REPUBLIC OF SOUTH AFRICA

FINANCIAL SERVICES OMBUD SCHEMES BILL

(As amended by the Portfolio Committee on Finance (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 20B—2004]

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BILL

To provide for the recognition of financial services ombud schemes; to lay down minimum requirements for ombud schemes; to promote consumer education with regard to ombud schemes; to co-ordinate the activities of ombuds of recognised schemes with the activities of the Pension Funds Adjudicator and the Ombud for Financial Services Providers; to develop and promote best practices for complaint resolution; to empower the Ombud for Financial Services Providers to act as a statutory ombud in certain cases; and to provide for matters connected therewith.

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

Definitions

1. In this Act, unless the context indicates otherwise—

"Adjudicator" means the Pension Funds Adjudicator appointed in terms of section 30C(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956); 5

"board" means the Financial Services Board established by section 2 of the Financial Services Board Act;

"client" means a person who uses the services of a financial institution or a person who enters into a transaction with a financial institution in respect of a product of that institution, and includes the— 10

(a) successor in title of such person; and

(b) beneficiary of such service or product;

"complaint" means a complaint by a client relating to any agreement with, or a financial service or product of, a financial institution, and in which it is alleged that the client has suffered or is likely to suffer financial prejudice or damage as a result of the financial institution— 15

(a) having contravened or failed to comply with a provision of any agreement or the law or of a code of conduct subscribed to by the financial institution;

(b) having wilfully or negligently supplied, or failed to supply, a financial service or a product to the client; 20

(c) having treated the client unreasonably or inequitably; or

(d) having maladministered the implementation of an agreement with, or the supply of a financial service or a product to, the client;

"Council" means the Financial Services Ombud Schemes Council established by section 2; 25

"financial institution" means—

(a) a bank as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993); 30

(b) any financial institution contemplated in paragraph *(a)* of the definition of "financial institution" in section 1 of the Financial Services Board Act; or

(c) any person declared to be a financial institution in terms of section 17;

"Financial Services Board Act" means the Financial Services Board Act, 1990 (Act No. 97 of 1990); 35

"Minister" means the Minister of Finance;

"ombud" means a person who is empowered in terms of a scheme to resolve a complaint;

"Ombud for Financial Services Providers" means the Ombud for Financial Services Providers appointed in terms of section 21(1)*(a)* of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), and includes a deputy ombud appointed in terms of section 21(1)*(b)* of that Act;

"participant", in relation to a scheme, means a financial institution that takes part in the scheme or its funding and that submits to the authority of the relevant ombud;

"person" includes a trust;

"prescribed" means prescribed by regulation;

"recognised scheme" means a scheme that has been granted recognition in terms of section 11;

"registrar" means the executive officer appointed as such in terms of section 13(1)*(a)* of the Financial Services Board Act;

"regulation" means a regulation made in terms of section 19;

"scheme", notwithstanding any other law, means any scheme or arrangement established by or for a financial institution, or a group of financial institutions, in order to resolve a client's complaint by an ombud—

(a) and includes any arrangement in terms of which resolution of the complaint is to be effected by mediation, conciliation, recommendation, determination or arbitration;

(b) but does not include any internal complaint resolution arrangement established by a financial institution either with or without any affiliate or subsidiary of the institution, nor the activities of the Ombud for Financial Services Providers, the Adjudicator and statutory ombud;

"statutory ombud" means the Ombud for Financial Services Providers, acting in the capacity contemplated in section 14;

"this Act" includes—

(a) any regulation; and

(b) any determination, decision, requirement or condition made, determined or imposed, and any notice published, by the Minister.

Establishment of Financial Services Ombud Schemes Council

2. (1) There is hereby established a council to be known as the Financial Services Ombud Schemes Council.

(2) The Council is an independent body having the powers and duties, and performing the functions, as set out in this Act.

(3) The Council is directly accountable to the Minister.

Composition of Council

3. (1) The Council consists of a chairperson, a deputy chairperson and at least three, but not more than five, other members appointed by the Minister after consultation with the board.

(2) *(a)* A member shall be appointed with due regard to—

(i) the person's knowledge, experience and expertise with reference to the matters for which the Council has been established;

(ii) the demographic and gender profile of the South African population.

(b) No member may be actually engaged in the—

(i) business of a financial institution; or

(ii) provision of a financial service or product of a financial institution to a client.

