

The Effects of the PoPI Act on Small and Medium Enterprises in South Africa

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Abstract—The Protection of Personal Information (PoPI) Act was created to promote the constitutional right to privacy in South Africa by safeguarding personal identifiable information (PII). This Act respects the right to privacy of customers and employees and also acknowledges the need for businesses to collect and use personal information[1]. Having this type of legislation in place is without a doubt very beneficial to most individuals. However, the effects that the PoPI Act will have on South African small to medium enterprises (SMEs) have not been explored in detail. Current practices such as direct marketing are perceived as a cost effective option for driving sales in SMEs[2] and this option will largely be removed once PoPI is in effect. The POPI Act is a substantial piece of legislation with complex intricacies not easily understood. This complexity adds on to the difficulty SMEs experience when attempting to comply with the Act[3]. Irrespective of the complexity, PoPI is not something that can be ignored and a data information privacy regulator has been established by government. All business owners, not just of big companies, need to comply with this Act or face significant consequences. The regulators will be looking to make examples of organisations not complying and it is of utmost importance to ensure compliance or face the consequences[4]. This paper explores the possible effects of the PoPI Act on SMEs in South Africa, focusing in particular on the marketing strategies used by surveyed SMEs. It also investigates the current compliance of SMEs and reasons why SMEs are battling to comply.

Keywords- Direct marketing; Effects; PII; privacy; SMEs

I. INTRODUCTION

With the newly adopted Protection of Personal Information (PoPI) in South Africa, organisations are all required to comply with this Act or face substantial consequences as a result of non-compliance. Examining privacy laws internationally reveals that the PoPI Act is mostly similar to the European Data Protection Directive (EU DPD) that was implemented in 1995[5]. Other strong correlations are found in the United Kingdom (UK) Data Protection Act (DPA) adopted in 1998[6]. In the United States of America's (USA) there is no single comprehensive law for regulating the collection and use of personal information. Instead, they have a system with a number of federal and state laws that overlap[7]. Having the

PoPI Act implemented will place South Africa on par with international standards and laws in this category. The Act has been signed by the president in November 2013, but is not yet enforced when writing this paper.

It is not clear how PoPI will affect businesses in South Africa, in particular small and medium enterprises (SMEs). Small businesses are known for making use of any electronic form of communication in their marketing strategies, such as the often frowned upon but not explicitly illegal direct marketing strategy[8]. Direct marketing will be seen as an illegal activity when PoPI is fully implemented[9] and will thus remove this strategy for SMEs. Marketing is a crucial activity and thus begs the following questions: What will the future look like for SMEs once PoPI is enforced? Will they be able to adopt alternative marketing strategies? More important, will SMEs be able to survive and what effects will the Act have on them?

This research aims to provide an overview of the PoPI Act. It then investigates some of the challenges faced in the compliance process by SMEs in terms of marketing and growth. A study examines the current compliance status of organisations by means of existing surveys and reveals SMEs opinion of the effect PoPI will have on their current business practice.

II. METHODOLOGY

A literature study was performed to obtain an overview of the PoPI Act as it currently stands. A further purpose was to define 'personal information' as in the context of data protection legislation. A survey was conducted that aims to obtain insight into the challenges that affect South African SMEs with the newly adopted privacy legislation. The lack of awareness of the PoPI Act as well as the current compliance with the Act is examined. The primary data utilised in this survey was collected from SMEs by means of an online survey. The survey was divided into four sections where the first was to collect company background data, in order to determine if the respondent qualify as a SME. The second section was to determine the PoPI awareness of SMEs. The third section investigated current PoPI compliance and security measures

that are in place for data protection. The fourth and last section was to determine the feeling of SMEs towards the PoPI Act and how it would affect their business once fully implemented. The sample consists of 135 participants of which 21% did either not qualify as a SME or did not complete the survey. The final sample with valid data consisted of 107 participants. The majority of participants operate in the Gauteng province. A quantitative analysis has been performed in order to determine the effects the PoPI Act has on SMEs in South Africa.

