective supervision of insurers.

The role of the statutory actuary
A statutory actuary is appointed by the insurer and approved by the Financial Services Board. This actuary is responsible for monitoring the financial soundness of the insurer to ensure that it is able to meet its policyholders' reasonable benefit expectations.

Amendment of section 23 (Audit Committee)

The main purpose of the changes to this section is to align the main requirements for the appointment of an audit committee of a long term insurer to the requirements in the Companies Act as amended by the Corporate Laws Amendment Act, No 24 of 2006.

Amendment of section 24 (Preference shares, debentures, share capital and share warrants)

New provision added that regulates the manner in which a long term insurer may conclude a transaction.

Amendment of section 25 (Registration of shares in name of nominee)

Some reference changes were made to this section as a result of changes to unit trust laws, references to "unit trust" has been substituted with "collective investment", and any references to "Unit Trusts Control Act, 1981 (Act No 54 of 1981)" has been substituted by the "Collective Investments Schemes Control Act".

Amendment of section 29 (Maintenance of financially sound condition)

An addition to this section (section (c)) states that the actuary must in addition ensure that an insurer has made provision for liabilities and meeting the capital adequacy requirements, otherwise it will be deemed to have failed to ensure the financial soundness of the insurer. This does not appear to add anything new and appears to perhaps correct something which was not previously more explicit in the Act!

Another 2 new regulatory subsections have been added, which effectively makes it more difficult for an insurer to declare or pay dividends despite knowing it does not comply with the financial soundness provisions, or that it can make the insurer financially unsound, and also by doing so that the value of its assets will be lower than the value of its liabilities; it is now also a duty of the statutory actuary to certify that an insurer complies with the financial soundness requirements in terms of the Act before such insurer declares or pays a dividend. Presumably this may also become part of the insurer's financial results when it declares dividends, if not already done.

Insurers are not to declare or pay dividends if:	
1	The insurer does not comply with the financial soundness provisions
2	Declaring or paying dividends can make the insurer financially unsound
3	Declaring or paying dividends will unbalance the insurer's assets to be lower than its liabilities

Amendment of section 30 (Assets)

Subsections (2) and (3) have been deleted as it relates to liquidity requirements which have now been moved to section 29 as discussed above.

Amendment of section 31 (Kinds and Spread of Assets)

The changes regulate how insurers must value their assets which require them to spread their total capital adequacy requirement, and not only the minimum capital adequacy requirement.

If the Registrar is not satisfied that the value of an asset reflects a proper value, the Registrar has the power to require an adjusted value for spreading purposes.

Amendment of section 34 (Prohibitions concerning assets and certain liabilities)

Restrictions are placed on insurers with regard to investments in derivatives.

Amendment of section 36 (Returns to Registrar)

If an insurer submits a report to the Registrar and the Registrar believes that such report requires further investigation, the Registrar may now nominate an expert to compile a report containing the information required by the Registrar, at a cost to the insurer!

Amendment of section 49 (Limitation of remuneration to intermediaries)

The change to this section effectively distinguishes between the remuneration for services rendered which are commissionable and services contemplated in the newly created section 49A which are rendered in terms of a binder agreement with the insurer which are not subject to commission limits.

Insertion of section 49A

The new section 49A in the LTIA regulates the conclusion of an agreement, in writing, between a long-term insurer and a person, and must set out the functions and powers of the person, as well as any conditions which the insurer imposes on such person. The purpose of the section is to ensure that formal agreements are in place and in writing.

Two parts of the section 49 amendment	
Commissionable financial services rendered	**Binder agreement with insurer (Section 49A)**
Set commission limits	No commission limits but formal agreements must be in place and in writing

Substitution of section 53 (Option for payment of policy benefits in money)

The amendment introduces the following changes:

(a) Despite the terms of an assistance policy entered into prior to 01 June 2009 the policyholder (should have been 'the beneficiary') may demand that where a benefit is expressed as a benefit not sounding in money (for example, the benefit is expressed as the 'cost' of the funeral, or the 'cost' of the catering etc), that such 'cost' be paid out in cash, equal to the amount which the insurer would have incurred.

(b) Similarly, for all new assistance policies that will be entered into on or after 01 June 2009, the Act now requires that such a policy providing a non-monetary benefit will have to include terms that will express the non- monetary benefit in a sum of money, and to pay such sum out at the request of the person entitled thereto. Such sum must not exceed the maximum amount payable under an assistance policy, which is currently R18 000.

Amendment of section 66 (Offenses by persons other than long term insurers)

Previously the Act referred to specific sections which a person could be found guilty of not complying with. References to specific sections have now been deleted as they are not the only sections which a person can contravene or fail to comply with, and a person will in future be expected to adhere to and comply with "any other" provision of the Act.

Amendment of section 67 (Offenses by long term insurers)

Changes are similar to those made in section 66.

Amendment of section 71 (Special provisions concerning long term insurers that are not public companies)

No exemption is granted to insurers under the LTIA if they receive such exemption under any other law (for example the Companies Act). They must still seek exemption from the Registrar of Long Term Insurance.

Amendment of section 72 (Regulations)

The Minister of Finance, after consultation with the Minister of Health, is empowered to make regulations identifying a kind, type or category of contract as a health policy and may prescribe matters relating to the design and marketing thereof.

The Minister, when making regulations, must have regard to –

(i) the need to ensure the sustainability of medical schemes;

(ii) the need to ensure access to health care services;

(iii) limitations on the liability undertaken by medical schemes; and

(iv) the extent to which medical schemes are able or willing to provide certain services.

Where the Minister has made regulations, then the kind, type or category of contract identified as a health policy in the regulations, is not subject to the Medical Schemes Act, 1998.

This is an important amendment for long term insurers. Many attempts in the past by long term insurers to develop products around health care were met by failures as they were viewed to be conducting the "business of a medical scheme" and discontinued by the long term industry. The Guardrisk case is an excellent example of the legal disputes which the industry had endured. The Minister of Finance and Minister of Health, will first satisfy themselves that the criteria mentioned above have been met before demarcating certain products as 'gap cover'.

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