



national treasury

Department:
NATIONAL TREASURY
REPUBLIC OF SOUTH AFRICA

National Treasury responses to comments raised by the Standing Committee on Finance

Following Standing Committee of Finance meeting 12 September 2012

Clause 19 Liability

Clause 19(1) . The intention of the liability clause is to entrench the common law. Following the discussion in the committee, National Treasury proposes a simplified liability clause as follows:

Proposed wording: clause 19(1) A registered credit agency may be delictual liable in respect of a credit rating issued or credit rating services performed in the ordinary course of business in terms of this Act, for any loss damages or costs sustained as a result of such a credit rating or credit rating service.

Clause 19(2) is a safeguard to indicate that there may be other measures such as contracts or other legal obligations that create liability and that clause 18 does not affect that.

, other than to indemnify the credit rating agency through an insurance contract, guarantee or similar for a loss incurred as a result of such liability

Clause 24(f) Rating assumptions:

Committee proposes deletion. National Treasury agrees.

Clause 25

National Treasury notes the concerns of the committee that "on site visits" and "inspections" are not appropriately delineated. We submit that on-site visits are better described as "compliance visits" insofar as they are meetings with regulated persons to assess their compliance with the law.

The purpose and main difference in the powers (a comprehensive analysis is in the appendix including the relevant cases).

1. **"On site" visits are ongoing aimed at those persons regulated by the FSB, or those who hold a licence or approval issued by the FSB as an ongoing supervisory tool to ensure compliance with the provisions of the different Acts.**

2. On-site visit powers are aimed at regular reviews of regulated persons only as part of the on-going supervisory activities of the registrar, and are one of a number of tools at the disposal of the registrar to enhance supervision. An on-site visit is therefore not preceded by a suspicion that the law has been transgressed.
3. For example, in the insurance environment, an on-site visit is an important part of the supervisory process, closely related to the off-site monitoring process. It provides information that supplements the analysis of the reports submitted by the insurer to the supervisor. On-site visits enable the supervisor to obtain information and detect problems that cannot be obtained or detected through off-site monitoring.
4. In particular:
 - in the case of insurers, for example, experiencing asset trouble, accounting irregularities or deficient management, it enables the supervisor to identify problems that the insurer could be given to ignore and, sometimes, to hide;
 - it offers supervisors the opportunity to have interactions with the managers, which is very valuable to assess their suitability;
 - it enables supervisors to assess the management's decision-making processes and internal controls;
 - it enables supervisors to identify activities that could potentially breach rules and regulations and take appropriate action; and
 - it provides supervisors the opportunity to analyse the impact of specific regulations and, more generally, to gather information for benchmarking.
5. **In contrast, inspections are often more of a forensic nature¹**, aimed at collecting evidence with some form of enforcement action in mind. In addition, inspections are for the most part, initiated, when the registrar has reason to believe that a contravention has occurred, or that a person is conducting unregistered business.

¹ The necessity for inspection powers were described as "a mechanism for the enforcement of regulatory control in the financial services industry" [*Platinum Asset Management (Pty) Ltd v FSB and another* 2006 (4) SA 73 (W)] whilst on-site visits are referred to as "the random overarching supervision of an industry at large with particular actors within that industry targeted without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general. Enforcement [inspections] however, is generally used to describe the notion that, at some point in the process, the focus moves from the integrity of the scheme of regulation in general to a focused investigation of a particular actor under that regime, often with a view to quasi-penal consequences". Hutchison et al Search and Seizure Law in Canada (vol 1) (Thomson, Scarborough 2005) at 5-30.7-5-30.8 referred to in *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 (CC)

"[Internationally] the trend in the cases had been towards a position that was more generous to inspectors involved in compliance [on-site visits] than it was to regulatory investigators involved in enforcement [inspections]." *MAGAJANE v CHAIRPERSON, NORTH WEST GAMBLING BOARD AND OTHERS* 2006 (5) SA 250 (CC)

6. An inspection in the context of the Inspection Act on the other hand is a regulatory power that is exercised where entities unlawfully operate outside of the regulatory framework and evidence is required to take appropriate action to enforce legislation or during on-site or off-site monitoring non-compliance is identified that cannot be verified and requires an in depth inspection to assess if enforcement action (as opposed to corrective or remedial action) should be taken against the insurer.
7. It is important to note that in terms of the Inspection Act, the registrar may recover any costs incurred during the inspection from the inspected institution. It would not be correct to apply this provision in the instance of what is actually a routine compliance visit (but in terms of the Inspection Act) of a credit rating agency. As regulated persons, agencies will have to pay annual levies, which are used to cover the cost of supervision.

Clause 32 (offences)

Hon Harris proposes to make only deliberate or intentional contraventions of the registration requirement offences. No other contravention of registration requirements explicitly require intention.

Fairness and proportionality require that industry players are treated equally. Deliberately is too narrow, we want to protect the public and registered entities by requiring that if a person venture into this field that he ensures that he has the necessary authorisation.