III. AN OVERVIEW OF THE POPI ACT

On the 26th of November 2013, the president of South Africa has signed the Protection of Personal Information (PoPI) Act into law. The purpose of the act is to safeguard personal information used by companies for business purposes. Personal information is defined by PoPI as any information relating to an identifiable, living, natural or juristic person[6]. In structure, the PoPI Act is almost a direct copy of the European Data Protection Directive (EU DPD)[10]. When comparing the principles of PoPI to similar privacy laws internationally, it is evident that the Act is well aligned on an international standard[8] with negligible variations in terminology. International legislation uses the term personal identifiable information (PII) rather than personal information (PI) as it is referred to in the PoPI Act. Both are similar but PII is a more internationally accepted and used term that refers to any type of information that can be used to identify a person[9]. PII can consist of contact details type information, demographic information, historical information, biometric information, personal opinions and views, private and confidential correspondence and also views and opinions about an individual made by another individual[6]. Another purpose of the PoPI Act is to regulate the way in which personal information should be processed. The enforcement body in South Africa still needs to be appointed and will be called the Information Regulator[6]. The Information Regulator will ensure that the prescribed conditions or principles that organisations or any entity must comply to, is enforced. These principles are listed in Table I below.

Upon examination, the conditions or principles listed in Table I requires a number of safeguards to be put in place. Taking into consideration the fact that companies in South Africa had limited responsibility in the past and is slow to respond to the current changing environment, according to surveys, it is evident that a number of significant challenges await SME businesses. The following section discusses some of the major identified challenges.

IV. CHALLENGES AFFECTING SOUTH AFRICAN SMEs

At the time of writing this paper, the PoPI Act is not yet enforced and South African businesses are in a grace period to comply. It is not clear how this Act will affect local businesses, but is expected to have a huge impact in a number of ways[11]. Certain and limited sections of PoPI already apply, but the majority of the Act will only be enforced at a later stage. It is still unknown when this date will be, but will be announced by the president in the near future[12].

TABLE I. POPI PRINCIPLES

PoPI Principle	Description
<i>1. Accountability</i>	The responsible party, meaning the person or entity processing the information, must ensure that all eight principles are adhered to.
<i>2. Processing Limitation</i>	There should be limits to the processing of information, meaning it should be processed in a lawful manner and not excessively.
<i>3. Purpose Specification</i>	There should be a specific lawful purpose of why personal information is collected. The purpose should be related to the responsible party's activity and the responsible party should ensure that the data subject is aware of this purpose.
<i>4. Further Processing Limitation</i>	Any further processing of the information must be compatible with the purpose it was originally collected for.
<i>5. Information Quality</i>	The information must be complete, accurate and not misleading. The information can be updated if necessary, but taking into account the purpose it was collected for.
<i>6. Openness</i>	Openness should exist, meaning the Information Regulator must be notified before any information processing occurs. The processing should be noted in a register and the data subject should be notified that data was collected about them.
<i>7. Security Safeguards</i>	The integrity of collected personal information should be maintained.
<i>8. Data Subject Participation</i>	The data subject has the right to ask and to be given free of charge any information that the responsible party might have.

a. Eight principles of the PoPI Act

One of the most prominent changes that will be required is the change of current strategies companies use to gather, save, utilise and distribute personal information[13]. The penalties imposed by government for non-compliance as well as potential payouts in damages as a result of civil class actions could add up to significant monetary amounts. When an organisation is lacking compliance with PoPI, the regulator is empowered to take legal actions to enforce PoPI in four ways[18]:

1. An organisation could face fines of up to R10 million. The amount of the fine is likely to vary due to various factors.
2. An organisation might face jail time of up to 10 years.
3. The regulator may order an organisation to stop processing personal information. This might lead to the closure of a company.
4. The regulator might initiate a civil action on behalf of another entity.

Other documented consequences for non-compliance include damage to the company's reputation, loss of customers and not being able to attract new customers[8].

One of the major concerns addressed in this paper is the current marketing strategies used by small to medium enterprises (SMEs). According to Paul Jacobs, a legal strategist and director of Web-Tech-Law, previously viable strategies such as direct marketing will no longer be permitted as a result of the Act. SMEs will require new marketing innovations and strategies[11]. Direct marketing occurred when a data subject was approached with the purpose of promoting business or

requesting the data subject for any kind of donation without prior consent[14].

Marketing is a significant priority for SMEs and often promotes less than reputable strategies. Small businesses have been known to make use any form of electronic communication to perform their marketing strategies, often using direct marketing, in order to get the attention of the consumer[13]. When the new privacy law is in place, this type of marketing will have to follow a different path. PoPI requires that marketing is performed only when consent is obtained from the data subject. This leaves SMEs with having to redraw the battle lines in terms of marketing directly through means of electronic channels to possible consumers[13].

