

REPUBLIC OF SOUTH AFRICA

DRAFT

FINANCIAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75))
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B — 2018]

BILL**GENERAL EXPLANATORY NOTE:**

- [] Words in bold type in square brackets indicate omissions from the existing enactments.
- _____ Words underlined with solid line indicate insertions in existing enactments.
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To amend—

- the Insolvency Act, 1936, so as to provide for a process when a creditor realizes his or her security in terms of a master agreement and for a power for the Master to deal with disputes of the preference by trustees;
- the Military Pensions Act, 1976, so as to provide for all categories of spouses and for life partners of members by amending, inserting and deleting certain definitions; and by providing for both genders throughout the Act and regulating the registration of a spouse to qualify for benefits upon the death of a member;
- the Banks Act, 1990, 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;
- the Government Employees Pension Law, 1996, so as to insert and delete certain definitions; to replace the divorce debt approach with a pensionable service reduction approach to adjust the benefit of a member of the Government Employee Pension Fund following a pension interest assigned to a former spouse of the member as result of a decree of divorce or for the dissolution of a customary marriage; and to provide for a transitional measure; and
- the Auditing Profession Act, 2005, so as to strengthen the governance of the regulatory board; to strengthen the investigating and disciplinary processes; to provide for the power to subpoena persons with information required for an investigation or disciplinary process; and to provide for the sharing of information amongst the regulators of the auditing profession.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 83 of Act 24 of 1936, as amended by section 24 of Act 16 of 1943, section 27 of Act 99 of 1965, section 30 of Act 54 of 1991 and section 290 of Act 9 of 2017

1. Section 83 of the Insolvency Act, 1936, is hereby amended—
 - (a) by the substitution for subsection (5) of the following subsection:

“(5) The creditor shall, as soon as possible after he has realized such property, other than collateral security held in terms of a master agreement contemplated in section 35B(2) (including eligible collateral in terms of the

applicable standards or rules made under the Financial Markets Act, 2012 (No. 19 of 2012)), prove in terms of section 44 the claim thereby secured and he shall attach to the affidavit submitted in proof of his claim a statement of the proceeds of the realization and of the facts on which he relies for his preference.”;

(b) by the substitution for subsection (10) of the following subsection:

“(10) Whenever a creditor has realized his security, other than collateral security held in terms of a master agreement contemplated in section 35B(2) (including eligible collateral in terms of the applicable standards or rules made under the Financial Markets Act, 2012 (No. 19 of 2012)), as herein before provided he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferment claim if such claim was proved and admitted as provided by section forty-four and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section one hundred and eleven to the trustee’s account, or apply to court after notice or motion to the trustee, for an order compelling the trustee to pay him forthwith. Upon such application the court may make such order as to it seems just.”; and

(c) by the insertion after subsection (10) of the following subsections:

“(10A)(a) Whenever a creditor has realized collateral security held under a master agreement contemplated in section 35B (including eligible collateral in terms of the applicable standards or rules under the Financial Markets Act, 2012 (No. 19 of 2012)), such creditor may retain the proceeds of the realization for the settlement of the secured claim and must as soon as possible after realization—

(i) give written notice of that fact to the trustee or the Master and provide the trustee or the Master with a certified copy of the master agreement and an affidavit confirming the terms of the master agreement, setting out the details of the transactions in terms of which the collateral security was realized as well as the facts relied upon for the preference, as proof of the secured claim;

(ii) if the net proceeds of the realization exceed the value of the claim, pay to the trustee or the Master the balance, after payment of those claims, and such amount shall be added to the free residue of the estate in question; and

(iii) if the net proceeds of the realization are less than the value of the claim, not submit a further claim against the estate in question for payment of the balance.

(b) Upon receipt of the notice submitted under subsection (10A)(a)(i), the trustee or the Master shall notify all creditors at the second meeting of creditors of the realization of the collateral security and inform them of their right to lodge an objection.

(10B)(a) The trustee or any other creditor interested in the estate may dispute the preference in writing to the Master no later than 14 days of the second meeting of creditors.

(b) The Master must immediately notify the creditor that has realized the collateral security under a master agreement as contemplated in subsection (10A) of the dispute.

(c) The creditor that has realized the collateral security must lay before the Master an objection and response to the dispute within 14 days of receipt of the notification contemplated in paragraph (b).

(d) The Master must make a determination on the dispute within 21 days of receipt of such objection and may request any material information from the parties to be furnished in connection with the dispute.

(e) If the Master is of the opinion that the dispute in terms of subsection (10B)(a) is well founded, the Master may direct the creditor to immediately pay the net proceeds, including any accruing interest, of the realization of the security to the trustee, and the creditor—

(i) must upon such direction, immediately pay such proceeds to the trustee; and

(ii) may thereafter apply to court, after notice of motion to the trustee, for an order compelling the trustee to immediately pay the creditor such proceeds, and the court may upon such application make any order as to it seems just.

(f) The creditor that has realized collateral security held under a master agreement contemplated in section 35B, whether or not the creditor has proved a claim against the estate in terms of subsection (10A)(a)(i), shall be liable to contribute not less than the creditor would have had to contribute if such creditor had proved the claim.”.

Amendment of section 1 of Act 84 of 1976, as amended by section 1 of Act 26 of 1977, section 4 of Act 97 of 1980, section 17 of Act 96 of 1983, section 11 of Act 75 of 1998 and section 8 of Act 21 of 2003

- 2.** Section 1 of the Military Pensions Act, 1976 is hereby amended—
- (a) by the substitution in subsection (1) for the definition of "dependant" of the following definition:
 "**dependant**", in relation any member, means his **[wife]** or her spouse or child;";
- (b) by the substitution in subsection (1) for the definition of "Director-General" of the following definition:
 "**Director-General**" means the Director-General: **[Health and Welfare]** National Treasury;";
- (c) by the substitution in subsection (1) for the definition of "Minister" of the following definition:
 "**Minister**" means the Minister **[of Health and Welfare]** responsible for finance;";

- (d) by the insertion in subsection (1) after the definition of "previously pensionable disability" of the following definition:

"spouse" in relation to any member means—

(a) a husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006);

(b) a life partner (including same sex life partner);

(c) a husband or wife according to the tenets of any religion, of the member at the date of the member's death;

(d) a person who is the natural parent of a child under the age of 18 years who is regularly maintained by the member; or

(e) a person with whom the member lived together as a husband, wife or life partner for a period of at least five years immediately before the commencement of the member's military services within the meaning of section 2(3);"

- (e) by the deletion in subsection (1) of the definition of "widow"; and
 (f) by the deletion in subsection (1) of the definition of "wife"."

