COMMENTS FROM MEMBERS OF ASISA to the PARLIAMENTARY STANDING COMMITTEE on FINANCE

FINANCIAL SECTOR REGULATION BILL, 2015 [b 34-2015]

Date: 16 November 2015

ASISA

SECTION	DRAFT SECTION WORDING	COMMENT
GENERAL COMMENT	ASISA members thank the Standing Committee on Finance for the opportunity to provide comments on the draft Financial Sector Regulation Bill ("Bill"), which was tabled in Parliament on 27 October 2015. **<u>Time available to respond</u>** ASISA members appreciate the assurances given by this Committee that additional time will be given in which to comment. What follows are therefore our preliminary comments, based on the analyses of the Bill that our members have been able to undertake in the time available, **<u>Constitutional concerns</u>** • <u>Separation between Legislative and Executive powers</u> Our democracy and Constitution are based on the principle of segregation of powers and having the necessary checks and balances in place to ensure that powers are not abused. Whilst the Constitution provides for the separation of Legislative, Executive and Judicial powers, we are concerned that the Bill, as presently worded, will bestow all three of these powers on the regulatory authorities. The purpose of the Bill is to create two Authorities under the "twin peaks" model as envisaged in the National Treasury Policy document "A Safer Financial Sector to Serve South Africa Better" (the "Red Book"). We fully support the establishment of a dual regulatory system in order to better regulate financial stability and responsible market conduct, so as to ensure a sound and sustainable financial sector. The Red Book incorporates various principles behind reforming the financial regulatory system, including the principle that "policy and legislation are set by government and the legislature, providing the operational framework for regulators." What is of concern is that the Bill seems to deviate from this principle, as it does not merely provide an operational framework for the Regulators to regulate the financial services industry in accordance with the policy provisions decided by government, but in fact gives the Regulators plenary powers to create policy by way of subordinate legislation such as standards, without any clear framework being provided therefor. Whilst sub-section 58(1)(a) expressly tasks the Financial Sector Conduct Authority to "regulate and supervise, in accordance with the financial sector laws, the conduct of financial institutions …", the Bill in fact assigns plenary legislative powers to the Regulators, which will enable them to not only regulate "Financial sector laws", but to in fact make "Financial sector laws. The Bill will in fact empower the Regulator to make "regulatory instruments" regarding, amongst other things, "financial products and financial services", which, although not subject to parliamentary approval, will trump Financial Sector Laws made by Parliament in the event of any inconsistency. It is submitted that the proposed assignment of plenary legislative powers does not accord with the provisions of Chapter 4 of the Constitution and is therefore probably unconstitutional (see EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1995(4)SA 877 (CC) , especially paragraph [51] [62] and [63].) While there are clear consultation requirements set out in Chapter 7, they do not require parliamentary approval of the regulatory instruments. The Bill merely requires that	

SECTION	DRAFT SECTION WORDING	COMMENT
	the instrument be submitted to the National Assembly, without stipulating anything further. Put differently, the regulatory instrument will apparently become effective irrespective of National Assembly's approval. We submit that in view of the impact of the definition of "this Act" which renders subordinate legislation akin to primary legislation, parliamentary oversight and prior approval of such subordinate legislation should be a prerequisite before the subordinate legislation becomes effective. If, however, the status of subordinate legislation is amended to its correct position in the hierarchy, then parliamentary approval would not be necessary or desirable. . While sections 105, 106 and 108 set out the purposes for which and matters in respect of which the standards (which are regulatory instruments) can be made, and stipulates scope and limit to the powers to issues standards, it is our view that no real limitations in fact exist. . The sections afford very wide powers to the regulators to not only regulate, but to in fact create policy. It is respectfully submitted that the assignment of such plenary powers is also not required in terms of the International Association of Insurance Supervisors Core Principles (refer paragraph 1.2 on page 15 of the document). We take note of the objective to protect financial customers and agree that there is a need for it. However, we submit that there are also other rights, interests and objectives that need to be safeguarded and met such as those of financial institutions, their shareholders (which include pension funds and thus also impact on their members) and their employees, and the economy. It is important that a balance be struck between the rights and interests of all stakeholders. Financial institutions contribute a substantial percentage to the GDP and legislative and regulatory measures imposed on the industry should accord with the proportionality principle. Whilst we agree that the provision and regulation of financial services and institutions can be improved upon, we believe that the approach should be to identify and address specific problems and areas of concern, and avoid disproportionate sweeping changes to the current legislative framework. • <u>Vicarious liability for offences and contraventions</u> Section 266 of the Bill appears not only to impose "strict criminal liability" but to contravene section 35(3)(h) of the Constitution which declares that every person has the right to a fair trial which includes the right to be presumed innocent. • <u>Conflation of judiciary and executive powers</u> Section 141(1) gives the responsible authority the power to issue a binding interpretation on the application of a specified provision of that law, in circumstances specified in the interpretation. The purpose of such a binding interpretation is stated to be to "promote clarity, consistency and certainty in the interpretation and application of financial sector laws" (section 141(2)). However, the interpretation of statutes is a function/responsibility of the judiciary and not of the executive. The proposed provisions not only usurp a function of the Courts, but also infringe on the separation of the legislative, executive and judiciary functions which is entrenched in the Constitution. • <u>Powers to conduct supervisory on-site inspections without consent or a warrant</u> It is a matter of concern that under section 131 of the Bill, power will be conferred on a financial sector regulator to enter the business premises of a supervised entity without a warrant, at any time during office hours, and to conduct a supervisory on-site inspection of the premises, without due regard to the rights granted in the Constitution.	

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SECTION	DRAFT SECTION WORDING	COMMENT
	ASISA was instructed by its members to obtain the opinion of senior counsel in respect of their concerns that relate to the aspects of the Bill that appear to be unconstitutional. To this end, Advocates G M Budlender SC and C de Villiers have prepared a Memorandum. An extract of the pertinent paragraphs from that Memorandum is annexed to this document. **Responses to comments do not address concerns** National Treasury has released a response document to comments received. We are concerned that in several instances the response does not adequately address the concern raised in the comments. Some examples of this are pointed out in the main body of comment below. **Regulators to be excluded from certain provisions of the Protection of Personal Information Act, 4 of 2013 ("PPI")** Sections 239(1)(c) and 239(2)(b) state that certain provisions of PPI do not apply to the use and disclosure of personal information by the financial sector regulators, or when a financial sector regulator sends personal information trans-border. It is submitted that it is not appropriate to exclude the financial sector regulators from the ambit of PPI.	
CHAPTER 1: INTERPRETATION, OBJECT AND ADMINISTRATION OF ACT		
Section 1 Definition - "this Act"	**"this Act"** includes the Regulations, Schedules and regulatory instruments made in terms of this Act; **''financial sector law''** means— *(a)* this Act; *(b)* a law listed in Schedule 1; *(c)* a Regulation made in terms of this Act or made in terms of a law referred to in Schedule 1; or *(d)* a regulatory instrument made in terms of this Act or made in terms of a law referred to in Schedule 1; **''regulatory instrument''** means each of the following: *(a)* A prudential standard; *(b)* a conduct standard; *(c)* a joint standard; *(d)* an Ombud Regulatory Council rule; *(e)* a determination in terms of section 235; *(f)* an instrument identified as a regulatory instrument in a financial sector law;	s9(1) of the Bill provides that "In the event of any inconsistency between a provision of this Act and a provision of another Act, *the provision of this Act prevails".* The Bill defines "*this Act*" to include "the Regulations, Schedules and *regulatory instruments* made in terms of this Act". A "*financial sector law*" is, in turn, defined to mean the Act; the laws listed in Schedule 1 (which include all the key Acts currently governing the provision of financial services in South Africa); and a Regulation or regulatory instrument made in terms of a law referred to in the Act or Schedule 1. The Bill defines *regulatory instruments* to include (amongst other instruments) the prudential and conduct standards (and joint standards**),** which standards are made and issued by either the Prudential or Conduct Authorities. Given the definition of "*this Act*" referred to above, the effect of section 9(1) of the Bill is that regulatory instruments issued by a Regulator under the Bill would, in the event of inconsistency, override both the original legislation referred to in Schedule 1 of the Bill and any

