



FINANCIAL MATTERS AMENDMENT BILL [B1 – 2019]

COMMENTS AND RESPONSES DOCUMENT

(only amendments to Military Pensions Act and Banks Act)

MARCH 2019

LIST OF COMMENTATOR(S)

Name	Contact Person
1. Banking Association of South Africa	Gary Haylett
2. COSATU	Matthew Parks

FINANCIAL MATTERS AMENDMENT BILL [B1 – 2019]**Amendment of the Military Pension Act, 1976**

Commentator	Section	Comment/s	Response
COSATU	General	COSATU welcomes and supports government's Financial Matters Amendment Bill. This is an important bill that seeks to address challenges that military veterans' partners have experienced accessing pension benefits when their partners and ex-partners pass away.	Noted
COSATU	General	<p>COSATU welcomes and supports the Bill amendments to the Military Pensions Act.</p> <p>The federation believes that they are critical in terms of protecting the rights and needs of military veterans, their partners, families and dependents.</p> <p>The proposed amendments are in line with the non-sexist values of the Constitution and the need to prevent discrimination based upon gender and sexual orientation.</p> <p>We believe that the amendments will also help protect the rights of partners, ex-partners and dependents and children of deceased military veterans who have often inadvertently struggled to access the remaining pension benefits due to their lost love one.</p> <p>COSATU supports the FMA Bill's Military Pensions Act proposed amendment in full.</p>	Noted
COSATU	General	COSATU supports the FMA Bill's proposed amendments of the Military Pensions Act as they are in line with the anti-discrimination values of the Constitution.	Noted

Amendment of the Banks Act, 1990

COSATU	General	The FMA Bill also critically provides a legal frame work for the granting of banking licenses to State Owned Enterprises (SOEs).	Noted
COSATU	General	COSATU supports the broad objectives and provisions of the FMA Bill with some proposed amendments to further strengthen its public accountability and oversight provisions with regards to its proposed amendments of the Banks and Auditing Professions Acts.	Noted

COSATU	General	<p>COSATU welcomes and supports the objectives of the Private Member's Bill, the Banks Amendment Bill tabled by Honourable FN Shivambu. As with the FMA Bill, COSATU supports the proposed provisions providing for SOEs to be granted banking licenses.</p> <p>However the federation is concerned by the lack of checks and balances and public accountability provided for in the Banks Amendment Bill. These can be addressed through the provisions provided for in the FMA Bill as well as COSATU's proposed additional amendments.</p>	<p>The FMA Bill seeks to ensure accountability and greater safeguards for the fiscus by requiring that state-owned companies are solvent when they apply for banking licences.</p> <p>Agreed.</p>
COSATU	General	<p>COSATU welcomes and supports the broad objectives of both Bills in providing legal frameworks for SOEs to be granted banking licenses.</p> <p>These are in line with COSATU's long standing calls to open up the banking sector to competition. We believe that there is a critical need to allow for state banks to enter the sector. This will help to inject badly needed competition to a sector that has been heavily characterised by monopolies, collusion, high charges and interest rates, lack of transformation and a general reluctance to support the needs of the poor and workers.</p>	Noted
COSATU	General	<p>COSATU appreciates the need for the Bill to provide for existing state banks e.g. the Post Bank.</p> <p>COSATU believes that the entry of state owned banks will help to bring about:</p> <ul style="list-style-type: none"> •More competition; •More affordable banking products and lower interest rates for consumers and SMMEs; <p>This is badly needed to help spur economic growth, improve the lives of the poor and especially the rural areas as well as to support SMMEs to grow.</p> <ul style="list-style-type: none"> •Transformation of a largely white male dominated industry; •State banks especially those with a targeted developmental focus e.g. a housing and construction or focus geographic areas e.g. rural areas that are largely neglected by the dominant banks. 	Noted
COSATU	General	<p>COSATU supports the provision that SOEs will not be exempt from any of the existing banking license requirements of the Banks Act and that they too will be accountable to the South African Reserve Bank.</p>	<p>Noted</p> <p>The Banks Act will apply to all companies (including state-owned companies) that conduct</p>

