

Opposition to Twin Peaks

While we have been focusing on the proposed market conduct section of the Financial Sector Regulation Bill (FSRB), those affected by the prudential focus have voiced serious concerns at the Parliament's Standing Committee on Finance.

Bankers View

The Banking Association SA argued that the system proposed by the Treasury for regulating the conduct of banks was far too intrusive and gave regulators too much power, says a **Business Day** report.

“While welcoming the new architecture, the association’s Wendy Dobson told Parliament’s Standing Committee on Finance that the Bill gave regulatory authorities ‘extensive powers to intrude into the commercial decisions and operations of banks’. These included the power to make binding interpretations of law and enforce compliance with them that Advocate Geoff Budlender SC – speaking on behalf of the Association for Savings and Investment SA – said was unconstitutional. Dobson called for strict checks and balances to curb the powers given to regulators to issue regulatory instruments – to be known as standards – on a wide range of issues. These covered ‘almost every commercial aspect of operating a financial institution’. She called for issues subject to these standards to be limited and linked to a clear case of market failure or material prejudice to customers. Regulatory impact assessments should also be required before these standards became effective.”

I discussed this with a legal expert who indicated that section 141 of the FSRB, in terms of which the responsible authority may issue a binding interpretation, also provides that a binding interpretation ceases to be effective if a court overturns or modifies an interpretation of the financial sector law on which the binding interpretation is based.

In other words, it is not irreversible or cast in stone.

S 141(6) provides further that the responsible authority must, before it issues a binding interpretation, publish a draft of the proposed interpretation and a notice calling for written public comments. A period of at least one month from the date of publication of the notice must be allowed for comments.

JSE takes issue with latest twin peaks Bill

Legalbrief Today commented on another article published a day later in **Business Day**:

“The JSE has come out strongly against proposed legislation that will abolish the legality of its clearing house, says a **Business Day** report. Exchange legal counsel, Louis Cockeran, warned that if its clearing house – JSE Clear – was not legally recognised, many participants in the local derivatives market would be forced to withdraw from it. Cockeran criticised the lack of consultation on the latest version of the Bill, published last month, which introduced changes the JSE regarded as ‘indefensible’. The Bill would remove the exchange’s status as a licensed and internationally recognised central counterparty because only independent clearing houses would be legally recognised, Cockeran said. He urged that the definition of clearing houses be neutral. If the Bill became law without this change, the JSE would need five years to transform JSE Clear into an independent clearing house.”

Call for Consumer Consultation

Free Market Foundation (FMF) Executive Director Leon Louw, who led oral evidence to the Standing Committee on Finance on 25 November 2015, stated that "little or no input has been received from consumers, and their rights and interests are scarcely mentioned."

Without a professionally, properly and independently conducted socioeconomic impact assessment (SEIA), government has no way of knowing whether benefits are likely to exceed costs, what those benefits and costs are likely to be, who will enjoy benefits and who will endure costs, what the nature and extent of costs and benefits might be, and how society and the country's economy will be impacted.

This view endorses a call we made last week for a thorough study to be conducted on what consumers want, rather than what the authorities think they do. It remains to be seen whether these inputs will result in further consultation and research, which may delay the implementation of the Financial Sector Regulation Bill.