SECTION	DRAFT SECTION WORDING	COMMENT
	and *(g)* an instrument amending or revoking an instrument referred to in paragraphs *(a)* to *(f)*;	subordinate legislation which may have been promulgated in terms thereof. Generally, the hierarchy of legislation is such that subordinate (or more accurately "delegated") legislation ranks lowest, and original legislation (i.e. a law passed by Parliament) will be superior to subordinate legislation, with the Constitution prevailing as the supreme law of the land. As a general rule, Parliament cannot confer a power on a delegated legislative body to amend or repeal an Act of Parliament. This has been recognised by the Constitutional Court, including in a matter where the legislature purported to delegate to the President the power to amend an Act of Parliament. The Constitutional Court found this would subvert the manner and form of the Constitution and noted that delegating plenary powers of this nature entailed giving away too much of the Legislature's law-making responsibility. **Proposal: That the regulations, the Schedules and regulatory instruments be excluded from the definition of "this Act".**
Section 1 Definition – "business document",	**"business document"**, in relation to a person, means a document held by the person in connection with carrying on a business;	This definition was not included in the earlier drafts of the Bill, and should expressly exclude any document that is privileged (such as for example, an opinion or advice from legal advisers or counsel). This is relevant to section 131 (powers to conduct supervisory on-site inspections). Privileged documents should not form part of the documentation to which the official has access under subsection 4(a).
Section 1 Definition - "outsourcing arrangement"	**''outsourcing arrangement''**, in relation to a financial institution, means an arrangement between the financial institution and another person for the provision to the financial institution of a specified service related to the provision by the financial institution of a financial product, a financial service or a market infrastructure, but does not include a contract of employment with a person who is a staff member;	The need to keep the definition as broad and brief as possible is understood. However, the importance of avoiding coverage of tasks that are normally beyond the remit of financial supervisors needs to be taken into account. As currently defined, activities such as "intermediary services" and activities performed by mandated agents of the financial institution will be caught in the ambit of the definition and it is submitted that such activities should not constitute outsourcing. We would also recommend that the ambit of the services rendered by other persons be narrowed to only pertain to the services material to the core business of the financial institution. **Proposal: That the section be re-worded in the following manner -** "In relation to a financial institution, means an arrangement between the financial institution

SECTION	DRAFT SECTION WORDING	COMMENT
		and another person in terms of which such other person undertakes to provide a specified service material to the core business of the financial institution to or on behalf of the financial institution which pertains to the provision of a financial product, financial service, or a market infrastructure by such financial institution, as the case may be, but does not include a contract of employment."
Section 1 Definition - "financial sector law"	"**financial sector law''** means— (a) this Act; (b) any act ~~law~~ listed in Schedule 1 and any Regulation or regulatory instrument made in terms of any such act; ~~(c) a Regulation made in terms of this Act or made in terms of a law referred to in Schedule 1; or~~ ~~(d) a regulatory instrument made in terms of this Act or made in terms of a law referred to in Schedule 1;~~	Subparagraph (b) – we suggest that reference should be made to "an act" and not "a law", as this in line with traditional naming conventions. Subparagraph (c) - the definition of "this Act" already includes Regulations and regulatory instruments made in terms of the FSRB. Hence subpar (c) is a duplication insofar it refers to "a Regulation made in terms of this Act". Subparagraph (d) - the definition of "this Act" already includes Regulations and regulatory instruments made in terms of the FSRB. Hence subpar (d) is a duplication insofar it refers to "a regulatory instrument made in terms of this Act". **Proposal: It is suggested that the section be amended as proposed.**
9	**Inconsistencies between Act and other financial sector laws** **9.** (1) In the event of any inconsistency between a provision of this Act and a provision of another Act that is a financial sector law, the provision of this Act prevails. (2) In the event of any inconsistency between a provision of a Regulation or a regulatory instrument made in terms of this Act, and a provision of a Regulation or a regulatory instrument made in terms of a specific financial sector law, the provision of the Regulation or regulatory instrument made in terms of this Act prevails.	The definition of "this Act" includes regulatory instruments made in terms of the Bill. A regulatory instrument will therefore prevail over another financial sector law in the event of inconsistencies between the regulatory instrument and the other financial sector law. National Treasury's response to comments made on the previous draft of the Bill indicates that this is not the intention, and regulatory instruments, as delegated legislation, should not trump a provision of primary legislation. **Proposal: In order to reflect the correct intention, we suggest that section 9(1) be amended to read as follows:** "9. (1) In the event of any inconsistency between a provision of this Act , excluding any regulations, Schedules or regulatory instruments made in terms thereof, and a provision of another Act that is a financial sector law, the provision of this Act prevails." Alternatively, that the proposal under the definition of "this Act" be implemented.

SECTION	DRAFT SECTION WORDING	COMMENT
CHAPTER 6: ADMINISTRATIVE ACTIONS		
Part 1 Administrative action committees		Save for section 87(3), the required number of members are not prescribed. In view of the responsibility being bestowed on the administrative action committee, this part should provide for a minimum number of members and include a requirement that any such member must meet prescribed fit and proper requirements, which requirements must be formulated with due regard to their responsibility.
87(3)(a)(ii)	**(3)** The members of an administrative action committee— (a) must include- (i) a retired judge; or (ii) at least one advocate or attorney with at least 10 years' experience in practising law in the Republic;	It is submitted that the advocate or attorney concerned should, *inter alia,* have a sound knowledge of administrative law. In terms of section 87(1), the administrative committee will be tasked to consider and make recommendations to the financial sector regulator on administrative actions. As presently worded there only needs to be one lawyer as part of the committee and, it is submitted that it will not be appropriate if such person is not required to have a sound knowledge and experience of administrative law.
93(1)(b)	**93 (1)** Before a financial sector regulator determines or amends an administrative action procedure in terms of section 92, the financial sector regulator must— (a) … (b) submit a draft of the proposed procedure or amendment to the Director-General and the other financial sector regulator; and (c) …	It is not clear what the purpose will be to refer a draft to the Director-General without the comments and responses thereto. Furthermore, it is not clear what the Director-General is expected to do with such draft. **Proposal: It should be a requirement that the Director-General approve such procedure and that the Director-General have power to refer it back to a financial regulator to make certain amendments.**
93(2)	**(2)** If a financial sector regulator changes a proposed procedure or amendment after expiry of the comment period, it is not obliged to publish the change before publishing the final version of the procedure or amendment.	As currently worded, the regulator will be at liberty to introduce substantially different procedures than those that had been referred to the public for comment, and to that which has been submitted to the Director-General. **Proposal: That the section be amended to read as follows:** (2) If a financial sector regulator changes a proposed procedure or amendment after expiry of the comment period, <u>in a manner which is not material,</u> it is not obliged to publish the change before publishing the final version of the procedure or amendment.

SECTION	DRAFT SECTION WORDING	COMMENT
94	**Reconsideration of decisions** **94.** (1)A financial sector regulator may, at any time, on its own initiative or on written application by an aggrieved person in terms of section 215— *(a)* reconsider a decision made by the financial sector regulator; *(b)* confirm, alter, substitute or revoke the decision; and *(c)* end or undo any action taken by it as a result of the decision. (2) No decision may be reconsidered in terms of subsection (1) if the decision is the subject of— *(a)* proceedings in the Tribunal; or *(b)* judicial proceedings	(a) ASISA members are concerned that a financial sector regulator will be empowered to exercise those powers listed in ss 94(1)(a) – (c) **"…at any time…".** If a decision has consequences which necessitate administrative, process and procedural changes for financial institutions, the effect of this power is that this can be undone at any time, no matter how long the lapse of time since the original decision was taken. It is submitted that this leads to uncertainty and is unreasonable. Furthermore, to empower a financial sector regulator to initiate reconsideration of decisions **"on its own initiative"** will have the result that no decision is final, alternatively that it is final only to the extent that it is not reconsidered. **Proposal: We submit that the phrases "…at any time…" and "…on its own initiative…" be deleted.** (b) Drafting error: The reference to section 215 may be incorrect – should the reference not be to section 230?
97(1)	**Regulatory instruments and consultation process** **97 (1)** Before making a regulatory instrument, the maker of the regulatory instrument must publish— (a) a draft of the regulatory instrument; (b) a statement explaining the need for and the intended operation of the regulatory instruct; (c) a statement of the expected impact of the regulatory instrument; and (d) a notice inviting submissions in relation to the regulatory instrument and stating where, how and by when submissions are to be made.	Whilst the section does provide for a consultative process, section 97(5) makes it clear that the Regulator will be the sole arbitrator as to whether or not the proposed legislative instruments should be implemented despite the submissions received. This does not accord with the "manner and form" provisions envisaged and prescribed in Chapter 4 of the Constitution. **Proposal: That all such regulatory instruments which will be akin to national legislation must go through a parliamentary process before it becomes effective. If, however, the status of subordinate legislation is amended to its correct position in the hierarchy, then parliamentary approval would not be necessary or desirable.**
97(3)	**(3)** If the maker is a financial sector regulator, the maker must, when complying with subsection (1), provide a copy of the documents referred to in that subsection to— (a) the other financial sector regulator, the Reserve Bank, the National Credit Regulator, the Council for Medical Schemes and the Director-General; and (b) if the regulatory instrument would impose requirements on providers of	It is not clear whether section 97(3) is for purposes of information sharing or awareness between regulators. The only other applicable regulatory authority in question appears to be the Prudential Authority or the Financial Sector Conduct Authority, but it is not clear whether other financial sector regulators (Counsel for Medical Schemes, National Credit Regulator, Financial Intelligence Centre) must be consulted and must agree with any proposed legislative regulatory instruments. The only obligation is to make a copy available. What will happen