			banking business. In this regard, the prudential and governance requirements in terms of the Banks Act will also apply to state-owned banks in their entirety. This will assist in ensuring that all banks are adequately capitalized and liquid at all times.
COSATU	General	<p>Consumers and industry need to be assured that all banks, including state banks are held to the highest standards and codes of conduct. It is workers and the poor who are the first to suffer when there is a failure of good governance in banks e.g. African Bank etc. It is taxpayers who are called upon to pay bail outs when banks risk collapse.</p> <p>COSATU believes that as it is taxpayers who will pay the bill if a state bank collapses that is there a need for strong oversight provisions to minimise such risks.</p>	<p>Noted</p> <p>The highest standards will apply to banks, including state-owned banks. The Banks Act in its entirety will apply to state-owned banks, and state-owned banks (as is the case with other banks) will be prudentially supervised by the Prudential Authority. Capital adequacy, liquidity, governance and risk management requirements that apply to other banks in terms of the Banks Act will also apply to state banks.</p>
COSATU	General	<p>Whilst COSATU welcomes and supports the provisions of the Banks Amendment Bill, we are concerned that it does not include checks and balances or public accountability provisions beyond those already provided for in the Banks Act. Given the explosion of corruption and collapse of good governance in many and especially the largest SOEs, such anti-corruption, accountability and transparency measures are badly needed and must be included.</p>	<p>The Banks Act contains sufficient checks and balances to require companies operating as banks to operate within the law, and for the Prudential Authority to apply to a competent court for the cancellation of the registration of a bank if the bank engages in criminal activities (including corruption). For example, in terms of section 25(4)(d) of the Banks Act, the Prudential Authority can apply for the cancelation of registration as a bank if the bank employs undesirable business practices.</p>
COSATU	General	<p>COSATU would like to thank the Committee for the opportunity to share its views on these two critical and progressive bills. We strongly support the objectives of both bills to provide a legislative framework for granting qualifying SOEs banking licenses. We support the additional provisions in the FMA Bill to provide much needed checks and balances on granting banking licenses to SOEs. However, COSATU feels that this check and balances and oversight mechanisms need and must be further strengthened as outlined in our proposed amendments.</p>	<p>Noted.</p>

		COSATU urges SCOF to support and adopt its proposed amendments to the FMA Bill and to ensure Parliament adopts the amended bill before the 2019 general elections.	
BASA	General	<p>The Banking Association South Africa (“BASA”) and its members welcome the opportunity to comment on the Financial Matters Amendment Bill (“Bill”). This Bill proposes to amend the Banks Act, Act No. 94 of 1990 (“Banks Act”), so as to regard certain state-owned companies as public companies for purposes of the application of the Banks Act; to determine prerequisites for these companies and their holding companies to qualify to apply for establishment as a bank; and to provide for inconsistencies between the Banks Act and certain other legislation with respect to state-owned companies.</p> <p>We welcome the proposed amendments as they address some of the concerns we raised in our submission, in response to the Economic Freedom Fighters’ draft Banks Amendment Bill; particularly with respect to conditions and limitations on the eligibility criteria to restrict application of the amendments to specific state-owned companies, as well as the need to address the inconsistencies between the Banks Act and certain other legislation with respect to state-owned companies.</p> <p>BASA and its members support all new banks in South Africa insofar as they are subject to similar regulatory supervision enforced by the South African Reserve Bank (“SARB”) as the primary supervisor under the provisions in the Banks Act; South African Reserve Bank Act, Act No. 90 of 1989 (“SARB Act”) and the Financial Sector Regulation Act, Act No. 9 of 2017 (“FSR Act”).</p>	Noted.
BASA	General	<p>We are of the view that this will ensure a level playing field in terms of prudential, governance and risk standards which the entirety of the financial sector is subject to. Furthermore, supervision for any new banks should be in line with the type of products and services such banks offer. This should include the relevant prudential, market conduct, credit and resolution requirements as this will be the best way to manage any risks such bank/s may introduce to the financial system.</p> <p>The FSR Act gives the SARB an explicit mandate to maintain and enhance financial stability. We place reliance on the SARB and the Prudential Authority (“PA”) to discharge their responsibilities and objectives without fear or favour, in their respective supervision of regulated financial institutions, including state-owned bank/s.</p>	<p>Noted</p> <p>It is paramount that a level playing field is maintained at all times, and for companies that conduct banking business to be subjected to the same prudential, governance, market conduct and other standards.</p>