PoPI targets direct marketing specifically, mostly done via electronic communication channels, forcing organisations to adhere to the following principles[15]:

- Consent from the consumer must be obtained before any electronic marketing can occur;
- For new customers, when collecting personal information, the option must be provided to give consent for receiving marketing information of the service or product provided (also for similar services and products);
- For existing customers whose personal information has already been collected, the option must be given to 'opt-out' at any point in time from receiving any marketing information;
- For each marketing communication process the provider's identity must be provided as well as contact details that can be used by the consumer to 'opt-out'.

The following can be used as a basic guideline by SMEs on how to proceed with marketing strategies and be aligned with the PoPI Act[15]:

- Review and audit existing databases used for direct marketing and determine where 'opt-in' and 'opt-out' options would be required;
- Obtain the 'opt-ins' in a lawful manner;
- Remove personal information of all customers who does not 'opt-in' for direct marketing;
- Ensure that an 'opt-in' process, aligned with PoPI, exists when new clients' personal information are being collected;
- Ensure security measures are in place to safeguard personal information held by your organisation from being accessed illegally by any third party.

Upon examination, the requirements above might look as if direct marketing strategies will no longer be a viable option. However, according to Lynnette van der Walt from Phatshoane Henney Group (South Africa's largest Association of LawFirms) this is not the case (reference); PoPI rather demands that direct marketing strategies be aligned with its principles or conditions and that it gets done in more focused ways. Companies will have to put in time and effort regarding consumers who are in need of their services or products and

whom also has given consent for receiving marketing information[15].

The next section will present an overview on the current compliance with the PoPI Act in South Africa. The information was obtained from existing surveys performed on companies in South Africa by third parties. These surveys did not specifically focus on SMEs, but more on the current compliance of all types of companies.

V. CURRENT POPI COMPLIANCE

A recent survey performed by Cibecs[16], showed that only 26% of companies in South Africa are in the process of complying with the PoPI Act or are busy upgrading their compliance measures. This survey also revealed that 38% of these companies are still using outdated compliance measures. In another instance, a survey performed by Deloitte indicated that only 42% of companies, in South Africa, have started upgrading their security structures for compliance to the PoPI Act[17]. Panda Security claims that very few SMEs have taken any steps to comply with the PoPI Act. The primary reason SMEs fail to comply is capacity and a lack of awareness regarding their legal obligations to the POPI Act[3].

Based on the statistics from these surveys, South Africa is not ready for the PoPI compliance process. This process could take up to three years for organisations to be fully compliant[17]. According to KPMG, companies should perform a gap analysis in terms of the readiness state towards the conditions of the PoPI Act[19]. The fact that so many companies are not compliant or even in the process of complying raises the need for PoPI awareness and education[8]. Organisations are unaware of the consequences they might face as a result of non-compliance[8]. They are also unaware of other consequences such as what a data breach could hold for their business.

It is critical that all organisations are aware of and understands the PoPI Act, in order to prevent any potential damages as a result of non compliance. According to Ernst & Young, the following steps are recommended towards compliance and improving awareness[18]:

1. A multi-functional steering committee should be established.
2. Provide PoPI awareness training.
3. Conduct a gap analysis.
4. Plan ahead for a privacy implementation plan.

Australia has implemented their Privacy Amendment Act in 2012. They have been actively implementing awareness campaigns annually since 2013. The latest results of these campaigns shows that 33% of Australians stated they had problems with the manner in which their personal information was handled previously. 74% of participants are now more concerned about their online privacy than five years ago. Raising awareness and educating organisations and individuals is not a once off event, but rather a continuous process[20]. Since a number of countries internationally have gone through the compliance processes already, it is recommended that

South Africans learn from them and possibly follow similar routes. The next section will present the findings from a survey performed to determine the effects the PoPI Act has specifically on SMEs in South Africa.

VI. FINDINGS ON THE EFFECTS OF POPI ON SMES

This section reports on findings of the research conducted in order to determine the effects the PoPI Act has on SMEs. A survey was performed, during the first half of 2015, that consisted of 25 questions with 107 respondents. The survey is divided into four sections namely: company background, PoPI awareness, PoPI compliance and the effects of PoPI on SMEs in South Africa. The results of each section are discussed below.

