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YOUR REF: **T Mkalip**

OUR REF: **C A Wessels/Lbn
1013169**

DATE: **17 February 2011**

Dear Sir

**COMMENTARY ON THE AMENDMENT OF SECTION 8 OF THE EMPLOYMENT EQUITY
ACT, ACT 55 OF 1998**

1. We refer to the abovementioned matter and confirm that we act on behalf of the Association of Test Publishers. We have been requested to submit the following commentary in respect of the proposed amendment of section 8 of the Employment Equity Act.
2. In terms of section 8 of the Employment Equity Act, Act 55 of 1998 psychometric testing of employees is prohibited, unless prerequisites are met, namely that the assessment or test being used must have been scientifically proved to be valid and reliable, that the test or assessment can be applied fairly to employees and that the test or assessment is not biased against any employee or group. The effect of the proposed amendment to section 8 of the Act is that an additional requirement is to be inserted in section 8 of the Act, namely that the test or assessment being used must have been certified by the Health Professions Council of South Africa established in terms of the Health Professions Act, 1974 (Act no 56 of 1974).
3. Our client submits that there is no legislation in existence in terms of which the Health Profession Council is entitled or obliged or can be compelled to certify any test or assessment. It is therefore premature to amend section 8 of Act 55 of 1998 by insertion of such a prerequisite if no mechanism is in place to make provision for the certification of tests and/or assessments. It would not be possible for test users to comply with the newly inserted prerequisite and the amendment would render section 8 unconstitutional.
4. This additional prerequisite therefore defeats the purpose of section 8, which permits the use of tests but is aimed at ensuring that the testing and/or assessments used is to

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be scientifically valid, reliable, objective and cannot be used to unfairly discriminate and disadvantage a certain employee or a certain group of employees, as it now creates the situation where there can be no testing and/or assessments due to tests having to be certified by the Health Professions Council of South Africa. It is therefore our client's submission that until such time as a mechanism has been provided for in terms of which the Health Professions Council of South Africa is entitled and obliged to certify tests and/or assessments, the proposed amendments to section 8 of Act 55 of 1998 are premature and would render section 8 unconstitutional and open to judicial challenge.

5. Our client however reserves the right to submit further comments should the legislator chose to change the wording of the proposed amendment of section 8 of Act 55 of 1998.

Yours faithfully



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