(3) The registrar is a member of the Council by virtue of the office of the registrar, without voting power.

Term of office of members of Council

4. (1) Members of the Council hold office for three years or such shorter period as the Minister may determine at the time of their appointment.

(2) A member whose term of office has expired is eligible for reappointment.

Vacating of office by members of Council

5. (1) A member of the Council must vacate office—

(a) on resigning as a member;

(b) if the member is discharged by the Minister on the grounds of misconduct or incapacity and such member is afforded a reasonable opportunity to be heard;

(c) if the member becomes an unrehabilitated insolvent;

(d) if the member has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or 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 for which the member has been sentenced to a period of imprisonment without the option of a fine or to a fine exceeding the prescribed amount;

(e) if the member has been absent for more than two consecutive meetings of the Council without leave of the chairperson presiding at the meeting; or

(f) if the member becomes subject to a disqualification referred to in section 3(2)*(b)*.

(2) A member referred to in subsection (1)*(f)* must inform the Minister of the member's disqualification in terms of section 3(2)*(b)* and the Minister must appoint within a reasonable period of time a person under section 3(1) to act in the place of such member for the unexpired period of term of office.

Meetings and decisions of Council

6. (1) The Council must meet at least twice in any financial year, or such sufficient number of times so as to arrange for the performance of its functions and must regulate its meetings in accordance with the rules and procedures to be established by the Council within six months after the appointment of the first members to the Council.

(2) *(a)* The chairperson or the deputy chairperson presides at meetings of the Council, but if both are absent from a meeting the members present must elect another member to act as chairperson of that meeting.

(b) At least half the appointed members form a quorum.

(3) The decisions of the Council are valid if taken by a simple majority of members in office at the relevant time, and in the event of an equality of votes on any matter the chairperson presiding at the meeting in question shall have a casting vote in addition to the chairperson's deliberative vote.

Remuneration of members of Council

7. A member of the Council who is not in the full-time employment of the State or the board is paid the remuneration and allowances approved by the Minister, after consultation with the board, as well as all the expenditure incurred in the performance of the functions of the Council.

Functions of Council and registrar

8. (1) The Council must—

(a) consider and grant or refuse an application for the recognition of a scheme;

(b) monitor compliance with this Act by a recognised scheme;

(c) promote co-operation and co-ordination of the activities of an ombud of a recognised scheme, the Adjudicator, the Ombud for Financial Services Providers and the statutory ombud, including in relation to informing and educating clients with regard to available resolution forums;

(d) after consultation with the relevant ombud, develop and promote best practices for complaint resolution by the recognised scheme in question;

(e) ensure that the independence and impartiality of an ombud is not affected when the Council performs its functions; and

(f) perform such other functions as the Minister, after consultation with the board, may direct in order to achieve the objects of this Act.

(2) The Council may—

(a) issue guidelines to inform clients of the jurisdiction of different ombuds and of the procedures for the submission of a complaint; and

(b) if necessary, require an independent assessment on the compliance with this Act by any recognised scheme and may recover the cost from the scheme.

(3) The registrar must assist the Council in performing its functions and implementing its decisions in addition to performing the administrative work of the Council.

(4) The Council must each year submit to the Minister, and provide a copy to the board, a report on its affairs and functions during the preceding year ended on 31 December.

Expenditure and service fees

9. (1) The expenditure connected with the functions of the Council is paid out of the funds of the board, and the approval of the board is required for all expenditure proposed to be incurred, or actually incurred, by the Council.

(2) The board may charge a service fee in accordance with the prescribed tariff in respect of any service rendered by the Council to a scheme or participant.

Requirements for recognition of scheme

10. (1) In order to qualify for recognition in terms of section 11, a scheme must comply with the following requirements:

(a) A majority of financial institutions, based on asset value, gross income or client base (as the Council may determine in general or in a particular instance), in a particular category of financial institutions must participate in the scheme;

(b) a body that is not controlled by participants in the scheme and to which the ombud is accountable must—

(i) appoint the ombud, settle the remuneration and monitor the performance and independence of the ombud; and

(ii) monitor the continued compliance by the scheme with its constitution, the provisions of the scheme and this Act and report any non-compliance to the Council;

(c) the scheme must provide for minimum requirements relating to qualifications, competence, knowledge and experience with which the ombud must comply;