A. Company Background

The survey had 107 valid respondents who either have the role of a business owner (52%), manager (20%), specialist (19%) or an employee (25%) of an SME (See Figure 1). The option of other was given and 2% selected this option with the roles of a teacher and chief executive officer (CEO) provided.

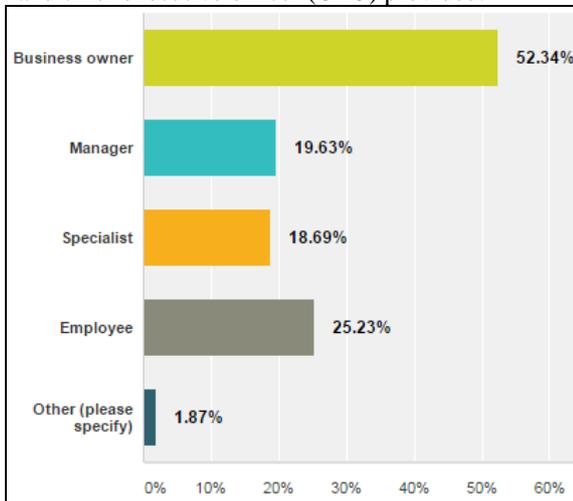


Figure 1. Participant Roles in the SMEs

The line of business for the sample SMEs were from various professions such as (See Figure 2):

- agriculture (4%);
- mining and quarrying (6%);
- manufacturing (9%);
- electricity, gas and water (1%);
- construction (8%),
- retail and motor trade (3%);
- wholesale trade (4%);
- catering, accommodation and other trade (3%);
- transport, storage and communications (3%);
- finance and business services (22%);
- community, social and personal services (15%);
- other (45%) (these included information technology, healthcare, psychology, entertainment, education and recruitment)

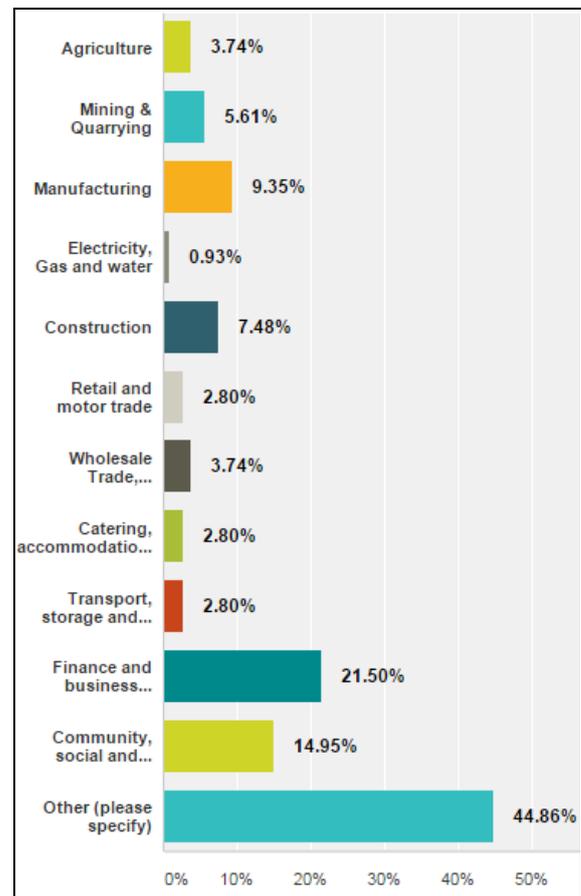


Figure 2. Type of Businesses

The majority of the SMEs have an employee count of 1-5 (52%) (See Figure 3). The respondents were asked to indicate if their company qualify as a SME and 82% were in the SME category, filtering out 18% of the initial sample data for this research. Companies with an employee count greater than 200 does not fall into the SME category and was removed.

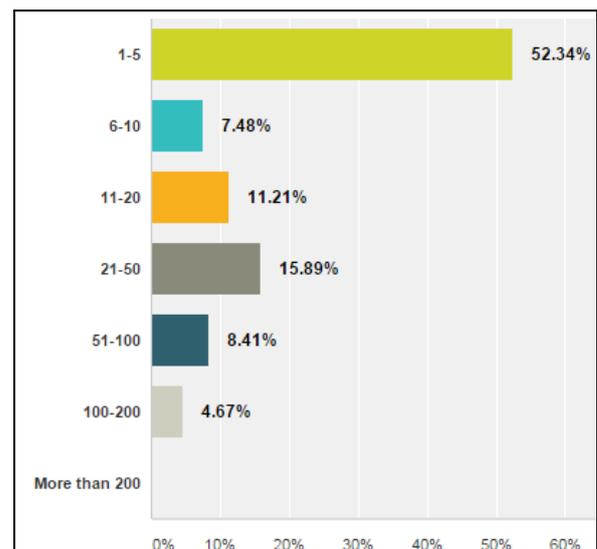


Figure 3. Number of Employees

49% of the SMEs participated does not have an IT infrastructure in place and 2% are unsure if they do (See Figure 4).