SECTION	DRAFT SECTION WORDING	COMMENT
	securities services, the market infrastructure that has the function of licensing those providers in terms of a financial sector law.	when a proposed conduct standard has major prudential impacts?
97(4)	**(4)** If the maker is the Ombud Regulatory Council, the maker must, when complying with subsection (1), provide a copy of the documents referred to in that subsection to the financial sector regulators, the National Credit Regulator and the Director-General.	**Proposal: We submit that any regulatory instrument issued by the Ombud Regulatory Council should also be furnished to every Ombud and adjudicator.**
97(5)	**(5)** In deciding whether to make the regulatory instrument, the maker must take into account all submissions received by the expiry of the period referred to in subsection (2).	As currently worded, the maker remains the sole arbitrator as to whether or not it should implement the proposed legislative instruments. As mentioned above this does not accord with the "manner and form" provisions envisaged and prescribed in Chapter 4 of the Constitution. Section 100, as currently worded, merely requires that the regulatory instrument be submitted to the National Assembly. Nothing further is required from National Assembly before the regulatory instrument becomes effective. Please refer to the comments on section 100. **Proposal: It is ASISA members' view that a regulatory instrument must be approved by the parliamentary standing committee. If, however, the status of subordinate legislation is amended to its correct position in the hierarchy, by removing it from the definition of "this Act", then parliamentary approval would not be necessary or desirable.**
99	**Urgent regulatory instruments** **99.** (1) A maker may make a regulatory instrument without having complied, or complied fully, with section 97 or 98 if the delay involved in complying, or complying fully, with those sections is likely to lead to prejudice to financial customers or harm to the financial system, or defeat the object of the proposed regulatory instrument. (2) As soon as practicable after making a regulatory instrument in terms of subsection (1), the maker must— *(a)* follow a procedure similar to section 97; and *(b)* include in the explanatory statement as required in terms of section 97(1), reasons why the regulatory instrument has been made urgently.	Whilst section 99(2) does provide for a subsequent consultative process, the pertinent question is what the impact of such a legislative instrument may be in the interim, pending such a consultative process. We point out that financial institutions might have to amend their systems, processes and implement change management initiatives (all of which are considerably costly), despite the fact that the instrument necessitating the changes might well be reversed. In our view the Bill itself should stipulate what measures may be introduced by the regulator upon the occurrence of a "systemic event" or crisis. It should also provide that such 'urgent' measures need to first be approved by a High Court. This will provide for the necessary "checks and balances" and ensure "proportionality". In addition, the explanatory statement required by s99(2)(b) should require the Regulator to provide detailed reasons, supported by verifiable evidence, as to why, in its opinion, the delay

SECTION	DRAFT SECTION WORDING	COMMENT
		involved in complying with sections 97 or 98 is likely to lead to prejudice to financial customers or harm to the financial system, or to defeat the object of the proposed regulatory instrument.
100	**Submission of regulatory instruments to National Assembly** **100**. A maker that makes a regulatory instrument must submit to the National Assembly, within 14 days after the regulatory instrument is made— (a) a copy of the regulatory instrument; (b) a statement explaining the need for, and the intended operation of, the regulatory instrument; ~~and~~ (c) a statement of the expected impact of the regulatory instrument~~.~~; (d) a general account of the issues raised in the submissions; and (e) a response to the issues raised in submissions.	It is not clear what the purpose is of introducing a requirement to merely submit the regulatory instrument to the National Assembly. It is submitted that having been submitted, they should then be noted by the National Assembly. **Proposal: The National Assembly should note the regulatory instruments so submitted.** In addition, in order for the submission to the National Assembly to have any meaning, National Assembly should also be aware of the issues that were raised in submissions, and what the response was to issues raised. **Proposal: That the section be amended as suggested.** The above comments are subject to amendments being made to the definition of "the Act" to establish the appropriate hierarchy for subordinate legislation. If this is not done, then being akin to primary legislation, regulatory instruments should follow the full parliamentary process.
103	**Commencement of regulatory instruments** **103.** (1) A regulatory instrument may be published in the Register, after the regulatory instrument has been submitted to the National Assembly as required in terms of section 100, and a period of 30 days has elapsed, when Parliament is in session. (2) Subject to section 104, a regulatory instrument comes into operation— (a) on the date the instrument is published in the Register; or (b) if the instrument provides that it comes into effect on a later date, on the later day.	If a regulatory instrument comes into operation on the date the instrument is published in the Register, then the word "may' in section 103(1) should be "must". Otherwise the instrument may never come into operation, if it is not a requirement to publish it. It should, however, only become effective once approved by National Assembly. The regulatory instruments have the effect of law and the legislature should at least be required to consider them prior to them becoming effective. Please also refer to our comments on s100. Clarity is required as to the process when Parliament is not in session.
104	**Commencement of urgent regulatory instruments** **104.** If the instrument was made in circumstances mentioned in section 99, it comes into effect on the date the regulatory instrument is published in the	With reference to our comments section 99 above, we submit that section 104 should be amended to determine that the instrument will become effective on the day as determined by the Court.

SECTION	DRAFT SECTION WORDING	COMMENT
	Register.	
105 and 106	**Prudential Standards** **105.** (1) The Prudential Authority may make prudential standards for, or in respect of - **Conduct standards** **106.** (1) The Financial Sector Conduct Authority may make conduct standards for, or in respect of -	Chapter 7 of the Bill empowers the Regulators to make prudential standards and conduct standards, with respect to the subject matter and for the purposes set out in sections 105 and 106 respectively. Each of these sections then set out an extensive (but not exhaustive) list of matters which may be provided for in such standards, while Chapter 7 stipulates consultation requirements to be followed by a Regulator in making such standards. Section 29 of the Bill empowers the Governor of the Reserve Bank to designate a financial institution as a "systemically important financial institution", and sets out the matters which must be taken into account and procedure to be followed when doing so. On the face of it, the powers granted to the Regulators referred to above are wide-ranging, and they enjoy an extensive discretion to regulate the financial sector by means of making standards, issuing directives, etc. In this regard, the granting of broad discretionary powers to an executive organ (such as the Regulators) may be held to be unconstitutional in the event that the empowering legislation does not provide adequate guidelines or criteria as to how the power is to be exercised. There is case law to the effect that providing a member of the executive with "unfettered and unguided" power is an unjustifiable limitation on the right to procedurally fair administrative action provided for in the Constitution. The Constitutional Court has recognised, however (in the matter of *Dawood v Minister of Home Affairs [1999] JOL 5398 (C)*), that the scope of discretionary powers granted to a decision-maker would vary from case to case, and that the granting of broad powers would be acceptable if the factors relevant to the exercise of such power are "indisputably clear" or if the relevant decision-maker has expertise relevant to the decisions which need to be made. **Proposal: That the empowering legislation provide guidelines/criteria for the exercise of the wide discretion being conferred.**
116(3)(a)	**116. (3)(**a) If the responsible authority has not determined an application within three months after it is made, the responsible authority is taken to have refused the application.	It appears unreasonable that the regulator can by simply not responding to the applicant, decline an application for a licence. The Regulator should be compelled to respond to license applications and there should not be a deeming provision –applicants need administrative