BASA	General	The proposed amendments only address the technical requirements of changes required to the Banks Act, in order to cater for certain state-owned companies to be considered for registration to operate as a bank, or become a controlling company in respect of such a bank. They do not state the rationale and reasoning why the Bill has sought this amendment, and the purpose or objective for a state-owned company to operate or own banks.	Government has previously set out the policy rationale for state banks. For example, in National Treasury’s policy document “A safer financial sector to serve SA better”, it was envisaged that state banks would assist in expanding access and enhancing financial inclusion.
BASA	General	We 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 are open to competition as the market would be more competitive with new entrants. However, such a state-owned bank would have to be subject to, and be governed under the same legislative, regulatory, prudential, conduct and corporate governance provisions applicable to current banks, to ensure that there is a level playing field, and to ensure consistency and transparency.	Noted The Banks Act requires that all banks operating in the country be subjected to the same prudential, governance and risk management requirements. It is paramount that a level playing field is maintained at all times, and for companies that conduct banking business to be subjected to the same prudential, governance and other standards.
BASA	General	We acknowledge the proposed amendment which seeks to provide for inconsistencies between the Banks Act and certain other legislation with respect to state-owned companies. However, it needs to be considered as to who the main regulatory/governing body of state-owned companies who are registered as banks shall be. The roles of the National Treasury and the SARB need to be re-looked at in instances where there is overlap insofar as such state-owned companies are concerned. The extent to which the Reserve Bank, on one hand, and National Treasury, on the other, will be required to regulate and supervise such state-owned companies will be unclear in the absence of amendments to other relevant legislation. To illustrate by way of example, section 7 of the Public Finance Management Act, Act No. 1 of 1999 (“PFMA”) provides that “The National Treasury must prescribe a framework within which departments, public entities listed in Schedule 3 and constitutional institutions must conduct their cash management”. Public entities listed in Schedule 3 of the PFMA fall within the definition of State-owned company as contemplated in the Bill and will therefore be subjected to the prescribed framework, notwithstanding that they may be registered as banks.	The Bill (once enacted) will amend the Banks Act, and will result in state-owned banks being prudentially regulated by the Prudential Authority. The PFMA regulates financial management in the national government and provincial governments so as to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively. The requirements for the efficient and effective management of revenue, expenditure and liabilities is not in contrast with the requirements in the Banks Act for banks to operate profitably, efficiently and with enough capital.