Amendment of section 3 of Act 84 of 1976, as amended by section 2 of Act 26 of 1997 and section 5 of Act 97 of 1980

3. Section 3 of the Military Pensions Act, 1976 is hereby amended by the substitution for paragraph (b) of the following paragraph:

"(b) pay pensions to the **[widows]** spouse, parents or children of deceased members;"

Amendment of section 4 of Act 84 of 1976, as amended by section 3 of Act 26 of 1997 and section 5 of Act 123 of 1984

4. Section 4 of the Military Pensions Act, 1976 is hereby amended—

- (a) by the substitution for paragraph (c) of the following paragraph:

"(c) **[the widow]** a spouse of a deceased member who, immediately prior to his death, was in receipt of a pension in terms of paragraph (b), shall be entitled to such pension with effect from the first day of the month following immediately on the month in which the member died, and such pension shall with effect from the said date be supplemented—

(i) in the case of a **[widow]** spouse of a deceased member who has died as a result of his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension to which he would have been entitled in terms of paragraph (a) if the degree of his pensionable disability had been determined at one hundred per cent; and

(ii) in the case of a **[widow]** spouse of a deceased member who died of a cause other than pensionable disability, by an amount which shall be equal to half of the amount of the annual pension which was payable to the member in terms of paragraph (a) immediately prior to his death;"

- (b) by the substitution for paragraph (d) of the following paragraph:
- "(d) **[the widow]** a spouse of a deceased member who, on the date of his death, was not in receipt of a pension in terms of paragraph (b), shall be entitled to the pension to which the member would have been entitled in terms of that paragraph if he had not died, and the latter pension shall be supplemented—
- (i) in the case of a **[widow]** spouse of a deceased member who has died as a result of his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension to which he would have been entitled in terms of paragraph (a) if the degree of his pensionable disability had been determined at one hundred per cent; and
- (ii) in the case of a **[widow]** spouse of a deceased member who has died of a cause other than his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension which was payable to the member in terms of paragraph (a) immediately prior to his death or to which he would have been entitled in terms of that paragraph if he had not died;" and
- (c) by the substitution for paragraph (e) of the following paragraph:
- "(e) the children of a deceased member who immediately prior to his death was in receipt of a pension in terms of paragraph (a) or who would have been entitled to such pension if he had not died and who is not survived by a **[widow]** a spouse or whose **[widow]** spouse dies after his death, shall be entitled to an annual pension which shall be calculated in accordance with formula II;"

Insertion of section 4B in Act 84 of 1976

5. The following section is hereby inserted in the Military Pensions Act, 1976 after section 4A—

Registration of spouse

4B. (a) A member shall register with the Director-General his or her spouse as determined by the Director-General.

(b) Registration of a person as a spouse shall be prima facie evidence of being a spouse.

(c) A person who is not registered as a spouse may, when bringing a claim under the Act, provide proof to the satisfaction of the Director-General that he or she is a spouse."

Amendment of section 10 of Act 84 of 1976, as amended by section 5 of Act 26 of 1977 and section 9 of Act 100 of 1979

6. Section 10 of the Military Pensions Act, 1976 is hereby amended—
- (a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:
- "(b) in the case of a **[widow]** a spouse referred to in section 4 (d), prior to the first day of the month in which the member concerned died;" and

- (b) by the substitution in subsection (2) for paragraph (c) of the following paragraph:
- "(c) in the case of the dependants of a deceased member referred to in section 4 (e), prior to the first day of the month following immediately on the month in which the member concerned died or prior to the first day of the month following immediately on the month in which the **[widow] spouse** of that member died;"

Amendment of section 11 of Act 84 of 1976, as amended by section 9 of Act 97 of 1980 and section 5 of Act 117 of 1990

7. Section 11 of the Military Pensions Act, 1976 is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph—
- "(b) that, after the pension has been awarded, a change in the marital state of the member concerned or of any dependant of him or in the number of his dependants or, in the case of a **[widow] spouse**, a change in his or her marital state has occurred;"

Amendment of section 12 of Act 84 of 1976, as amended by section 6 of Act 26 of 1977, section 10 of Act 97 of 1980 and section 7 of Act 123 of 1984

8. Section 12 of the Military Pensions Act, 1976 is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph—
- "(b) in the case of a **[widow] spouse** of a member, up to and including the last day of the month in which her or she dies;"

Insertion of certain words in Act 84 of 1976

9. The Military Pension Act, 1976 is hereby amended by the insertion after—
- (a) the word "he" of the words "or she", wherever it occurs; and
- (b) the word "him" of the words "or her", wherever it occurs.

Amendment of section 1 of Act 94 of 1990, as amended by section 1 of Act 44 of 2013 and section 290 of Act 9 of 2017

10. Section 1 of the Banks Act, 1990, is hereby amended by the substitution for the definition of "public company" of the following definition:
- "**public company** has the meaning ascribed to that expression in section 1 of the Companies Act, and includes a state-owned company contemplated in section 1 of the Companies Act;"

Amendment of section 12 of Act 94 of 1990, as amended by section 5 of Act 9 of 1993 section 8 of Act 19 of 2003 and section 6 of Act 20 of 2007

11. Section 12 is hereby amended by the insertion after subsection (3) of the following subsections:

"(4)(a) A state-owned company may only with the approval of the Minister, granted with the concurrence of the executive authority, as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), of the state-owned company, apply for authorisation to establish a bank in terms of subsection (1).

(b) An application in terms of paragraph (a) shall include a declaration by the auditor of the state-owned company, contemplated in section 61, that certifies that for the period of 24 months immediately preceding the date of the application, the assets of—

(i) the state-owned company exceeded its liabilities;

(ii) the holding company of the state-owned company exceeded the holding company's liabilities; and

(iii) the holding company of the state-owned company's holding company exceeded the liabilities of the first-mentioned holding company (if applicable).