SECTION	DRAFT SECTION WORDING	COMMENT
	(b) The responsible authority may, by notice to the applicant, extend the period of three months in paragraph *(a)* for one or more further periods, but the total period may not be more than nine months.	certainty. It could be that an application is misplaced, or not properly dealt with, and the applicant will simply (incorrectly) assume that it has been rejected, when in fact the regulator has simply not applied his/her mind to the application for whatever reason. Furthermore, s116(3)(b) allowing the regulator to deal with an application for up to nine months does not support the business environment, as a business may not be able to operate for a period of nine months while it waits for its license, and/or a business opportunity may be lost. The applicant has a right to procedurally fair administrative action in terms of section 3(2) of the Promotion of Administrative Justice Act, 2000 ("PAJA"). This section does not seem to constitute fair procedure. In their response to comments on the earlier draft of the Bill, National Treasury points out that the applicant would have recourse through PAJA. It is not understood why this should be necessary – the section as drafted is open to abuse and could easily be remedied by requiring the authority to acknowledge the application, to advise them of progress after thirty days and to inform them if the period is extended, and for how long and why. **Proposal: Delete this subsection.**
CHAPTER 9: INFORMATION GATHERING, SUPERVISORY ON-SITE INSPECTIONS AND INVESTIGATIONS		
131	**Powers to conduct supervisory on-site inspections** **131.** (1) A financial sector regulator may, at any time during normal business hours - *(a)* without a warrant enter the business premises of a supervised entity; and *(b)* conduct a supervisory on-site inspection on the premises.	ASISA members are of the view that the powers conferred by section 131 must be made subject to the criteria set out in in section 136. It is noted that the phrase "without a warrant" was not included in the on-site inspection provisions in the previous version of the Bill. It is therefore a matter of concern that power will be conferred on a financial sector regulator to enter the business premises of a supervised entity without a warrant, at any time during office hours, and to conduct a supervisory on-site inspection of the premises, without due regard to the rights granted in the Constitution. In this regard, when sections 131 and 136 are compared, we submit that it is the <u>nature of the power</u> that is being exercised which is decisive and not the identity of the functionary. See, for example, the statement of the Constitutional Court that: "What matters is not so much the functionary or the function…The focus of the enquiry as to whether conduct is 'administrative action' is not the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising" [*Administrative Law in*

SECTION	DRAFT SECTION WORDING	COMMENT
		South Africa – Hoexter 175]. Furthermore, the exercise of the powers to be conferred are subject to the same rights, notwithstanding which entity is exercising that power. **Proposals:** We accordingly submit that similarly to section 136, the power being conferred in terms of section 131 should be subject to the following requirements: • The consent of the financial institution; or • A duly authorised warrant; or • If the regulator believes, on reasonable grounds, that a delay caused by applying and obtaining a warrant will defeat the purpose of the search and believes on reasonable grounds that a warrant would be issued; and • That the exercise of these powers must be done with strict regard to decency, good order and a person's rights to human dignity, freedom and security of the person and privacy. Whilst conducting an investigation is an administrative action (and hence subject to the Promotion of Administrative Justice Act, 2000), it constitutes an invasion of privacy which is subject to section 36 of the Constitution. Compliance with section 36 can only be achieved by including guidelines in that set out how an inspector must conduct an investigation. This will ensure that the conduct is required to be within the bounds of the Constitution. The guidance afforded by the Constitutional Court in the in the matter of Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC), ad para 77 informs the inspection of private premises. **Proposal: For the sake of legal certainty it is suggested that the guidelines afforded by the Constitutional Court be incorporated in the legislation.**
133	**Investigators** **133.** (1) A financial sector regulator may, in writing, appoint a person as an investigator and may appoint any person to assist the investigator in carrying out an investigation.	ASISA members submit that is not appropriate for "any" person to be appointed to assist an investigator as provided in s133(1). It is proposed that some minimum standards be set for 'qualifying' investigators in order to ensure fair treatment and, as important, to prevent any potential conflicts.

SECTION	DRAFT SECTION WORDING	COMMENT
	(2) The financial sector regulator must issue an investigator appointed in terms of subsection (1) with a certificate of appointment, which must be in the possession of the investigator when an investigator exercises any power or performs any duty in terms of this Act, and such investigator must produce the certificate of appointment at the request of any person in respect of whom such power is being exercised.	
136(5)(a)(v)	**136(5)(a)** While on premises in terms of this section, an investigator, for the purpose of conducting the investigation, has the right of access to any part of the premises and to any document or item on the premises, and may do any of the following: … (ii) examine, make extracts from and copy any document in the premises; … (v) require a person on the premises to operate any computer or similar system on or available through the premises to— (aa) search any information in or available through that system; and (bb) produce a record of that information in any media that the investigator reasonably requires;	The powers of investigators to enter and search premises under s136 should not include access to legally privileged documents. National Treasury, in its response to comments made on the previous draft of the Bill, comments that provisions to protect legal privilege have been included. However, the only section that ASISA members can find that does protect legally privileged documents is s139(4)(a) which only applies to Part 5 of the Bill. S136 is in Part 4.
139(2)	**(2)***(a)* A person who is questioned by a financial sector regulator or an investigator in terms of this Chapter may object to answering the question on the grounds that the answer may tend to incriminate himself or herself. *(b)* On such an objection, the financial sector regulator or investigator may require the question to be answered. *(c)* An answer given as required in terms of paragraph *(b)* - (i) is not admissible in evidence against the person in any proceedings for an offence or a penalty, except proceedings in respect of a contravention of section 263 based on the false or misleading nature of the answer; and (ii) must not be taken into account by a financial sector regulator in determining whether or not the person has contravened a financial sector law, or taken into account in relation to a penalty to be imposed on the person in relation to such a contravention.	Section 139(2) ostensibly seeks to protect a person's right against self-incrimination.The fact that evidence directly obtained or derived from an answer during examination may not be admissible in criminal proceedings does not protect a person's right to self-incrimination if the information provided by the person is used to unearth or collate other information which would not have been uncovered but for the information provide by answers and used in subsequent criminal proceedings. **Proposal: The section as presently worded therefore needs to amended to provide that any incriminating evidence uncovered as a result of an answer furnished in the course of relevant proceedings may also not be relied upon in subsequent criminal and/or administrative proceedings.**

SECTION	DRAFT SECTION WORDING	COMMENT
	(3) Before a financial sector regulator or an investigator starts to question a person in terms of this Chapter, if the financial sector regulator or the investigator suspects that the person has contravened a financial sector law, the financial sector regulator or the investigator must inform the person of the right to object in terms of this section. (4) *(a)* A person does not have to produce a document or answer a question asked in terms of this Part if that person is entitled to claim legal professional privilege in relation to the contents of the document or such answer; or *(b)* If the person contemplated in paragraph *(a)* is a legal practitioner, the said person is entitled or required to claim that privilege on behalf of a client of the person. (5) Subsections (2) and (4) do not limit any right of a person.	
CHAPTER10: ENFORCEMENT		
141	**Binding interpretations** **141.** (1) The responsible authority for a financial sector law may issue a binding interpretation on the application of a specified provision of that law, in circumstances specified in the interpretation. (2) The purpose of a binding interpretation is to promote clarity, consistency and certainty in the interpretation and application of financial sector laws. (3) A binding interpretation ceases to be effective if - *(a)* a provision of the financial sector law that was the subject of the binding interpretation is repealed or amended in a manner that materially affects the binding interpretation, in which case the binding interpretation will cease to be effective from the date that the repeal or amendment is effective; or *(b)* a court overturns or modifies an interpretation of the financial sector law on which the binding interpretation is based, in which case the binding interpretation will cease to be effective from the date of judgment unless - (i) the decision is under appeal;	In ASISA members' view, this power is problematic from a constitutional law perspective. Firstly, it is arguable that this provision violates the separation of powers principle in that it is the judiciary's role to interpret legislation. By granting the Regulator the power to issue binding interpretations of financial sector laws, the powers of the courts are being usurped. In addition, the entire body of judicial precedent will be rendered superfluous if, for example, the Regulator decides to issue an interpretation that is contrary to the case law on that point. The fact that a particular interpretation ruling is only binding until a court finds otherwise does not, in our view, cure the separation of powers issue, and it also places the burden on affected financial institutions of incurring the costs of approaching the Court whenever they do not agree with a particular interpretation. Secondly, this provision also arguably constitutes an unconstitutional abdication by Parliament of its law-making powers. In effect, by granting the Regulator the power to "interpret" the relevant primary legislation in a binding manner, this arguably gives the "interpretation rules" the status of primary legislation. We note that it is an accepted principle in our law that delegated legislation (such as formally gazetted regulations) cannot be used to interpret the Act under which they were promulgated. However, in the case of this Bill, instruments which

