



THE BANKING
ASSOCIATION
SOUTH AFRICA

Financial Matters Amendment Bill [B1-2019]

**Public Hearings: Standing Committee on Finance
12 February 2019**

Presented by: Gary Haylett

General Manager: Strategic Projects (Prudential Division)



Areas of the Bill for comment

1

- A. Proposed amendments to the Insolvency Act
- B. Proposed amendments to the Banks Act



Proposed amendments to the Insolvency Act



Proposed amendments to the Insolvency Act

3

- BASA is supportive of the proposed changes to the Insolvency Act (IA) following on from our meetings with National Treasury (NT) & the Department of Justice and Constitutional Development (DoJ) over the past 3 years.
- BASA would like to place our written response on record, as we have previously communicated to NT and DoJ that we believe that should the **additional** changes requested to the Insolvency Act, not materialise, systemic risk will be introduced into our economy.
- As the proposed amendments are currently drafted, the IA will allow the secured creditor immediate access to its IM, **but** the proposed section 83(10B) then allows any other creditor, or the Master to dispute the preference, and after considering submissions from both parties, if the Master is of the opinion that the dispute is well founded the secured creditor is obliged to pay the proceeds of the IM to the trustee. *This effectively negates the right of immediate access.*
- In our view, and in the view of our legal counsel, if such a process exists, it cannot be said that the collateral is immediately available to the secured creditor.





Proposed amendments to the Insolvency Act

4

- We are supportive that other creditors', the trustee's and the Master's rights to approach a court for an order overturning the preference should not be curtailed, but allowing the Master to opine on the issue would negate "immediate access" with reference not only to our domestic OTC Derivatives Margin Requirements, but also to the laws of the jurisdictions of our major international trading counterparties that have been in place since 2016.
- Failure to have the ability to transfer or mitigate risk, will expose our financial markets to systemic risks and could result in the government and or tax payers having to step in, similar to the international crisis of 2008, but on a domestic scale.
- We believe that failure to make the recommended changes to the Insolvency Act will also result in South Africa not securing a "clean" ISDA Collateral Legal Opinion.





Proposed amendments to the Insolvency Act

5

- A very simplistic derivative trade explanation is as follows:
 - A bank will take over a corporate's risk exposure through a derivative contract
 - The bank will then look to offset this risk, either fully or partly (depending on its own risk appetite)
 - Most of the trade offset is conducted with international banks (as the local market could have the same directional view)
 - To conduct the trade, the local bank will place Initial Margin ("IM") up front and Variation Margin ("VM") during the life of the transaction.
 - In the event of a default by the SA bank, the offshore bank is relatively protected by the IM & VM, however, the bank will require the collateral immediately to allow it to offset its exposure.





Proposed amendments to the Insolvency Act

6

- A very simplistic derivative trade explanation is as follows:
 - If our insolvency law does not allow for immediate access to the collateral, the foreign and or local counterparties will not look to take the risk on board at the onset of the trade.
 - Either the SA bank then carries this full risk on its own or declines to take over the corporates risk
 - Both scenarios create systemic risk in our economy



Proposed amendments to the Banks Act



Proposed amendments to the Banks Act

8

- BASA and its members have no objection to the introduction of the state as a potential owner and/or operator of a bank that will compete with the current banking industry.
- We support all new banks in South Africa insofar as they are subject to similar legislative and regulatory supervision to ensure a level playing field.
- We welcome the proposed amendments as they address some of the concerns we raised in our previous submission in respect of the EFF's Banks Amendment Bill, particularly with respect to:
 - Placing conditions and limitations on the eligibility criteria to restrict application of the amendments to certain state-owned companies; and
 - the need to address the inconsistencies between the Banks Act and certain other legislation with respect to state-owned companies.
- The rationale for this amendment is still not clear.
- Our concerns regarding the funding mechanism, challenges facing SOCs and potential conflicts of interest remain.
- We place reliance on the SARB and the Prudential Authority to discharge their responsibilities and objectives without fear or favour, in their respective supervision of regulated financial institutions, including state-owned bank/s.