(c) For purposes of the application of this Act to state-owned companies, a provision of this Act which is inconsistent with a provision of another Act, other than the Financial Sector Regulation Act, shall prevail."

Amendment of section 24A of Government Employees Pension Law, 1996, as inserted by section 3 of Act 19 of 2011

12. Section 24A of the Government Employees Pension Law, 1996 is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph:

"(d)(i) The benefit that is subsequently payable to the member shall, as provided in the rules, be decreased by reducing the member's years of pensionable service to take into account the pension interest of the member which was assigned to any former spouse of the member.

(ii) The rules referred to in subparagraph (i) shall be made on the advice of an actuary."

Transitional measure for amendment to Government Employees Pension Law, 1996

13. (1) If the amount of the pension benefit payable to a member is subject to reduction contemplated in section 24A(2)(d) of the Government Employees Pension Law, 1996, before its amendment by section 8 of this Act, the member shall, within 12 months after the commencement of this section, in writing notify the Fund whether the reduction shall be dealt with in terms of section 24A(2)(d) of the principal Act—

(a) before its amendment by section 8 of this Act; or

(b) as amended by section 8 of this Act.

(2) If a member does not notify the Fund as required by subsection (1), the reduction shall be dealt with in terms of section 24(2)(d) of the principal Act as amended by section 8 of this Act.

Amendment of section 4 of Act 26 of 2005

14. Section 4 of the Auditing Professions Act, 2005 is hereby amended by the insertion after subsection (2) of the following subsection:

“(2A) The Regulatory Board must, with the approval of the Minister, determine a policy framework for performing its functions in terms of subsection (1).”

Amendment of section 11 of Act 26 of 2005

15. The following section is hereby substituted for section 11 of the Auditing Profession Act, 2005:

“Appointment of members of Regulatory Board

11.(1) The Regulatory Board consists of not less than six but not more than 10 nonexecutive members appointed by the Minister.

(2) The Minister must appoint competent persons[, **who must include registered auditors,**] to effectively manage and guide the activities of the Regulatory Board, based on their knowledge, **[and]** experience, including in auditing, and independence.

(3) When making the appointments, the Minister must take into consideration, amongst other factors—

- (a) the need for transparency and representivity within the broader demographics of the South African population;
- (b) any nominations received in terms of subsection (5); and
- (c) the availability of persons to serve as members of the Regulatory Board.

(4) **[Disregarding any vacancy in its membership, not more than 40% of the members of the Regulatory Board may be registered auditors]** None of the members appointed in terms of this section may be a registered auditor or registered candidate auditor.

(5) Before the Minister makes the appointments, the Regulatory Board must, by notice in the *Gazette* and in any national newspaper, invite nominations from members of the public.

(6) The Minister may appoint an alternate member for every member of the Regulatory Board, and an alternate member may attend and take part in the proceedings at any meeting of the Regulatory Board whenever the member for whom he or she has been appointed as an alternate is absent from that meeting.

(7) The Regulatory Board, as soon as practicable after the appointment of its members, must publish by notice in the *Gazette*—

- (a) the name of every person appointed;
- (b) the date from which the appointment takes effect; and
- (c) the period for which the appointment is made.

(8) No member may—

- (a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor;
- (b) receive payments from a registered auditor or registered candidate auditor; or
- (c) conduct business with a registered auditor or registered candidate auditor.”

Amendment of section 12 of Act 26 of 2005

16. Section 12 of the Auditing Professions Act, 2005 is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A member of the Regulatory Board appointed in terms of section 11 holds office for such period, but not exceeding ~~three~~ **[two]** years, as the Minister may determine at the time of his or her appointment, but must on termination of the period for which he or she was appointed, continue to hold office for a further period not exceeding three months until his or her successor has been appointed.”.

Amendment of section 20 of Act 26 of 2005

17. Section 20 of the Auditing Professions Act, 2005 is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) Sections 15 and 16 relating to meetings and decisions of the Regulatory Board, respectively, with the necessary changes apply in respect of any committee, except that the committees must meet **[at least four times a year]**as and when it is required.”.

Amendment of section 24 of Act 26 of 2005

18. The following section is hereby substituted for section 24 of the Auditing Professions Act, 2005:

“Investigating and disciplinary committees

24. (1) The investigating committee must include individuals with the requisite legal expertise.

(2) The Regulatory Board must appoint a disciplinary committee consisting of as many members as it may determine necessary to deal with disciplinary hearings in terms of this Act.

(3) Notwithstanding the provisions of section 20(5), when the disciplinary committee convenes a hearing under section 50, the Regulatory Board must appoint a panel which comprises of at least four members of the disciplinary committee with suitable expertise and experience to conduct the hearing.

(4) A person may not be appointed to, or hold office as, a member of the disciplinary committee if the person—

(a) does not possess the necessary skills, expertise and knowledge; and

(b) is not a citizen or permanent resident of the Republic.

(5) A member of the disciplinary committee may not participate in a panel contemplated in subsection (3) if he or she has an interest in a matter considered by the panel.

(6) A member of the disciplinary committee holds office for a period of three years, or such shorter period as the Regulatory Board may determine, from the date of his or her appointment.

(7) A member of the disciplinary committee may be re-appointed at the expiry of a term for a further term not exceeding three years.

(8) A person may resign as a member of the disciplinary committee by giving at least three months written notice to the Regulatory Board, or a shorter period of notice approved by the Regulatory Board.

(9) The Regulatory Board may terminate the appointment of a member of the disciplinary committee if—

(a) the member is unable to perform the functions of office due to health or other reasons accepted by the Regulatory Board; or

(b) an independent inquiry by the Regulatory Board has found that the member has—

(i) failed in a material way to discharge his or her responsibilities as a member of the disciplinary committee;

(ii) acted in a manner that is inconsistent with continuing to hold the office;

or

(iii) acted in a manner that is inconsistent with this Act.

(10) A member of the disciplinary committee may not use his or her position or any information by virtue his or her work for the committee to—

(a) improperly benefit himself or herself or another person;

(b) impede the committee's ability to perform its functions."