SECTION	DRAFT SECTION WORDING	COMMENT
	(ii) the decision is fact-specific and the general interpretation upon which the binding interpretation was based is unaffected; or (iii) the reference to the interpretation upon which the binding interpretation was based did not form a part of the reasoning on which the judgment of the court was based. (4) The responsible authority that issues a binding interpretation may amend or revoke the interpretations if it is necessary to do so because of a change in the law or a judicial decision. (5) A binding interpretation ceases to be effective upon the occurrence of any of the circumstances described in subsection (3), whether or not the responsible authority publishes a notice of withdrawal or modification of the binding interpretation.	fall short even of delegated legislation (i.e. interpretation rules) are given the power to interpret primary legislation. In addition, at a practical level, section 141 does not clarify what the effect of a contrary court ruling will be on historic conduct where a financial institution did not adhere to the Regulator's ruling. On the face of it, sub- section 141(4) is inconsistent with ss141(3)(a) and (b) – the amendment or revocation is by operation of law and, as currently worded, suggests that the responsible authority still has a discretion to amend or revoke its binding interpretations, notwithstanding ss141(3)(a) or (b). We furthermore submit that the proposed dispensation, in terms of which a financial institution must adhere to an "binding interpretation", until such time "as a court attaches a different interpretation …" (section 141(3)) will bring about great uncertainty for both financial institutions and customers, as it is by no means clear what the impact of a contrary Court ruling will be on actions taken by financial institutions in accordance with the "binding interpretation". In this regard it is to be noted that it will not always be possible to place the parties in the positions they would have been in, but for the binding interpretation. In view of section 275 (which we submit is unconstitutional to the extent that it seeks to deprive clients and/or financial institutions the right to claim damages in the event of non-compliance with the provisions of the Promotion of Administrative Justice Act, 2000), neither Financial Institutions, nor their customers, will have any recourse for damages suffered by reason of abiding by an erroneous interpretation. **Proposal: It is submitted that the section be deleted and that section 141 be amplified to expressly provide that the Regulator may apply to the High Court for a declaratory order as regards the correct interpretation of a Financial Sector Law.**
148(2)	**148**(2) A directive of a financial sector regulator is not a ground on which a person may terminate a contract with a financial institution, accelerate a debt under such a contract or close out a transaction with the financial institution,	We believe the rendering null and void of certain provisions in contracts between two contracting parties to be an unwarranted interference into private arrangements between individuals. We believe there may be very good commercial/risk reasons why a financial

SECTION	DRAFT SECTION WORDING	COMMENT
	despite any provision to the contrary in any contract or document.	institution may not want to do business with a person which has been issued with a directive (depending on the directive) and the parties should be free to specify in their contracts the consequences of certain actions taken by either of them. We are comfortable if the section in the Act does not give an automatic right to terminate / accelerate / close out, in the absence of such a contractual provision between them.
CHAPTER 11: SIGNIFICANT OWNERS		
General		Concerns were raised with National Treasury in the ASISA response to the previous draft of the Bill. The revised provisions of this Chapter do not alleviate all previous concerns, in particular, in relation to the 15% threshold set out in s155(d) and the Minister's ability to reduce it through regulation. In addition, a new concern arises due to the provisions of s157, which section was not included in previous drafts. In both regards, the potential impact on investors not having certainty and being subject to a rapidly changing landscape (where the threshold can be lowered, even with a consultative process), potentially creates an unattractive investment environment for not only local investors, but also makes South Africa a less attractive investment destination in respect of listed financial institutions. **Proposal:** Given these various concerns, as well as the new principles embodied in s157 being introduced for the first time in this version of the Bill, it is proposed that this entire Chapter be deleted and rather dealt with during Phase 2 of Twin Peaks, that is, when sector-specific legislation is being revised e.g. Insurance Act, Collective Investments Schemes Act, especially as it is still not apparent that a one-size-fits-all approach should be implemented across all financial institutions.
155	**Significant owners** **155**. (1) A person is a significant owner of a financial institution if— (a) the person, directly or indirectly, alone or together with a related or interrelated person, has the ability to control or influence materially the	Amongst other National Treasury responses on Chapter 10 (the previous draft Bill chapter dealing with Significant Owners), the following is stated: In relation to BASA's comment that there are more than 10 000 registered financial services providers ("FSPs") and that provision needs to be made to ensure that insignificant holdings

SECTION	DRAFT SECTION WORDING	COMMENT
	business or strategy of the financial institution; (b) the person, directly or indirectly, alone or together with a related or interrelated person, has the power to appoint a person to be a member of the governing body of the financial institution; (c) the person's consent is required for the appointment of a person as a member of a governing body of the financial institution; (d) in the case of a financial institution that is a company, the person, directly or indirectly, alone or together with a related or interrelated person— (i) holds at least 15%, or a lower percentage as may be prescribed in Regulations, of the issued shares of the financial institution; (ii) is able to exercise or control the exercise of at least 15%, or a lower percentage as may be prescribed in Regulations, of the voting rights attached to securities of the financial institution; or (iii) holds rights in relation to the financial institution that, if exercised, would result in the person, directly or indirectly, alone or together with a related or interrelated person— (aa) holding at least 15%, or a lower percentage as may be prescribed in Regulations, of the securities of the financial institution; (bb) having the ability to exercise or control at least 15%, or a lower percentage as may be prescribed in Regulations, of the voting rights attached to shares or other securities of the financial institution; or (cc) having the ability to dispose of or direct the disposal of at least 15%, or a lower percentage as may be prescribed in Regulations, of the financial institution's securities; (e) in the case of a financial institution that is a close corporation, the person, directly or indirectly, alone or together with a related or interrelated person, owns at least 15%, or a lower percentage prescribed in Regulations, of the members' interest, or controls directly, or has the right to control, at least 15%, or a lower percentage as may be prescribed in Regulations, of members' votes in the close corporation; (f) in the case of a financial institution that is a trust, the person, directly or	are not caught in the net, Treasury commented: "*The scope of the Bill is limited to approvals relating to significant owners of Banks, FMIs, CIS and Insurance Firms. Any additional financial institutions would need to be prescribed through Regulations. See revised Bill".* However, on our reading of the Bill, the significant owner provisions apply to all FSPs, and not just these entities. National Treasury provided the same response – that the scope of the Bill is 'limited' - to the JSE's concern on the previous section 120(1)(a). We do not agree with this statement. The definitions of the Bill are such that the scope of this Chapter is not limited to only these entities. Even if it were so limited, our concerns remain regarding the ability of Regulations to prescribe a lower percentage. National Treasury's response on page 189 of their response document is that: *"The 15 percent threshold will provide alignment across the different financial institutions that currently have different thresholds. The 15 percent threshold is in line with the international standards".* Our understanding is that the 'alignment' relates to the current 15% threshold in respect of Banks – the current threshold for insurers is 25%; the Collective Investment Schemes Act and Financial Advisory and Intermediary Services Act do not provide for any thresholds. The Banks Act does not permit the 15% threshold to be lowered by the Minister and nor does it require regulatory approval for a shareholder to dispose to a level below the stipulated threshold. Assuming that the 15% is in line with international standards, it is still not clear whether international standards permit the reduction of this threshold by the Minister in Regulations as proposed. Regarding ASISA's comment that the Minister not be permitted to prescribe a percentage lower than the (15%) threshold, on page 192 of their response document, National Treasury responds that "*Where the shareholding is fragmented, a lower shareholding might be significant relative to the holdings of other shareholders. The clause is aimed at providing flexibility."* Our understanding of this response is that it would mostly relate to listed entities i.e. fragmented shareholding is more typical in large listed entities. Assuming that to be the case, ASISA has previously raised the concern that this would have for entities trading on the JSE. Other stakeholders have also raised similar concerns. For example, Transaction Capital (on previous section 120 on pages 196 & 197 of National treasury's response document. These concerns are similar to those we have raised previously and still valid (and more so where the Minister has the power to reduce the threshold "*where the shareholding is fragmented*" [*see

SECTION	DRAFT SECTION WORDING	COMMENT
	indirectly, alone or together with a related or interrelated person— (i) controls or has the ability to control at least 15%, or a lower percentage as may be prescribed in Regulations, of the votes of the trustees; (ii) has the power to appoint at least 15%, or a lower percentage as may be prescribed in Regulations, of the trustees; or (iii) has the power to appoint or change any beneficiaries of the trust; or (g) is declared in terms of section 156 to be a significant owner of a financial institution. (2) The Minister, the Reserve Bank and a financial sector regulator are not, in those capacities, significant owners of a financial institution.	example below]). A further example, and possibly not directly related to this, is Strate's comment about approval being required for a disposal of an interest in a financial institution. If an entity is or has become a significant owner under the Bill, and it wants to dispose of its interest to below the threshold (and assuming the buyers do not cross the threshold), approval should not be required. Where the financial institution concerned is a listed entity, the provisions in Chapter 11 could and will have far-reaching (and unintended) consequences, given that one of the key reasons for the entities in question being listed is for the relative ease of trading in its shares. This is especially so where Chapter 11 applies to holdings below the threshold of 15% (a distinct possibility in light of the provisions mentioned above), as well as where a significant owner holding, for example* 16%, seeks to dispose of 2% of those holdings on the open market and is naturally unaware of the counter-party's identity. The counter-party may or may not already hold shares in the entity concerned or may hold shares but well below the 15% threshold and thus not become a 15% shareholder even if it purchases 2% from the then significant owner. This would unduly impede market trading. We propose this principle be reconsidered and dealt with in financial sector specific legislation, as a one-size fits all approach is not appropriate - banks, insurers and financial services providers, for example, should be considered separately.
157	**Approvals relating to significant owners** **157** (1) A person may not enter into an arrangement in respect of any of the following institutions, being an arrangement that results, or would result, in the person, alone or together with a related or interrelated person, becoming a significant owner of the financial institution, without the approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed: (a) An eligible financial institution; (b) a manager of a collective investment scheme; or (c) a financial institution prescribed in the Regulations.	The principles proposed in this new section are highly problematic – given the limited time available we note below only a couple of examples; there are no doubt more. Section 157 is entirely new and has far wider implications than those contained in the previous draft, especially sections 157(2) – (5). Whereas the previous draft of the Bill only captured entities which, through an acquisition of an interest in a financial institution became significant owners, or through a disposal of an interest in financial institution no longer qualified as a significant owner, the Bill now provides that <u>every</u> disposal or acquisition of shares in an eligible financial institution, manager of collective investment scheme or financial institution prescribed in the Regulations, which would <u>affect that person's level of control or influence</u> in respect of the business or strategy of that financial institution, would require approval from the relevant responsible authority. This means that an acquisition or disposal by a significant