BASA	General	<p>A number of consequential amendments to the PFMA would be required, to the extent that any of the provisions of the PFMA disable state-owned companies registered as banks to operate as banks. Such amendments may lead to unintended consequences, to the extent that state-owned companies registered as banks are excluded from compliance with certain provisions of the PFMA:</p> <p>the object of the PFMA (which is to “secure transparency, accountability, and sound management of the revenue, assets and liabilities of the institutions to which this Act applies”) may not be fully be achieved;</p> <p>This may lead to the unfair consequences of differential treatment amongst state-owned companies.</p>	<p>The Bill seeks to ensure that the Banks Act will apply to registered state-owned banks. The Bill in the proposed section 12(4)(d) (cl 11) provides that, in the case of inconsistencies, the Banks Act prevails over the PFMA. The Banks Act and the Financial Sector Regulation Act, 2017, will be the primary legislation regulating a state-owned bank.</p>
BASA	General	<p>The PFMA would need to be amended to stipulate the specific expenditures of state-owned companies (registered as banks) that may be funded from the National/Provincial Revenue Fund or statutory money. It could not be in the interests of the public for such funding to be utilised for fines which may be imposed for any legislative/regulatory non-compliance, for example.</p>	<p>Any expenditure in accordance with applicable legislation should be defrayed from the funds of bank regardless of the source.</p>
BASA	General	<p>The impact on commercial banks in terms of their risk profile and target market, needs to be considered, as this may change going forward once the impact of a state-owned or operated bank on the banking industry starts to take effect. Consideration should be given to the potential for systemic risk on the current banking industry should such a bank come into being, especially if there is large-scale movement of public sector staff away from the current banks to such a bank.</p>	<p>The Bill seeks to ensure that the Banks Act will apply to registered state-owned banks. In this regard, the Bill will contribute towards enhancing the competitiveness of the South African banking system. It is not envisaged that the enacting of the Bill will have any systemic effects on the banking system.</p>
BASA	General	<p>A further consideration is that if state-owned companies can in future operate or control banks in competition with the commercial banking sector, then safeguards need to be in place that will ensure that the state cannot impose laws or regulations that compel other state institutions (including provincial and local government) to only hold accounts with a state-owned bank. Currently, all commercial banks compete via tender to operate banking facilities for various arms of government, and this forms a substantial portion of business for such banks.</p>	<p>The Bill seeks to ensure that the Banks Act will apply to registered state-owned banks.</p> <p>All banks (including state-owned banks) that intend to compete for government business would still need to do so on a competitive basis as is currently the case.</p>
BASA	General	<p>We welcome the proposed amendment regarding limitations and eligibility criteria to restrict application of the amendments to regard certain state-owned companies as public companies for purposes of the application of the Banks Act. We recognize</p>	<p>Noted.</p>

that there may be state-owned companies that could carry out the business of a bank without causing a consequential disruption to public interests.

BASA

General

In terms of section 13 of the Bank’s Act, the Registrar of Banks may not authorise the establishment of a bank unless the Registrar of Banks is satisfied of certain factors. The table below lists these factors with corresponding comments for consideration in light of the Bill:

Banks Act criteria	Comments
The establishment of the proposed bank will be in the public interest.	The Registrar of Banks would need to test whether this is the case with due regard to the public interest that the relevant state-owned company was established to promote or protect.
The business the applicant proposes to conduct is that of a bank.	It is unclear as to whether state-owned companies would be allowed to conduct any other business if they are allowed to register as banks. This needs to be considered.
The applicant will conduct the business of a bank in the capacity of a public company incorporated / registered in terms of the Companies Act.	The definition of ‘state-owned company’ is aligned to this requirement.
The applicant will be able to establish itself successfully as a bank.	It needs to be considered whether the Registrar of Banks would be expected to take into account, the specific circumstances of the state-owned Company and if so, whether the Registrar of Banks would be expected to adopt a more flexible or a stricter approach in assessing this.

In terms of the Banks Act, the Prudential Authority is duty-bound to ensure that all institutions that conduct banking business are subject to the same prudential and governance requirements. In this regard, the Prudential Authority is expected to ensure that the Banks Act and associated standards apply to state-owned banks in their entirety (as is the case with other banks). This includes the requirements that are contained in section 13 of the Banks Act, including ensuring that the directors and executive officers of state-owned banks meet the fit and proper requirements.

		<p>The applicant will have the financial means to comply, in the capacity of a bank, with the requirements of the Banks Act</p>	<p>It needs to be considered whether funding from the National/Provincial Revenue Fund, or statutory money, may or ought to be taken into account in this analysis.</p> <p>The cost of compliance with legislation/regulations, including the provisions of the Financial Intelligence Centre Act, as well as the payment of levies envisaged in the Levies Bill, is likely to be burdensome.</p>	
		<p>The applicant will conduct the business of a bank in a prudent manner.</p>	<p>It would be unfair if state-owned companies are to be afforded any leniency in this regard.</p>	
		<p>Every person who is a director/executive officer of the proposed bank is, as far as can reasonably be ascertained, a fit and proper person to hold such office</p>	<p>This could involve the Registrar of Banks opining on individuals in the executive which could result in disruptive political debate. As such, precautionary measures should be considered.</p>	
		<p>Every person who is to be an executive officer of the proposed bank has sufficient experience of the management of the kind of business that it intends to conduct</p>	<p>It would be unfair if state-owned companies are to be afforded any leniency in this regard.</p>	
		<p>The composition of the board of directors will be appropriate having regard to the nature/scale of the business it intends to conduct</p>	<p>It would be unfair if state-owned companies are to be afforded any leniency in this regard.</p>	
BASA	General	<p>Recommendation: From a policy perspective, the legislature must consider whether it is desirable that local governments may also establish their own banks.</p>		<p>The definition of “public company” in clause 10 (amending s12 of the Banks Act) of the Bill</p>