Amendment of section 37 of Act 26 of 2005

19. Section 37 of the Auditing Professions Act, 2005 is hereby amended by the substitution for paragraph (b) of subsection (3) for the following paragraph:

"(b) has been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any offence involving dishonesty, other than [theft, fraud or forgery,] an offence committed prior to 27 April 1994 associated with political objectives, and has been sentenced to imprisonment without the option of a fine [or to a fine exceeding such an amount as may be prescribed by the Minister];"

Amendment of section 45 of Act 26 of 2005

20. Section 45 of the Auditing Professions Act, 2005 is hereby amended by the insertion after subsection (6) of the following subsection:

"(7) If a registered auditor reports an irregularity to the Regulatory Board in terms of this section, he or she may not resign or be removed as an auditor until after he or she has complied with subsection (3)."

Amendment of section 48 of Act 26 of 2005

21. Section 48 of the Auditing Professions Act, 2005 is hereby amended—
(a) by the insertion after subsection (1) of the following subsection:

"(2A)(a) Despite subsection (1), the Regulatory Board may, if it deems it appropriate, refer a matter brought against a registered auditor to a professional body accredited in terms of section 32(2) of this Act for investigation.

(b) The Regulatory Board must determine the processes and procedure to be applied by a professional body requested to investigate a matter in terms of paragraph (a).”;

(b) by the substitution for subsection (5) of the following subsection:

“(5)(a) In investigating a charge of improper conduct the investigating committee may—

(i) require the registered auditor to whom the charge relates or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;

(iA) subpoena the registered auditor to whom the charges relates or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books, or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;

(ii) inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and

(iii) make copies of and take extracts from such information.

(b) **[The provisions of this subsection apply regardless of whether the registered auditor is of the opinion that such information contains confidential information about a client]**The obligation to produce any information under subsection (5)(a)(i) may not be excused by reason of any alleged confidential information of a client contained therein.

(c) A subpoena issued in terms of subsection (5)(a)(iA) must—

(i) be in the prescribed form;

(ii) be signed by an authorised official of the Regulatory Board;

(iii) be served on the person concerned in a way that would constitute proper service of a subpoena in the High Court.

(d) Service contemplated in paragraph (c)(iii) on the last known address appearing from the Regulatory Board’s records constitutes proper service for purposes of this section.

(e) Service contemplated in paragraph (c)(iii) may be effected in any manner agreed between the Regulatory Board or the investigating committee and the person or registered auditor being subpoenaed.

(f) A person who has been issued with a subpoena under subsection (5)(a)(iA) may not without just cause, fail to provide the information, book or document specified in the subpoena, in his or her possession or custody or control which he or she has been required to produce.

- (g) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any information, including but not limited to any working papers, statements, correspondence, books or other documents, to the investigating committee.”;
- (c) by the insertion of the following subsection after subsection (8):
- “(9) Subject to the Constitution and any other law, no person who is or was concerned with the performance of any function under this section may disclose any information obtained in the performance of that function except—
- (a) for the purpose of an investigation or a disciplinary process under this Chapter;
- (b) if the person of necessity supplies it in the performance of functions under this Act;
- (c) when required to do so by order of a court of law;
- (d) at the written request of, and to, any appropriate regulator which requires it for the institution, or an investigation with a view to the institution, of any disciplinary action or criminal prosecution: or
- (e) at the written request of, and to, any appropriate international regulator of audits and auditors, that requires such for the purpose of investigation or a disciplinary process.”; and
- (d) by the insertion of the following subsection after subsection (9):
- “(10)(a) A person commits an offence if he or she fails, without sufficient cause, to comply with a subpoena in terms of section 48(5)(a)(iA).
- (b) A person found guilty under paragraph (a) is liable on conviction to a fine or to imprisonment for a period not exceeding one year.”.

Amendment of section 50 of Act 26 of 2005

22. The following section is hereby substituted for section 50 of the Auditing Professions Act, 2005:

“Disciplinary [hearing] process

50.(1) The Regulatory Board may, for each case of alleged improper conduct—

(a) consider the case without constituting a disciplinary hearing; or

(b) appoint a panel to conduct a disciplinary hearing.

(2) Where the Regulatory Board decides to appoint a panel as contemplated in subsection 1(b), the Regulatory Board must—

(a) designate a member of the panel to chair the proceedings of the disciplinary hearing; and

(b) appoint a person to present the charges to the panel.

(3) If, for any reason, a panel member (3) is unable to complete proceedings of the disciplinary hearing, the Chairperson may—

(a) replace that member;

(b) direct that the proceedings continue before the remaining panel members; or

(c) constitute a new panel and direct the new panel to either continue the proceedings, or start new proceedings.

(4) A panel may at any time prior to the conclusion of a disciplinary hearing amend the charge sheet or a charge on the grounds that an error exists in its formulation or that a charge is not properly articulated in the original charge sheet.

(5) A hearing before the panel is open to the public except where, in the opinion of the chairperson of the panel, any part of the hearing should be held in camera.

(6) A panel may, for the purposes of a disciplinary hearing, subpoena any person—

(a) who may be able to give material information concerning the subject of the hearing; or

(b) who the panel suspects or believes has in his or her possession or custody or under such person's control any information, including but not limited to any working papers, statements, correspondence, books or other documents, which has any bearing on the subject of the hearing,

to appear before the panel at the time and place specified in the subpoena, to be questioned or to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents.

(7) A subpoena issued in terms of subsection (6) must—

(a) be in the prescribed form;

(b) be signed by the chairperson of the panel or, in that person's absence, by any member of the panel; and

(c) be served on the registered auditor concerned personally or by sending it by registered mail.

(8) The panel may retain any information, including but not limited to any working papers, statements, correspondence, books or other documents produced in terms of subsection (6), for the duration of the hearing.

(9) The chairperson of the panel may call upon and administer an oath to, or take an affirmation from, any witness at the hearing who was subpoenaed in terms of subsection (6).

(10) At a hearing the registered auditor charged—

(a) may be assisted or represented by another person in conducting the proceedings;

(b) has the right to be heard;

(c) may call witnesses;

(d) may cross-examine any person called as a witness in support of the charge; and

(e) may have access to documents produced in evidence.