SECTION	DRAFT SECTION WORDING	COMMENT
	(2) A person may not enter into an arrangement in respect of any of the following institutions, being an arrangement that results or would result in an increase or reduction in the extent of the ability of the person, alone or together with a related or interrelated person, to control or influence the business or strategy of the financial institution, without the approval of the responsible authority for the financial sector law in terms of which the institution is required to be licensed: *(a)* An eligible financial institution; *(b)* a manager of a collective investment scheme; *(c)* a financial institution prescribed in the Regulations. (3) An arrangement referred to in subsection (1) or (2) need not involve the acquisition of, or disposition of, shares or other interests or property. (4) If a person enters into an arrangement in contravention of subsection (1) or (2), the arrangement, in so far as it has an effect mentioned in the relevant subsection, is of no effect. (5) An approval in terms of subsection (1) or (2) may not be given unless— (a) the responsible authority is satisfied that the person becoming a significant owner, or the arrangement, will not prejudicially affect the prudent management and the financial soundness of the financial institution; and (b) in the case of an arrangement that results or would result in an increase in the extent of the ability of the person to control or influence the business or strategy of the financial institution as mentioned in subsection (2), the responsible authority is satisfied that the person meets the applicable fit and proper person requirements. (6) The Financial Sector Conduct Authority may not give approval in terms of subsection (1) or (2) in respect of an eligible financial institution that is a market infrastructure without the concurrence of the Prudential Authority and the Reserve Bank. (7) This section does not affect any other requirement in terms of a financial sector law to obtain approval or consent in respect of an acquisition or disposal.	owner which does not change their "significant owner" status would still require approval from the relevant authority. It also means that a person need not acquire a 15% shareholding to become a significant owner e.g. so long as the arrangement, which need not involve an acquisition or disposition of shares, results in any increase or reduction in that person's ability to influence the business, that person must obtain regulatory approval. This is extremely wide, without any reference to, for example, a material change An example of such a situation might be where siblings are both shareholders and one is authorised to act on behalf of the other while the latter is indisposed. The principle proposed here could throw markets into turmoil where for example, at some stage after the arrangement has been entered into, the regulator determines that the arrangement fell into the scope of this clause, whereas the entities themselves did not (whether reasonably or not) form that view. Section 157(4) provides that such an arrangement (which would not have been approved by the regulator) would have no effect. Assuming that the 'arrangement' did, for example, involve a share sale, and that further share sales had since taken place, what kind of redress would be applicable? **Proposal:** We propose this principle be reconsidered and dealt with in financial sector specific legislation, as a one-size fits all approach is not appropriate - banks, insurers and financial services providers, for example, should be considered separately. Alternatively, if this proposal is not accepted, then materiality should be brought into this provision. See for example s155(1): "A person is a significant owner of a financial institution if the person … has the ability to control or influence materially the business or strategy of the financial institution". It is inconsistent that a person becomes a significant owner when that person can control or influence <u>materially</u> the business or strategy of the financial institution under s155(1)(a), but that under s157(2), an arrangement that need only result in influencing the business or strategy requires the registrar's approval. At least the word "materially" should be inserted before "influencing".

SECTION	DRAFT SECTION WORDING	COMMENT
	CHAPTER 12: FINANCIAL CONGLOMERATES	
158	**Designation of financial conglomerates** 158. (1) The Prudential Authority may designate members of a group of companies as a financial conglomerate.	We propose the same type of consultation process as set out on s29(2)(b) and s156(3) namely that the affected group would be given notice and be able to make submissions, specifically as such a designation has far-reaching implications for a group of companies with regard to the power of the prudential authority under Chapter 12 (e.g. restructuring and approvals for acquisitions and disposals).
	CHAPTER 13: ADMINISTRATIVE PENALTIES	
165	**Administrative penalties** **165.** (1) The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator within the period specified in the order, if the person - (a) has engaged in conduct that contravenes a financial sector law; or (b) has contravened an enforceable undertaking accepted by the responsible authority. (2) The period specified in terms of subsection (1) must be at least one month. (3) In determining an appropriate administrative penalty for particular conduct, the responsible authority must have regard to - (a) the need to deter such conduct; (b) the degree to which the person has co-operated with a financial sector regulator in relation to the investigation of the contravention; and (c) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions. (4) In determining an appropriate administrative penalty for particular conduct, the responsible authority may consider any of the following: (a) The nature, duration, seriousness and extent of the contravention; (b) any loss or damage suffered by any person as a result of the conduct; (c) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct;	Section 165 does not stipulate what process the Regulator should follow before an administrative penalty may be imposed. It is important that the process be prescribed in the Bill and that it provides for due process and the proper application of the principle that a person has the right to state their case. A person against whom the responsible authority is considering imposing an administrative penalty should first be informed of what such person did wrong, and the person should be granted an opportunity to submit mitigating circumstances. It is furthermore submitted that the maximum amount of the penalty that may be levied should be either prescribed in the Bill or by Regulation issued by the Minister. We note the introduction of section 171 which did not appear in previous drafts and which allows for a person to make application for remission of a penalty. However, this should not be the only process in terms of which representations may be made before the penalty is imposed.

SECTION	DRAFT SECTION WORDING	COMMENT
	(d) whether the person has previously contravened a financial sector law; (e) the effect of the conduct on the financial system and financial stability; (f) the effect of the proposed penalty on financial stability; (g) the extent to which the conduct was deliberate or reckless. (5) An administrative penalty order may include an amount to reimburse the responsible authority for reasonable costs incurred by the responsible authority in connection with investigating the contravention. (6) The responsible authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced. (7) An administrative penalty order is not a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). (8) The responsible authority that makes an administrative penalty order must publish the order.	
172	**Prohibition of indemnity for administrative penalties** **172.** (1) A person may not undertake to indemnify or compensate another person, directly or indirectly, wholly or partly, in respect of a payment made or liability incurred by the other person in connection with an administrative penalty order imposed on the other person. (2) An undertaking in terms of subsection (1) is of no effect.	We believe this provision constitutes an unwarranted interference into the private arrangements of individuals, and that parties should be free to contractually undertake to indemnify each other for causing an administrative penalty to be issued against the other party. An example of this is where a financial services provider ("FSP") enters into a juristic representative arrangement with another entity. The FSP is responsible to the regulator for all the acts of its juristic representative and should be able to require that the juristic representative indemnifies the FSP for any breach of the contract which results in an administrative penalty being issued against the FSP. Another example is a delegation of administrative functions under the Collective Investment Schemes Control Act. The management company still remains responsible to the regulator for the function being performed by the delegated party, and should be entitled to hold the delegated party to book if it fails to perform its obligations, and causes loss to the management company by allowing an administrative penalty to be issued to the management company. The management company should be entitled to seek financial redress in the form of an indemnity from the delegated party, and in fact the delegated party would usually have insurance to cover this.