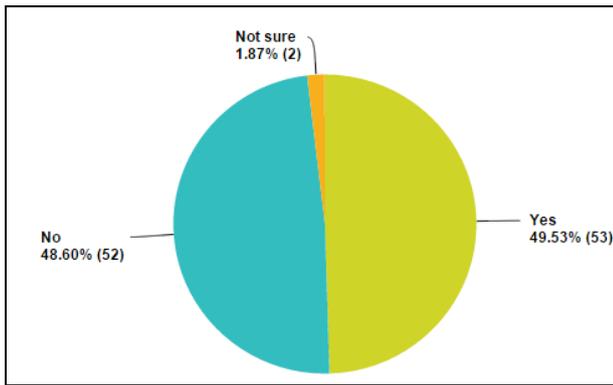


Figure 4. Company has an IT Infrastructure in Place

With such a high percentage of SMEs not having an IT infrastructure in place, how aware are small companies of the PoPI Act? The next section discusses the findings regarding PoPI awareness within SMEs.

B. PoPI Awareness

This section of the survey aimed to determine the awareness ratio of PoPI within SMEs. The first question on awareness was simply asking if the participant is aware of the newly adopted PoPI Act. 46% responded that they are indeed aware, leaving 54% that are not even aware of the Act.

The next set of questions, see Table II below, only applied to the 46% that are aware of the PoPI Act. The aim was to determine the level of awareness regarding the PoPI Act.

TABLE II. POPI AWARENESS

Awareness Question	Yes	No
Are you aware of the eight principles or conditions of the PoPI Act?	37%	63%
Are you aware of the responsibilities your organisation has when dealing with personal information?	67%	33%
Do you know that South Africa is currently in a grace period to comply to the PoPI Act?	65%	35%
Are you aware of the penalties for non-compliance	41%	59%
Are you aware of the steps and procedures involved to become compliant with the PoPI Act?	28%	72%
Are you aware of any courses or workshops that would help your business with the compliance process of the PoPI Act?	15%	85%

In the case where a participant said that they are unaware of the new privacy legislation being implemented, they were prompted to follow a link for a quick overview regarding the PoPI Act. Hereafter they could continue with the remainder of the questionnaire.

Based on the results from the questions in Table II, a significant number of respondents who claimed that they are

aware of the PoPI Act, are not aware of the conditions the Act sets out. Companies are unaware of the responsibilities involved when dealing with personal information. They are not aware of the penalties imposed by government nor the steps required to become compliant. SMEs are also unaware of any courses or workshops being held by third parties that could help with the compliance process.

C. PoPI Compliance

The next set of questions was to determine the compliance ratio of SMEs with the PoPI Act. Figure 5 indicates that 16% of the SMEs are not compliant with the PoPI Act, 56% are not sure if they are compliant, meaning that they are not aware of the conditions this Act sets out. 12% indicated that they are in the process of complying while 16% stated that they do comply with the standards of the PoPI Act (See Figure 5).

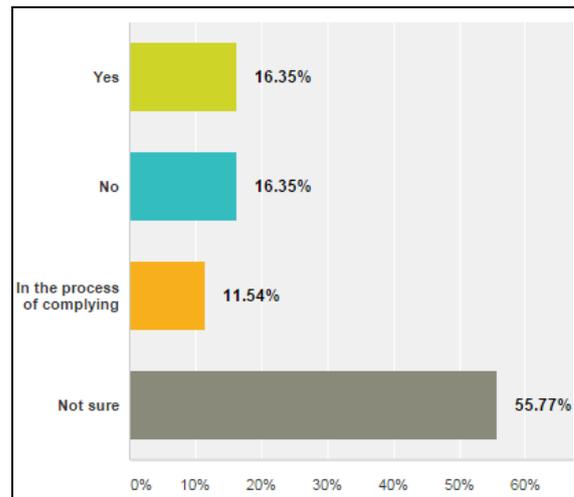


Figure 5. PoPI Compliance

Another question asked was "Do you have any security measures and policies in place for your IT infrastructure". 37% answered no and 17% stated that they are not sure. The remainder 46% claim that they do have security measures in place (See Figure 6).