(11) A registered auditor charged may—

(a) at any time before the conclusion of the disciplinary hearing, admit that he or she is guilty of the charge despite the fact that he or she denied the charge or failed to react in terms of section 49(3)(b) or (c); or

(b) in the case where the registered auditor makes an admission in terms of paragraph (a), be regarded as guilty of improper conduct as charged.

(12) The person referred to in subsection (2)(b) may during a hearing—

- (a) lead evidence and advance arguments in support of the charge and cross-examine witnesses;
- (b) question any person who was subpoenaed in terms of subsection (6); or
- (c) call anyone to give evidence or to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which such person suspects or believes to have a bearing on the subject of the hearing.
- (13)(a) A witness who has been subpoenaed may not—
- (i) without just cause, fail to attend the hearing at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;
- (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge to all questions lawfully put to him or her; or
- (iv) fail to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which he or she has been required to produce.
- (b) A witness who has been subpoenaed must remain in attendance until excused by the chairperson of the panel from further attendance.
- (c) A witness who has been subpoenaed may request that the names of the members of the panel be made available to him or her.
- (d) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law may, with the necessary changes, apply in relation to the examination of any information, including but not limited to any working papers, statements, correspondence, books or other documents, or to the production of such information to the panel by any person called in terms of this section as a witness.
- (e) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false.
- (f) A person may not prevent another person from complying with a subpoena or from giving evidence or producing any information, including but not limited to any working papers, statements, correspondence, books or other documents, which he or she is in terms of this section required to give or produce.
- (14) If the improper conduct with which the registered auditor is charged amounts to an offence of which he or she has been convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the registered auditor as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court.
- (15) In exercising its powers or performing its duties in terms of this section, the disciplinary committee must consider the delegation or assignment of such powers and duties in accordance with section 19.”

23. The following section is hereby substituted for section 51 of the Auditing Professions Act, 2005:

“Proceedings after [hearing] disciplinary process”

51.(1) After the conclusion of a disciplinary [hearing] process contemplated in section 50(1)(a), the **[disciplinary committee]Regulatory Board** must[, **within 30 days**]—

- (a) decide whether or not the registered auditor is guilty as charged **[of improper conduct]**;
- (b) if the **[disciplinary committee]Regulatory Board** finds **[that]** the registered auditor charged **[is]** guilty **[of improper conduct]**, take cognisance of any aggravating or mitigating circumstances; and
- (c) inform the registered auditor **[charged and the Regulatory Board]** of the finding.

[(2) A registered auditor found guilty of improper conduct in terms of this section may—

- (a) address the disciplinary committee in mitigation of sentence; and**
- (b) call witnesses to give evidence on his or her behalf in mitigation of the sentence.]**

(3)(a) If the registered auditor charged is found guilty **[of improper conduct]**, or if the registered auditor admits to the charge, the **[disciplinary committee]Regulatory Board** must either—

- (i) caution or reprimand the registered auditor;
 - (ii) impose a fine on the registered auditor not exceeding the amount **[calculated according to the ratio for five year’s imprisonment prescribed in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991)]** determined by the Minister from time to time; or
 - (iii) **[suspend the right to practice as a registered auditor for a specific period; or] require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction. [; or**
 - (iv) cancel the registration of the registered auditor concerned and remove his or her name from the register referred to in section 6.]**
- (b) The **[disciplinary committee]Regulatory Board** may impose more than one of the sanctions referred to in paragraph (a).

(c) A sanction in terms of subsection (3)(a) may be suspended for a specific period or until the occurrence of a specific event, or made subject to any conditions.

(4) The**[A disciplinary committee] Regulatory Board** may order any person [—

- (a)]** who admitted guilt in terms of section 49(4)[; or
- (b) whose conduct was the subject of a hearing under section 50(1)(b),]** to pay such reasonable costs as have been incurred by an investigating committee **[and the disciplinary committee]** in connection with the investigation **[and hearing]** in question, or such part thereof as the **[disciplinary committee]** considers just.

(5) The Regulatory Board may, if it deems it appropriate, publish the finding and the sanction imposed in terms of subsections (3) and (4).

(6) **[(a) The Regulatory Board must give effect to the decision of the disciplinary committee.**

(b)] Where an order as to costs has been made under subsection (4), the amount thereof shall be recoverable by the Regulatory Board from the person concerned, and any amount so recovered must be paid into the funds of the Regulatory Board.”.

Insertion of section 51A of Act 26 of 2005

24. The following section is hereby inserted in the Auditing Professions Act, 2005 after section 51:

“Proceedings after disciplinary hearing

51A.(1) After the conclusion of a disciplinary hearing contemplated in section 50(1)(b), the panel must, within 30 days—

(a) decide whether or not the registered auditor is guilty as charged;

(b) if the panel finds the registered auditor charged guilty, take cognisance of any aggravating or mitigating circumstances; and

(c) inform the registered auditor and the Regulatory Board of the finding.

(2) A registered auditor found guilty in terms of this section may—

(a) address the panel in mitigation of sentence; and

(b) call witnesses to give evidence on his or her behalf in mitigation of the sentence.

(3)(a) If the registered auditor charged is found guilty, or if the registered auditor admits to the charge, the panel must either—

(i) caution or reprimand the registered auditor;

(ii) impose a fine on the registered auditor not exceeding the amount determined by the Minister from time to time;

(iii) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction;

(iv) cancel the registration of the registered auditor concerned and remove his or her name from the register referred to in section 6;

(v) disqualify the registered auditor from registration as a registered auditor on a temporary or permanent basis.

(b) The panel may impose more than one of the sanctions referred to in paragraph (a).

(c) A sanction in terms of subsection (3)(a) may be suspended for a specific period or until the occurrence of a specific event, or made subject to any conditions.

(4) The panel may order any person—

(a) who admitted guilt in terms of section 49(4); or

(b) whose conduct was the subject of a hearing under section 50(1)(b).

to pay such reasonable costs as have been incurred by an investigating committee and the panel in connection with the investigation and hearing in question, or such part thereof as the panel considers just.

(5) The Regulatory Board may, if it deems it appropriate, publish the finding and the sanction imposed in terms of subsections (3) and (4).

(6)(a) The Regulatory Board must give effect to the decision of the panel.