			prohibits municipalities from establishing state-owned bank.
BASA	General	<p>We wish to reiterate that 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 on the understanding set out above.</p> <p>We are open to competition as the market would be more competitive with new entrants. However, such a state-owned bank would have to be subject to, and be governed under the same legislative, regulatory, prudential, conduct and corporate governance provisions applicable to the existing commercial banks, to ensure that there is a level playing field, and to ensure consistency and transparency.</p> <p>The rationale and reasoning as to why the amendments have been sought are however, not clear.</p>	Government has previously set out the policy rationale for state banks. For example, in National Treasury’s policy document “A safer financial sector to serve SA better”, it was envisaged that state banks would assist in expanding access and enhancing financial inclusion.
BASA	General	We wish to highlight that the current legislative/regulatory landscape applicable to state-owned companies may need to be amended or enhanced to enable specific types of state-owned companies to be registered and operate as banks.	The Bill only applies to national and provincial state-owned companies which have the prior approval of the Minister of Finance and the relevant executive authorities and which are financially sound according to the auditor’s declaration. This provides safeguards to ensure that specific types of state-owned companies are registered and operate as banks.
BASA	General	The SARB discussion paper on Designing a deposit insurance scheme for South Africa highlights the importance of having an explicit and privately funded deposit insurance scheme (“DIS”) as part of the financial safety net. It adds that it is the policy view that South Africa should implement an explicit and credible privately funded DIS, in line with the requirements of the Key Attributes and the Core Principles ¹ . The Key Attributes of Effective Resolution Regimes for Financial Institutions document states that the objective of an effective resolution regime is to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation.	Noted

BASA	General	<p>We would like to obtain an understanding of how a state-owned company registered and conducting the business of a bank, would fit within the envisaged resolution framework, and in particular, insofar as contributing to the privately funded DIS, without placing additional burden on tax payers.</p> <p>We place reliance on the SARB and the PA to discharge their responsibilities and objectives without fear of favour, in their respective supervision of regulated financial institutions, including state-owned bank/s.</p>	<p>A registered state bank will be expected to contribute to the deposit insurance and resolution regime. As a state-owned bank would be required to be profitable, it is envisaged that the contributions that a state-owned bank make to the deposit insurance and resolution fund will be from its profits, and thus not require contributions from the fiscus.</p>
COSATU	Section 12 [Clause 11 of the Bill]	<p>COSATU is largely pleased with oversight and accountability provisions provided for in the FMA Bill.</p> <p>In particular, we welcome and support the requirements that for an SOE to be allowed to apply for a banking licence:</p> <ul style="list-style-type: none"> •Its liabilities must not exceed its assets over a period of 24 months. This is fundamental to avoid further burdening an already fragile state to more financial exposures or reckless lending and looting. •That the relevant oversight Minister and Finance Minister must approve of such an application by an SOE. This is critical to help ensure executive accountability and to prevent rogue scenarios. 	<p>Noted</p>
COSATU	Section 12 [Clause 11 of the Bill]	<p>However, COSATU is concerned that the provisions of the Bill itself do not go far enough to ensure oversight and accountability. We therefore propose the following additional provisions to be inserted into the Bill:</p> <p>1. Section 11. 4 (b) on page 7 of the Bill speaks of the “Minister, granted with the occurrence of the executive authority according to the PMFA...”</p> <p>The memorandum of the Bill, Section 4.2 (a) on page 20 speaks of both the Minister of Finance and the line function Minister being required to give approval of an SOE banking license application.</p> <p>In short the provisions of the Bill do not appear to fully flesh out the correct objectives of the Bill as provided for in the memorandum.</p>	<p>The Bill does reflect what is stated in the Memorandum on the Objects as to requiring either the national line Minister or the provincial line MEC’s approval, in addition to the Minister of Finance’s approval. Please refer to the proposed section 12(4)(b) in cl 11 of the Bill. It refers to the executive authority, as defined in the PFMA.</p> <p>A further limitation on the establishment of state-owned banks may be to exclude provinces (like municipalities) from establishing banks</p>