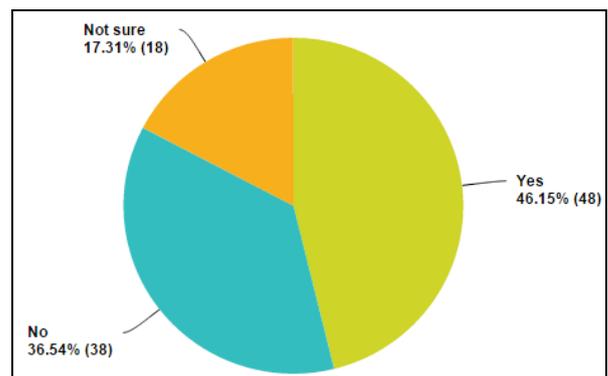


Figure 6. Security Measures and Policies in Place

Based on the results in this section, the majority of SMEs are not compliant to the PoPI Act or are not sure if they are compliant.

D. View of SMEs

The last section of the survey questions was to determine the feeling towards the Act and possible effects it might have towards SMEs in South Africa.

The first question in this section was attempting to get the feeling is of SMEs towards the PoPI Act that will be implemented soon. 16% indicated that they approve but are not feeling very positive towards the change. 6% stated they do not approve and are completely against the Act. 32% indicated that they are not sure how they feel about the Act. The remainder of the participants (46%) approve and feel very positive towards the implementation of the PoPI Act (See Figure 7).

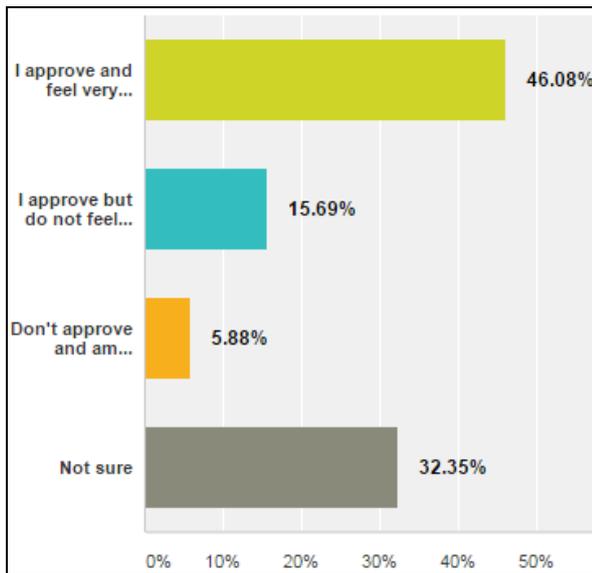


Figure 7. SMEs Feeling Towards PoPI

Figure 8 below shows the effects of the PoPI Act towards the daily operations of SMEs. 15% indicated that very big changes and adjustments will have to be made with this newly adopted privacy law. 38% indicated that they are not sure what effects the Act will have on their business, possibly indicating that they are not aware of the implications awaiting for them on the implementation of this Act. 47% stated that PoPI will not cause many changes.

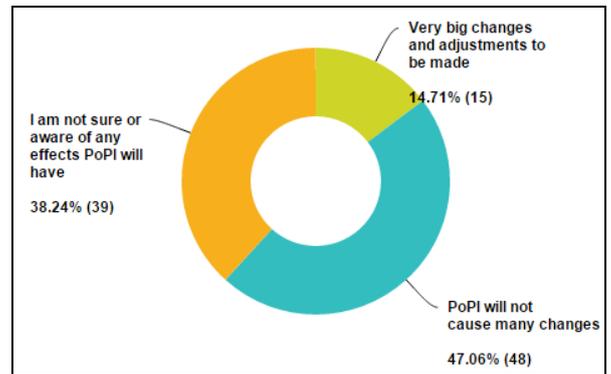


Figure 8. Effects of PoPI on Daily Operations

In terms of PoPI and business growth, 16% of the respondents stated that they think PoPI will have a positive effect; 32% answered no; 44% said they are not sure and 8% said they do not care (See Figure 9).