(b) Where an order as to costs has been made under subsection (4), the amount thereof shall be recoverable by the Regulatory Board from the person concerned, and any amount so recovered must be paid into the funds of the Regulatory Board.”.

Insertion of section 57A in Act 26 of 2005

25. The following section is hereby inserted in the Auditing Professions Act, 2005 after section 57:

“Protection of personal information

57A.(1) The Regulatory Board must ensure that appropriate measures are taken in respect of personal information in its possession or under its control to prevent—

(a) loss of, damage to or unauthorised destruction of the information; and

(b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).

(2) In order to give effect to subsection (1) the Regulatory Board must take reasonable measures to—

(a) identify all reasonable and foreseeable internal and external risks to personal information in its possession or under its control;

(b) establish and maintain appropriate safeguards against the risks identified;

(c) regularly verify that the safeguards are effectively implemented; and

(d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.”.

Short title

26. This Act is called the Financial Matters Amendment Act, 2018.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL MATTERS AMENDMENT BILL, 2018

1. PURPOSE OF BILL

The Financial Matters Amendment Bill proposes amendments to the Insolvency Act, 1936, (Act No. 24 of 1936 - "the Insolvency Act"), Military Pensions Act, 1976 (Act No. 84 of 1976 - "the Military Pensions Act"), the Banks Act, 1990 (Act No. 94 of 1990 - "the Banks Act"), the Government Employees Pension Law, 1996 ("Proclamation No. 21 of 1996 - "the GEP Law") and the Auditing Profession Act, 2005 (Act No. 26 of 2005 – "the Auditing Profession Act").

2. AMENDMENTS TO THE INSOLVENCY ACT

The Insolvency Act is proposed to be amended to provide for a process to be followed when a creditor realizes his or her security and also to provide for a power for the Master of the High Court to deal with disputes regarding preference by trustees.

3. AMENDMENTS TO THE MILITARY PENSIONS ACT

3.1 Section 9(1) of the Constitution of the Republic of South Africa Act, 1996 ("the Constitution"), provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In terms of section 9(3) of the Constitution the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.2 The Military Pensions Act provides for, among others, pensions and gratuities for certain persons in respect of disability caused or aggravated by military services. The Military Pensions Act recognises certain marriages and the male gender, for purposes of benefits, in manner that is contrary to section 9 of the Constitution. For example, section 1 of the Military Pensions Act defines "dependant" in relation to a member, to be his wife or child. This definition assumes that members are only husbands in heterosexual relationships and furthermore perpetuates the discriminatory stereotypes that a heterosexual relationship is the only relationship which is acceptable. The Military Pensions Act disregards the fact that the military service comprises of both men and women who are in different types of relationships which are treated equally in terms of the Constitution and recognised in other laws, such as the Marriages Act, 1961 and the Civil Union Act, 2006. The Bill proposes, among others, the amendment of the word "spouse" to include members in different types of relationships and

the deletion of the definition of "wife" and "widow". To ensure gender neutrally, the Bill also proposes the substitution of the word "widow" for the word "spouse" wherever it exists.

4. AMENDMENTS TO THE BANKS ACT

4.1 Under the Companies Act, 2008 (Act No. 71 of 2008), state-owned companies are no longer classified as public companies. Currently, the Banks Act only allows for public companies to establish a bank. As a result, state-owned companies meeting the prudential and other requirements of the Banks Act, are unable to apply for authorisation to establish a bank.

4.2 To limit the fiscal risks of state-owned banks which may, in terms of its founding legislation, be able continue to operate despite being not a going concern, it is proposed that only qualifying state-owned companies that are financially sound may apply for authorisation to establish a bank. For this purpose, the Bill proposes that—

- (a) a state-owned company must first obtain the approval of the Minister of Finance, acting with the concurrence of the Minister responsible for the state-owned company to apply for authorisation to establish a bank; and
- (b) the assets of the company, its holding company and, if applicable, the holding company of its holding company, must exceed its liabilities.

5. AMENDMENTS TO THE GEPF LAW

5.1 The GEP Law regulates the Government Employee Pension Fund (GEPF). Non-member spouses were denied the enjoyment of their share of the pension benefit immediately upon divorce or on dissolution of a customary marriage. Instead, they had to wait until their member former spouses became entitled to their own benefit whereas the Pension Funds Act, 1956 (Act No. 24 of 1956) entitled non-members spouses to immediate enjoyment of their pension interest in other funds, governed by the Pension Funds Act, upon divorce or dissolution of a customary marriage.

5.2 In the matter of *Mathilda Louisa Wiese v GEPP and others* an application was brought before the Western Cape High Court by a former spouse of a member of the GEPF who was unable to realise her pension interest since the GEP Law only allowed for the realisation of such interest as and when an exit takes place in relation to the former spouse, such as resignation, termination of employment or death, and no such event had occurred. The applicant requested the court to declare GEP Law inconsistent with section 9(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to the extent that it did not

allow spouses of former members to realise their pension interest immediately upon divorce or dissolution of a customary marriage.

5.3 The Court declared that-

- (a) the GEP Law is inconsistent with section 9(1) of the Constitution in so far as it fails to afford to former spouses of members of the GEPF the same rights and advantages as are afforded to former spouses of members of funds subject to the Pension Funds Act, more particularly those contained in section 37D(1)(d), (3), (4) and (5) and is invalid to the extent of that inconsistency; and
- (b) the invalidity is suspended for 12 months to allow Parliament to correct the defect.

5.4 The order granted by the Western Cape High Court paved the way for the implementation of a 'clean break' principle on divorce which allows division of a pension interest on divorce and not later, only when an exit event occurs. The High Court's declaration of invalidity was referred to the Constitutional Court for confirmation. While proceedings at the Constitutional Court were pending, Parliament amended the GEP Law by enacting the GEP Law Amendment Act which cured the defect. The parties agreed that the GEP Law Amendment Act disposed of the main issues before the Constitutional Court and submitted that the matter had become moot.

5.5 The insertion of section 24A to the GEP Law provided for the payment of pension interest of a member of the GEPF to a former spouse (the non-member spouse) upon divorce or dissolution of a customary marriage ("clean-break principle"). The portion of the member's pension interest assigned to a non-member spouse is deemed to accrue to the member on the date on which the decree of divorce or for the dissolution of a customary marriage is granted.