		<p>COSATU Proposed Amendment:</p> <p>Amend Section 11.4 (b) with the insertion of wording to the effect of the “relevant oversight Minister and the Minister responsible for Finance”.</p>	<p>and to only provide provincial legacy banks. Currently only one, Ithala.</p>
COSATU	Section 12 [Clause 11 of the Bill]	<p>The Bill’s provisions speak to a Minister’s approval. The memorandum speaks to the oversight Minister and the Finance Minister’s approval.</p> <p>Whilst supporting these provisions, COSATU believes they are not fully in sync with existing Cabinet practice and good governance.</p> <p>Cabinet normally approves a variety of executive decisions ranging from approval of bills, appoint of SOE boards and the employment of Directors-General and even Deputy Directors-General. The granting of bank licenses to SOEs potentially carries significant financial exposure to the state. Yet no role is provided for in the Bill for Cabinet approval.</p> <p>COSATU believes that such an oversight mechanism is critical and must be included. COSATU therefore proposes it be included.</p> <p>COSATU Proposed Amendment:</p> <ul style="list-style-type: none"> •Insert in Section 11.4 (b) wording to the effect of the “and the approval of Cabinet”. 	<p>The relevant Minister is the shareholder representative, and is also a member of Cabinet. The Minister may consult Cabinet, but ultimately has to exercise shareholder decisions.</p>
COSATU	Section 12 [Clause 11 of the Bill]	<p>The Bill is silent upon an oversight role for Parliament. COSATU believes that Parliament as the elected representatives of the public must and can play an oversight role. This is critical in the fight against corruption and the collapse of SOEs.</p> <p>COSATU believes that such an oversight mechanism is critical and must be included. COSATU therefore proposes it be included.</p> <p>COSATU Proposed Amendment:</p> <ul style="list-style-type: none"> •Insert in Section 11 e.g. an 11.5 wording to the effect of the “the relevant oversight Minister and the Finance Minister must submit to Parliament notification of the intent for the SOE to apply for a banking license for Parliament’s comment. Parliament should be provided with a reasonable timeframe within which to comment e.g. 30 days.” 	<p>The decision to apply for a banking licence will be taken by the shareholder. There are however safeguards as Parliament may require the relevant Minister and the Minister of Finance to account to it.</p>
COSATU	Section 12	<p>The Bill is silent on a provision for public comments and participation.</p>	<p>The decision to apply for a banking licence will be taken by the shareholder.</p>

	<p>[Clause 11 of the Bill]</p>	<p>Whilst one may appreciate that the public is not involved in banking license applications normally, state banks will be covered by taxpayers' funds if they collapse. The public has a vested interest in such a matter.</p> <p>Practice across the state as provided in all legislation is for the public to be given opportunities to comment on key state policies, decisions and actions e.g. bills, regulations, board appointments, codes of practice etc.</p> <p>COSATU believes that such an oversight mechanism is critical and must be included. COSATU therefore proposes it be included.</p> <p>COSATU Proposed Amendment:</p> <ul style="list-style-type: none"> •Insert in Section 11 e.g. an 11.6 wording to the effect of the “the relevant oversight Minister and the Finance Minister must gazette and advertise for public comment notification of the intent for the SOE to apply for a banking license for Parliament’s comment. The public should be provided with a reasonable timeframe within which to comment e.g. 30 days.” 	<p>It is envisaged that the decision and the policy rationale for establishing a state bank would be covered in the policies and policy documents of the particular government department. At that stage, the public is given a chance to provide comments on the policy positions and the rationale for proposed policies.</p>
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