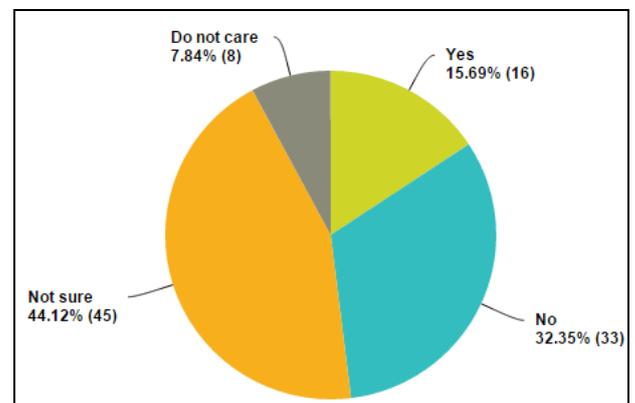


Figure 9. PoPI - Positive Effect Towards Business Growth

The next question raised was to determine how big of an effect will PoPI have on the current marketing strategies used by their business. Only 3% answered that it will have an immense effect; 11% stated a relatively big effect; 21% said medium effect; 22% responded that the Act will have very little effect on their current marketing strategies; 22% stated it will have no effect at all; 23% said they are not sure what effect the Act will have (See Figure 10).

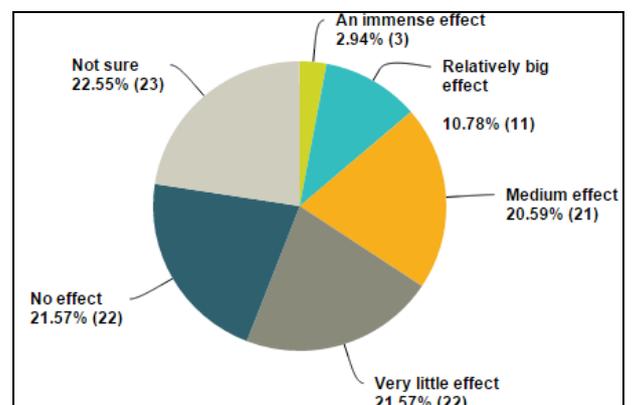


Figure 10. PoPI Effects in Terms of Marketing Strategies

Looking at the biggest concerns SMEs have with the implementation of the PoPI Act, the majority said they are not sure (25%) or they have no concern (24%). 5% stated that marketing strategies are their biggest concern and 19% stated the penalties imposed by government. Respondents were the least concerned about the company reputation (3%) and the difficulties to attract new customers (2%). 13% stated that all of the mentioned ramifications are a very big concern for them (See Figure 11).

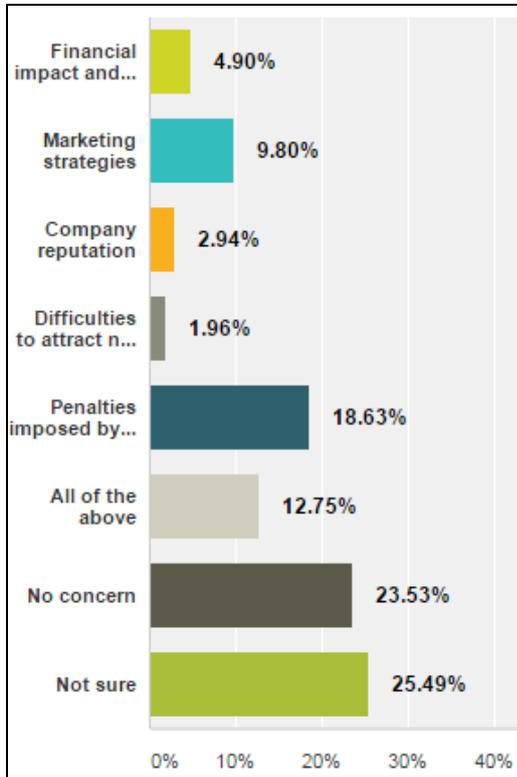


Figure 11. Biggest Concerns with PoPI Implementation

Looking at the benefits PoPI has for respondents, the majority said that their personal information will be safeguarded (35%). 18% stated that all of the listed items are big benefits of the PoPI Act. 18% said none of the above or are not sure. 14% voted for information being processed in a legal manner. 5% are happy to know that their information will be accurate and complete when being processed. 14% said no more spam marketing is the biggest benefit of the PoPI Act. (See Figure 12).