5.6 The amount paid to the non-member spouse in giving effect to the clean-break principle is regarded by the GEPF rules as a debt due by the member ("the divorce debt approach") to the GEPF.

5.7 The rules of the GEPF (rule 14.10.9) require that a divorce debt be created at the time a member is divorced from his or her spouse or at the dissolution of a customary marriage in respect of the amount paid to the former spouse. Members have the opportunity to settle a portion or all of that debt over their period of membership should they so wish, but if there remains an unsettled amount at the time the member exits the Fund, the debt is deducted

from the benefit payable. On retirement of a member, in terms of the current rules of the GEPF, the divorce debt is offset against the member's gratuity entitlement. Should the gratuity be less than the outstanding divorce debt, the balance of the debt is recovered by a reduction in the annual pension. In the above scenario, the member will then retire and not receive any cash.

5.8 The divorce debt approach is an issue for consideration in an application before the High Court in the matter of *Crafford v Government Employees Pension Fund and Others* wherein the applicant applied to court for an order declaring section 24A of the GEP Law to be inimical to the provisions of sections 9 and 27(1)(c) of the as well as the underlying constitutional values of freedom and equality. The applicant in the Crafford matter is claiming that the divorce debt approach, which results in a "forced loan" infringes upon her constitutional rights to equality and social security. The applicant further claims that this approach imposes an unjustifiable burden on members of the GEPF.

5.9 Due to the prejudice suffered by the members as a result of the divorce debt approach, it is proposed that the divorce debt approach be replaced with the reduction of a member's year of pensionable service ("the service reduction approach").

6. AMENDMENTS TO THE AUDITING PROFESSION ACT

6.1 The Auditing Profession Act provides for, among others, the establishment of the Independent Regulatory Board for Auditors ("IRBA"), the education, training and professional development of registered auditors and registered candidate auditors, regulation of the conduct of registered auditors and registered candidate auditors.

6.2 Section 4 of the Auditing Profession Act provides for general functions of the IRBA. This requires IRBA to take steps to promote the integrity of the auditing profession by, among others, investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct. The proposed amendment is for the IBRA to determine a policy framework, with the approval of the Minister, for performing its functions.

6.3 The Auditing Profession Act currently empowers the disciplinary committee to impose a fine not exceeding the amount calculated according to the ratio for five year's imprisonment prescribed in terms of the Adjustment of Fines Act, 1991, on a registered auditor who is found guilty following a disciplinary hearing. The proposed amendment provides a power for the Minister to determine the maximum amount which can be imposed on a registered auditor as a sanction following a guilty finding in a disciplinary hearing.

6.4 To strengthen the independence of IRBA and also to deal with issues of conflict of interest by members of IRBA, the proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of the IRBA; and further prohibit members of IRBA from-

- (a) sharing directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor;
- (b) receiving payments from a registered auditor or registered candidate auditor; or
- (c) conducting business with a registered auditor or registered candidate auditor.

6.5 To address the challenges faced by IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors, the amendment provides a power for IRBA to subpoena any person with information required to complete an investigation.

6.6 The disciplinary committee of IRBA is overburdened by the number of disciplinary cases it has to deal with due to the limited number of members appointed in the disciplinary committee. To address this challenge, provision is made to allow IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment also provides for the appointment of a panel from members of the disciplinary committee to deal with disciplinary cases. Therefore, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. Importantly, the decision of a panel is regarded as a decision of the disciplinary committee. The amendment is also aimed at ensuring that disciplinary cases are expedited.

6.7 The amendment also empowers IRBA to, if it deems appropriate, refer a matter brought against a registered auditor to an accredited professional body for investigation.

6.8 As a regulator it is important that IRBA maintains process to deal with personal information. The amendment provides requires IRBA to take appropriate measures in respect of personal information in its possession or under its control.

7. SUMMARY OF BILL

7.1 INSOLVENCY ACT, 1936: Clause 1- Amendment of section 83

The proposed amendments-

- (a) excludes collateral security held in terms of a master agreement contemplated in section 35B(2) of the Insolvency Act, including eligible collateral in terms of the standards or rules made under the Financial Sector Regulation Act, 2017, whenever a creditor realizes his security.
- (b) allows a creditor who has realized his collateral security to retain the proceeds of the realization for the settlement of the secured claim.
- (c) empowers the Master of the High Court to, if the trustees dispute the preference, direct the creditor to pay the proceeds of the realization to the trustees.

7.2 MILITARY PENSIONS ACT, 1976

7.2.1 Clause 3 - Amendment of section 1

The proposed amendment provides for—

- (a) the amendment of the definition of "dependent" so that instead of "his wife", it refers to "his or her spouse";
- (b) the amendment of the definition of "Director-General" by replacing the words "Health and Welfare" with the words "National Treasury";
- (c) the amendment of the definition of "Minister" by replacing the words "of Health and Welfare" with the words "responsible for finance";
- (d) the insertion of a definition of "spouse" to recognise members of the military in all the various types of relationships that are provided for in law;
- (e) the deletion of the definitions of "widow" and "wife" in view of proposed change elsewhere in the Act to use the gender neutral term "spouse"; and
- (f) the registration of spouses by members.

7.2.2 Clauses 3 to 9 – Amendment of sections 1, 3, 4, 10, 11 and 12 and all provisions of the Act

The proposed amendments provide for—

- (a) the substitution of the word "widow" for the word "spouse" wherever it occurs and inserting a reference to the female gender, where necessary;
- (b) throughout the Act to provide for references to both genders; and
- (c) the registration of a spouse by a member with the Director-General.

7.3 BANKS ACT, 1990

7.3.1 Clause 10 – Amendment of section 1

An amendment to the definition of “public company” is proposed to include a state-owned company as defined in the Companies Act, 2008 (Act No. 71 of 2008), read with section 12(4) of the Banks Act (as proposed to be amended).