SECTION	DRAFT SECTION WORDING	COMMENT
CHAPTER 14: OMBUDS		
194(2)(b)	(2) The Ombud Regulatory Council must not recognise an industry ombud scheme unless satisfied that - (b)the governing rules of the industry ombud scheme - (i) identify the financial products or financial services to which the industry ombud scheme relates (ii) make adequate and appropriate provision for making complaints; (iii) are legally binding on the members of the industry ombud scheme, and enforceable by the governing body of the industry ombud scheme; (iv) require each member of the industry ombud scheme to comply with, and give effect to, any determination of the ombud made in terms of the industry ombud scheme; (v) require each member of the industry ombud scheme to include in contracts for the provision to financial customers of financial products or financial services, an obligation on the member to comply with the governing rules of the scheme; (vi) make adequate provision for monitoring and oversight of the operation of the industry ombud scheme by a committee comprised of persons who are not members of the industry ombud scheme; (vii) provide that the terms and conditions, including remuneration and other benefits, of the engagement of the ombud, and any action to terminate that engagement, are subject to approval by that committee; and (viii) otherwise comply with applicable Ombud Regulatory Council rules;	**Proposal: The following amended version of the wording contained in the second draft, clause 187(1)(e)(iii) should be included in the final draft of section 194(2)(b):** "require that complaints be disposed of in an accessible, procedurally fair informal, economical and expeditious manner, having regard to what is equitable in all the circumstances, as well as– (aa) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and (bb) the provisions of any applicable law, conduct standard, codes of conduct, pension fund rules and rules of practice;"
CHAPTER 15: FINANCIAL SERVICES TRIBUNALS		
General		Please refer to the Extract from Counsel's memorandum annexed to this document – paragraphs 60 – 71 refer.
222(5)	(5) This section does not affect any other right that a person may have.	The meaning of this sub-section is unclear and the wording is vague. It does not add any value within the context of s.222.

SECTION	DRAFT SECTION WORDING	COMMENT
		Proposal: Delete ss222(5)
CHAPTER 17: MISCELLANEOUS		
239(1)(c) &(2)(b)	**(1)(c)** Sections 11(1), 12(1), 15(1), and 18(1) of the Protection of Personal Information Act do not apply to the use and disclosure of information by the financial sector regulators or the Reserve Bank for the purposes referred to in paragraphs (a) or (b). **(2) (b)** Section 72(1) of the Protection of Personal Information Act does not apply to an agreement referred to in paragraph (a)(v).	It is submitted that it would not be appropriate to exclude the financial sector regulators from the ambit of this Act.
239(3)(a)&(b)	(3) (a) Information may only be disclosed by a financial sector regulator or the Reserve Bank to a designated authority if, before disclosing the information, the financial sector regulator or the Reserve Bank is satisfied that the designated authority that receives the information has proper and effective safeguards in place to protect the information, which safeguards are similar to those provided for in this section. **(3)(b)** A financial sector regulator or the Reserve Bank may only consent to information that is provided to a designated authority being made available to third parties only if it is satisfied that the third parties have proper safeguards in place to protect the information received, which safeguards are similar to those provided for in this section.	In the context of data protection, and specifically where it involves the sharing of personal information with third parties (who may even be in other countries), the words "proper and effective safeguards in place to protect personal information" should also include reference to security measures that must be in place to protect the integrity of the personal information. Section 239 contains no reference to security safeguards. **Proposal: While subsection 3(c) – (e) might be seen as a data protection safeguard, the section should also include a reference to security safeguards.** It is submitted that it should not be up to the financial sector Authorities or the Reserve Bank to decide whether the third parties with whom they plan to share information have appropriate safeguards in place. This falls in the domain of the Information Regulator to be appointed in terms of the Protection of Personal Information Act.
266	**Vicarious liability for offences and contraventions** **266.** (1) If a financial institution commits an offence in terms of a financial sector law, each member of the governing body of the financial institution also commits the offence and is liable on conviction to a fine not exceeding the maximum amount of a fine that may be imposed for the commission of the offence, unless it is established that the member took all reasonably	It is submitted that the effect of section 266(1) and (2) places a burden of proof on members of a governing body, who will be presumed to be guilty and there will be an onus on each member to prove his or her innocence, given the imputation of liability in both subsections. In ASISA members' view, this violates their Constitutional right to a presumption of innocence. This is because the effect of section 266(1) is that - • a member of the governing body is presumed to be guilty unless " it is established that

SECTION	DRAFT SECTION WORDING	COMMENT
	practicable steps to prevent the commission of the offence. (2) If a key person of a financial institution engages in conduct relating to the provision of financial products or financial services that amounts to a contravention of a financial sector law, the financial institution must be taken also to have engaged in the conduct unless it is established that the financial institution took all reasonably practicable steps to prevent the conduct.	the member took all reasonably practical steps to prevent the commission of the offence", • a member of the governing body is potentially a "guilty person" purely by reason of membership of a governing body."
283(3)	**(3)** The financial sector regulators must strive to exercise their powers in terms of financial sector laws in a manner consistent with policy frameworks so declared~~, but failure to do so does not affect the validity of any action taken by a financial sector regulator.~~	It is self-evident that if a power is exercised in terms of a law, it is valid. If the law is not consistent with the policy framework, then it should be motivated that the law be changed, **Proposal: Amend the section as indicated.**
SCHEDULE 4: AMENDMENTS AND REPEALS		
FINANCIAL ADVISORY AND INTER-MEDIARY SERVICES ACT		
General comment on Section 10 Debarment of representatives FAIS s14 Pages 151-154	There are thousands of licensed financial services providers ("FSP"s) and it is generally known that they have been inconsistent in terms of their approach to debarment investigations, the quality of evidence gathered and the processes followed in the consideration and imposition of debarment of representatives. These inconsistencies have led to a number of court judgements and appeals. In this context it is appreciated that the regulator wishes to amend these provisions with a view to addressing some of the problems with the existing wording and interpretation of the debarment provisions in FAIS, but the proposed changes in the Bill will, in our view, not address these inconsistences; taking into account the comments made by National Treasury in response to submissions on the previous draft. We believe that the lack of legal certainty will result in a number of unintended consequences and impracticalities as amplified in our comments below. First, however, and while it is agreed that debarment is necessary in order to protect the public from unscrupulous individuals, the fundamental question is not how FSPs should proceed in terms of debarments or whether FSPs should also debar representatives who resign prior to debarment hearings but rather whether FSPs are best positioned and capable to impose debarments. "Debarment" has serious consequences for the individual concerned i.e. it constitutes an infringement of the rights set out in section 22 of the Constitution (freedom of trade,	

SECTION	DRAFT SECTION WORDING	COMMENT
	occupation and profession). National Treasury's response in this regard is that the appeals process created will address this concern. However, the underlying problem will, in our view, not be addressed within the proposed new regime given the fact that FSPs will simply not be in a position to follow "due" process. In this regard, FSPs investigative capabilities are severely limited and constrained unlike the FSB's powers of investigation and gathering of evidence referred to in subsection 3 of the Commissions Act, 8 of 1947, which powers are bestowed on the FSB in terms of subsection 12(1) of the Financial Services Board Act, 97 of 1990. The Bill gives extensive investigative powers to the Authority. It is submitted that the Authority is therefore in a much better position to conduct such investigations and to impose all debarments under s145 of the Bill. Apart from the practical difficulties alluded to under the specific comments provided below, we believe that in principle, the objectives of debarring individuals would be better served if considered and imposed by the Authority from the outset and in all instances. **Proposal: Section 14 of the FAIS act should be deleted in its entirety.**	
s10 FAIS s14(3)	**14 (3)** Subject to subparagraph (d), a financial services provider must— *(a)* before debarring a person— (i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons thereof and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients; (ii) provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process; and (iii) give the person a reasonable opportunity to make a submission in response; *(b)* consider any response contemplated in paragraph *(a)*(iii), and may thereafter decide to debar or not to debar the person; and upon the decision to debar such person- *(c)* immediately notify the person in writing of— (i) the financial services provider's decision to debar the person; (ii) the grounds and reasons for such decision; (iii) a right of appeal to an internal appeal mechanism established by the Authority, and a subsequent right of review of the decision of the Authority to the Tribunal; (iv) the period within which the internal appeal proceedings to the Authority, or review proceedings to the Tribunal, must be instituted; and (v) any other formal requirements in respect of the proceedings for the internal appeal to the Authority or the review to the Tribunal; and	Where a decision is made not to debar, It would also serve no purpose to inform such person of the appeal procedures. Refer to proposed rewording of the relevant provisions under s14(3)(b) and (c)(i). It is clear from s14(3)(a)(i) that written notification of the intention to debar and a notification of the decision to debar in terms of s14(3)(c), is required. Clarification is required as to the exact nature or evidence needed to meet the notification requirement. In reality, and due to circumstances beyond the control of the FSP (for example where the FSP is unable to establish the whereabouts of the representative), there will be many instances where it will not be possible to notify the representative. In these instances, and given the pre-emptory nature of 14(3) i.e. "a financial services provider **must**", the FSP will ostensibly remain in breach in perpetuity and until such time as the whereabouts of the representative has been established and notification has taken place. It is this impasse that also highlights a significant gap in the process where such a representative could join another FSP without the knowledge of the FSP or the FSB. This situation will clearly undermine the objectives of the debarment provisions. Perhaps this impasse could be addressed by adding a provision whereby FSPs will be obliged