27% of the data sample stated that they rely on direct marketing. The majority do not rely on direct marketing and have other marketing strategies in place. 6% said that their business will not be able to adopt any other marketing strategy which raises big concerns. 15% said they are unsure if they will be able to adopt new marketing strategies within their business. The remainder will be able to adopt different marketing strategies (36%) or do not rely on direct marketing (43%).

4% stated that their business will not survive if they are unable to perform direct marketing strategies; 13% are not sure

if their business will survive; the remainder will be able to survive (33%) or do not rely on direct marketing (50%).

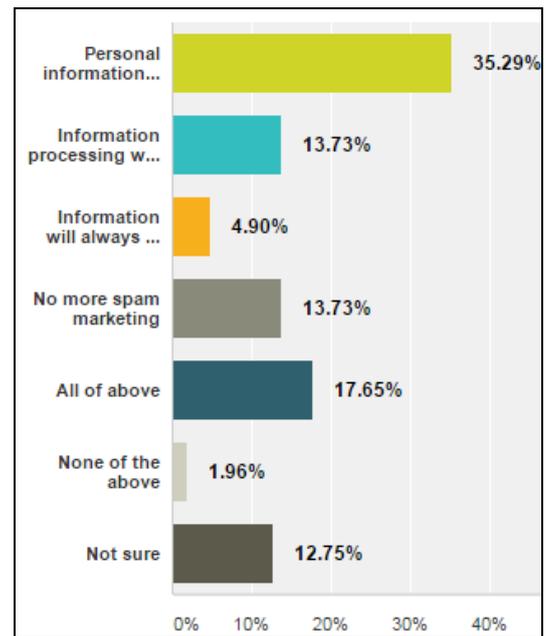


Figure 12. Benefits of PoPI

The last question asked was to determine the possibility of their business to close down with the implementation of the PoPI Act. 1% said their business will close down guaranteed; 2% said that there is a very big possibility for this; 4% answered medium possibility; 37% said little possibility; whereas 56% stated that there is no possibility (See Figure 13).

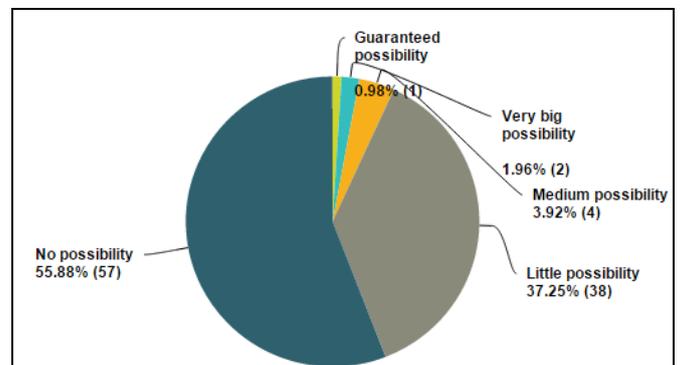


Figure 13. Possibility to Close Down Business with PoPI Implmentation

Looking at the results in terms of the view of the SMEs, the majority are not too concerned about the effects that the PoPI Act will have on their businesses. This might be due to the lack of awareness of the Act or it might also be due to the fact that most SMEs do not rely on direct marketing and will be able to adopt different marketing strategies.

VII. CONCLUSION

The research reported on in this paper examined the effects that the newly adopted Protection of Personal Information (PoPI) Act has on small and medium enterprises (SMEs) within South Africa. The results indicated that the majority of SMEs are not yet compliant due to various reasons. One of the biggest reasons is the lack of awareness regarding the legal obligations they have and the substantial consequences the Act imposes for non-compliance[3]. It is recommended that South Africans look at countries around the globe who has already gone through the privacy act compliance processes and follow similar routes. A further part of the study was to determine the effects the Act would have on SMEs in terms of marketing and growth. It was shown that while only a limited number of respondents feel that the loss of direct marketing as a strategy would have a severe impact on their business, the PoPI Act could in fact result in the loss of jobs. For others businesses the loss of direct marketing as a strategy might not be as profound, but the process of obtaining compliance is far from clear. This adds to the already difficult administrative burden business owners face in the current South African environment and could result indirectly on even less growth for SMEs in the initial stages of the Act's adoption and compliance enforcement period.

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