7.3.2 **Clause 11 – Amendment of section 12 – proposed subsection (4)**

- (a) The amendment stipulates that a state-owned company must first obtain the approval of the Minister of Finance acting with the concurrence of the Minister responsible for the state-owned company to apply for authorisation to establish a bank. Furthermore, it may only apply for such Ministerial approval if the Prudential Authority certifies that the company's assets exceed its liabilities and its holding company's assets exceeds the holding company's liabilities. If the holding company of the state-owned company has a holding company, the same applies.
- (b) Since conflict between the provisions of—
- (i) the Banks Act and the Companies Act for companies that are banks; and
 - (ii) the Banks Act and the Public Finance Management Act, 1999 (Act No. 1 of 1999), for state-owned companies that are banks and public entities falling under the Public Finance Management Act,
- may arise, the proposed subsection (4)(c) provides that in such event, the provisions of the Banks Act prevail.

7.4 **GOVERNMENT EMPLOYEES PENSION LAW, 1996**

7.4.1 **Clause 12 - Amendment of section 24A**

The proposed amendment provides for the benefit that is payable to the member, following a divorce or dissolution of a customary marriage, to be decreased by the member's years of pensionable service taking into account the pension interest of the member which was assigned to any former member. The amendment requires the benefit payable to the member, to be provided for in the rules of the GEPPF. These rules are to be made on the advice of an actuary.

7.4.2 **Clause 13 - Transitional measure**

The Bill proposes a transitional measure to allow members whose amount of the pension benefit payable is subject to section 24A(2)(d) before its amendment as intended in this Bill, to choose whether the reduction must be dealt with in terms of—

- (a) the divorce debt approach (i.e. section 24A(2)(d) before its amendment by this Bill); or
- (b) the service reduction approach (i.e. section 24A(2)(d) as amended by this Bill).

7.4.3 A member must notify the GEPF of his or her choice within 12 months after this amendment takes effect. If a member does not so notify the GEPF, the service reduction approach will be applied.

7.5 AUDITING PROFESSION ACT, 2005

7.5.1 Clause 14 - Amendment of section 4

The proposed amendment requires IBRA to determine a policy framework, with the approval of the Minister, for performing its functions.

7.5.2 Clause 15 - Amendment of section 11

The proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of IRBA. The proposed amendment also prohibits members of IRBA from-

- (a) sharing directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor;
- (b) receiving payments from a registered auditor or registered candidate auditor; or
- (c) conducting business with a registered auditor or registered candidate auditor.

7.5.3 Clause 16 - Amendment of section 12

The proposed amendment allows members of IRBA whose term of office is terminating, to continue to hold office for a further period not exceeding three months until the member's successor has been appointed.

7.5.4 Clause 17 - Amendment of section 20

The proposed amendment removes the limit on the number of meetings that must be held by committees established by IRBA and allows for committees to meet as and when it is required.

7.5.5 Clause 18 - Amendment of section 24

The proposed amendment makes provision for IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment also gives IRBA power to terminate the appointment of a member of the disciplinary committee under certain circumstances. The proposed amendment regulates the conduct of members of the disciplinary committee by requiring members to disclose their interest and ensuring that a member with interest in a matter is not allowed to participate in the work of the committee.

7.5.6 Clause 19 - Amendment of section 37

The proposed amendment prohibits the registration of an individual as an auditor or candidate auditor if the person has been convicted of an offence and sentenced to imprisonment for more than 12 months without the option of a fine.

7.5.7 **Clause 20 - Amendment of section 45**

The proposed amendment prohibits the resignation or removal of a registered auditor before the auditor completes the process of reporting irregularities to IRBA as envisaged in section 45.

7.5.8 **Clause 21 - Amendment of section 48**

The proposed amendments-

- (a) allow IRBA to refer a matter brought to it against a registered auditor to an accredited professional body for investigation;
- (b) provide for a power for the disciplinary committee to subpoena a registered auditor who has been charged for improper conduct or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books, or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge;
- (c) make the failure to comply with a subpoena in terms of this section, an offence;
- (d) prohibit the disclosure of information of information obtained in the performance of functions in terms of this Act, under certain circumstances.

7.5.9 **Clause 22 - Amendment of section 50**

The proposed amendment provides for a disciplinary process which may take place without a hearing or through a hearing conducted by a panel appointed by IRBA. Therefore, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. The amendment is also aimed at ensuring that disciplinary cases are expedited.

7.5.10 **Clause 23 - Amendment of section 51**

The proposed amendments provide-

- (a) for a power for the Minister to determine the maximum amount which can be imposed on a registered auditor as a sanction following a guilty finding in a disciplinary process held by the IRBA without a hearing;

- (b) for more sanctions which may be imposed by IRBA, including requiring the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction.

7.5.11 **Clause 24 - Insertion of section 51A**

The proposed amendment provides for a power for the panel to decide on the finding after conducting a disciplinary hearing against a registered auditor, including the power to impose a sanction. The amendment allows for an opportunity for a registered auditor found guilty to address the panel in mitigation of sentence and call witnesses to give evidence on his or her behalf in mitigation of the sentence.

7.5.12 **Clause 25 - Insertion of section 57A**

The proposed amendment requires IRBA to take appropriate measures in respect of personal information in its possession or under its control.

8. ORGANISATIONS AND INSTITUTIONS CONSULTED

- Department of Telecommunications and Postal Services
- Department of Justice and Constitutional Development
- Government Pensions Administration Agency
- Government Employees Pension Fund
- Financial Sector Conduct Authority
- South African Post Office (SOC) Limited
- KZN Department of Economic Development, Tourism and Environmental Affairs
- Ithala (SOC) Limited
- South African Reserve Bank

9. FINANCIAL IMPLICATIONS FOR STATE

9.1 The amendments to the Insolvency Act will not have financial implications for the State.

9.2 The amendments to the Military Pensions Act will result in additional costs to the State since life partners will be included under the scope of the Act.

9.3 The amendments to the Banks Act will not have financial implications for the State.

9.4 As to the amendments to the Government Pension Employee Law, the Government Employee Pension Fund will carry additional cost in respect of the change in the determination

of a member's benefit affected by a divorce or degree of dissolution, and also the cost of the actuary advising on the rules to be made in this regard.

9.5 The appointment of members of the panel to conduct disciplinary hearings proposed in the amendments to the Auditing Profession Act may have financial implications for the State.

10. PARLIAMENTARY PROCEDURE

10.1 The Office of the Chief State Law Adviser and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

10.2 The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.