SECTION	DRAFT SECTION WORDING	COMMENT
	(d) immediately notify the Authority in writing of its inability to effect notification as contemplated in subparagraphs 14(3)(a)(i) or 14(3)(c).	to notify the FSB of its inability to comply with the notification requirements after unsuccessful attempts to either locate the whereabouts of the representative and/or to effect service of the notification. See suggested changes to the introductory clause and the addition of subparagraph (d) which is to be read with the suggested changes under s14(5). In the current s14A regime where the FSB is unable to serve their notice of intention to debar, they "record list" the representative which means that the representative will not be able to be registered as a representative of any other FSP until the pending investigation/debarment proceedings have been resolved. We submit that the FSB employ the same practice upon notification by a FSP as per the suggestions made above i.e. insertion of subparagraph (d). In this regard the FSB may also want to consider provisions which will clearly set out what will be expected of FSPs in terms of the process and what role the Authority will play in such cases e.g. take over the matter and consider debarment in terms of s145. As regards the further changes being made to s14(3)(c)(iii), (iv) and (v) pertaining to appeals/reviews, it is not clear what the duties and powers of the "internal appeal proceedings" would entail and what the formal requirements will be. For example, whether such powers of the internal appeal mechanism established by the Authority include reviewing both the merits and procedures followed by the debarring FSP and/or involve a complete and separate investigation and/or whether such powers include the setting aside of the debarment imposed by the FSP. It is not clear what the implications of upholding an appeal would be and how this would relate or impact the previously terminated underlying contractual relationship (employment or mandate contract) between the debarring FSP and the debarred representative. In this regard there could potentially also be legal arbitrage between these provisions and labour law i.e. CCMA proceedings where a representative was dismissed and debarred by its FSP employer. Further clarity is sought as to the scope and powers of such an appeal mechanism.
s10 FAIS s14(4)	**14 (4)** Where the debarment has been effected as contemplated in subsection (1), the financial services provider must— *(a)* immediately withdraw any authority which may still exist for the person to act on behalf of the financial services provider;	As regards s14(1)(d) we have previously recommended that the time period within which to notify the Authority be changed from five days to fifteen days. In some larger FSPs, the debarment process forms part of the industrial relations hearing

SECTION	DRAFT SECTION WORDING	COMMENT
	(b) where applicable, remove the name of the debarred person from the register referred to in section 13(3); *(c)* immediately take steps to ensure that the debarment does not prejudice the interest of clients of the debarred person, and that any unconcluded business of the debarred person is properly attended to; *(d)* in the form and manner determined by the Authority, notify the Authority within ~~five~~ fifteen days of the debarment; and *(e)* with the notification referred to in paragraph *(d)*, provide the Authority with the grounds and reasons for the debarment in the format that the Authority may require.	which may take place at a decentralised level (in branches across the country) and which process may involve various role-players at the hearing such as the forensic team, management representatives, or the Chair at such hearing as well as local branch staff including secretaries that may perform certain administrative functions related to the industrial relations and debarment proceedings. The mere collation of all the evidence used in such hearings, the time taken to transcribe minutes of the hearing and also making copies of the entire record, all takes time; not to mention the time required to post or courier documentation (often voluminous evidence packs) to other departments and staff members in different locations where these staff members may be tasked with preparing the documents, completing the form prescribed by the Authority and dispatching the final and complete set of documents to the Authority. In light of the above we believe it would be unreasonable to expect notification to be made within five days of the debarment and recommend that a fifteen day period should be allowed.
s10 FAIS s14(5)	**14 (5)** A debarment in terms of subsection (1) that is proposed to be undertaken ~~in respect of a person who no longer is a representative of the financial services provider,~~ must be commenced without undue delay from the date of the financial services provider becoming aware of the reasons for debarment, and must, within three months from such date request the Authority to consider debarment under section 145, where the provider is unable to complete its investigation and or effect the debarment as contemplated under section14(3). ~~not longer than three months from that date.~~	The provisions relating to the three month period remain ambiguous. For ease of reference National Treasury's response is quoted below: *"A three month period within which to begin a process of debarment is considered sufficient, once the reason for debarment becomes known.* *In those instances where it is impossible due to no fault of the provider to complete the investigation within the three month period, the matter can be referred to the regulator once the investigation has been finalised, for consideration of debarment by the regulator."* With reference to the first paragraph, the three month period is used in the context of an obligation on the FSP to "**begin** a process" as opposed to the second paragraph where it is used in the context that the FSP must "**complete**" the investigation within the three month period and inform the FSB where they are unable to complete their investigation. Experience has shown that while a financial services provider ("FSP") may suspect the existence of reasons for a person to be debarred, the available evidence may be inadequate

SECTION	DRAFT SECTION WORDING	COMMENT
		or insufficient for a debarment procedure to be commenced without undue delay. Hence the need for forensic investigations to be pursued, often with ex-representatives being either obstructive or totally un-cooperative. Forensic investigations often take longer than three months for sufficient information to be obtained before debarment proceedings can be commenced, given that one is dealing with representatives who are no longer attached to the FSP. The fact remains that it will be impossible to complete all investigations within the three months period and to suggest that the Authority will consider debarment in cases where it is "impossible" for the FSP to complete an investigation is confusing and not aligned or in accordance with the proposed provisions as they stand. A distinction is also to be made between instances where the FSP is unable to fully investigate the matter within the three month period or unable to effect the debarment due to, for example, the inability to serve the notice of debarment. In any event, we believe it would be unreasonable to expect or prescribe a standard three month time period within which to complete the entire process; irrespective whether the representative had left the employ of the FSP or not. It is simply an unrealistic expectation to prescribe a specific period considering the following aspects: • Nature, scale, complexity and circumstance of each case differ. In this regard it must also be kept in mind that s14(3)(a)(i) provides that the FSP is required to provide "adequate notice" to the representative of the FSP's intention to debar. • Gathering of evidence is dependent on numerous factors such as the availability and co-operation of various witnesses including handwriting experts. Also see comments under the "General" section above regarding the lack of investigative powers of FSPs who are unable to compel individuals to provide or produce information/documentation. • Often the residential, postal or contact details of the resigned representatives are unknown and difficult to establish. In the context of the notification provisions under ss14(3)(a)(i) and (c), the process will inevitably be delayed where the whereabouts of the representative is not known and where such notifications cannot be served. The FSB is well aware of these difficulties where they are unable to effect a debarment under the current s14A provisions i.e. where they were unable to serve their intention to debar an

SECTION	DRAFT SECTION WORDING	COMMENT
		individual. Unintended consequences of these provisions as currently formulated may lead to situations where FSPs, in order to avoid possible non-conformance of not being able to fully complete an investigation and effecting the debarment within the prescribed three month period, will simply review the whatever evidence is available at that stage, however incomplete, which in turn, may result in a decision not to impose debarment for lack of evidence where the decision may have been different had there been more evidence available after the investigation could be properly completed. It is therefore strongly recommended that consideration be given to amend the provision as per the proposed wording. Also refer to comments relating to "effecting' the debarment where notification is not possible; either in terms of S14(3)(a)(i) or (c). Alternatively, at least consider extending the period from three months to six months.
FINANCIAL MARKETS ACT (PAGE 164)		
Page 165 s1(d) and (j)	(c) by inserting after the definition of "bank" "central counterparty" means a clearing house, whether associated or independent, that - … (d) "external central counterparty" means a foreign person who is authorised	The definitions proposed in the Bill are also included in the draft Financial Markets Act Regulations published for comment by National Treasury on 5 June 2015. Having definitions for the same terms in both the Act and Regulations could lead to confusion. Since ASISA has commented on the definitions in the draft Regulations, we propose those definitions are used and our comments in respect of those draft Regulations be taken into account. **Proposal: The definitions are either contained in the Financial Markets Act or the Regulations, but not both.**
Page172 s7(c)	c) by the substitution in subsection (3) for paragraph (k) of the following paragraph: ''(k) may issue [guidelines] guidance notes and binding interpretations on the application and interpretation of this Act;''	The Authority should not have the power to make legislation without following the parliamentary process. **Proposal: Delete the word "binding".**

SECTION	DRAFT SECTION WORDING	COMMENT
Page 174 s8; s6A(3)	(b) The Authority must notify the external market infrastructure that has applied for recognition of their decision, within six months of receiving the application.	We submit that the current wording allows the regulators to inform the applicant of a decision within six months but does not oblige the regulators to conclude the application within six months. This could lead to a drawn out application process, which is not ideal. **Proposal: To ensure that applications are concluded finally within six months, the following wording is proposed:** '(b) The Authority must conclude the application for recognition by notifying the external market infrastructure that has applied for recognition of their decision, within six months of receiving the application."