(d) the scheme must have sufficient human, financial and operational resources, funded by the participants in the scheme, to enable the ombud to function efficiently and timeously;

(e) the proposed procedures of the scheme must enable the ombud—

(i) to resolve a complaint through mediation, conciliation, recommendation or determination;

(ii) to act independently in resolving a complaint or in making a determination;

(iii) to follow informal, fair and cost-effective procedures;

(iv) where appropriate, to apply principles of equity in resolving a complaint;

(v) to report to the registrar and to a body representative of the relevant category of financial institutions on matters which may be of interest to them;

(f) provision must be made for the effective enforcement of determinations of the ombud;

(g) provision must be made to ensure that the questions, concerns and complaints of consumers are treated equitably and consistently in a timely, efficient and courteous manner;

(h) the scheme must provide for ways in which it will co-operate with the Council's functions of promoting the education of clients and co-ordinating the activities contemplated in section 8(1)*(c)*; and

(i) any other requirements that may be prescribed and that are not in conflict with the objects of this Act.

(2) Nothing contained in subsection (1) precludes a scheme from providing that its participants are bound by other provisions set out in the scheme and that are not in conflict with the provisions of this Act.

Application for recognition by scheme

11. (1) A scheme must submit its application for recognition in the prescribed manner and form to the Council together with the supporting documentation and information determined by the board and a non-refundable prescribed fee.

(2) A properly authorised representative of the body referred to in section 10(1)*(b)* or of the participants concerned may appear before the Council in order to submit the scheme's application for recognition and to present its case in support of such recognition.

(3) The Registrar of Securities Services established under the Securities Services Act, 2004, must, in respect of any dispute resolution scheme submitted by a self-regulatory organisation under that Act— 5

(a) facilitate, by forwarding the rules of that scheme to the Council, the recognition process described in subsection (1), excluding the non-refundable prescribed fee; 10

(b) prior to approving a dispute resolution scheme included in the rules of a self-regulatory organisation submitted in terms of that Act, confirm with the Council that any such dispute resolution scheme included in such rules meets requirements materially equivalent to those of section 10 of this Act; and

(c) facilitate the ongoing compliance by the self-regulatory organisation with the requirements of this Act. 15

(4) The Council must, after consideration of an application—

(a) if satisfied that the scheme complies with the requirements of this Act, grant the application; or

(b) if not so satisfied, refuse to grant the application and furnish the scheme with reasons for such refusal. 20

(5) At any time after a scheme has been recognised in terms of subsection (4)*(a)* and after affording the relevant scheme an opportunity to be heard, the Council may impose on such scheme any requirement contemplated in section 10(1)*(i)* prescribed after the date of recognition of the scheme. 25

(6) No change to—

(a) the constitution of a recognised scheme;

(b) the provisions under which a recognised scheme operates; and

(c) the terms of reference of a recognised scheme's ombud,

is valid unless approved by the Council. 30

(7) If an application has been granted, the Council must issue a certificate of recognition in the prescribed manner to the relevant scheme and the registrar must publish the recognition by notice in the *Gazette*.

Suspension, reinstatement or withdrawal of recognition

12. (1) The Council may at any time suspend or withdraw recognition— 35

(a) on application by the scheme;

(b) if the scheme has ceased to function; or

(c) if the scheme no longer complies with any provision of this Act.

(2) The Council may reinstate the recognition of a suspended scheme if the reason for the suspension no longer exists. 40

(3) The registrar must in the prescribed manner publish a notice of suspension, reinstatement or withdrawal of recognition in the *Gazette*.

(4) A suspension or withdrawal of recognition for the reasons contemplated in paragraphs *(b)* and *(c)* of subsection (1)—

(a) may only be made after the scheme in question has been afforded a reasonable opportunity to be heard; and 45

(b) is subject to an appeal by the scheme in question to the board of appeal established by section 26(1) of the Financial Services Board Act.

(5) For the purposes of an appeal contemplated in subsection (4)*(b)* the provisions of section 26 of the Financial Services Board Act apply with the necessary changes. 50

Jurisdiction

13. (1) The ombuds referred to in this Act have the following jurisdiction:

(a) The Adjudicator and the Ombud for Financial Services Providers have jurisdiction as set out in their respective enabling Acts;

(b) an ombud of a recognised scheme has the jurisdiction provided by the procedures under which such scheme operates and the terms of reference of such ombud; and 55

(c) the statutory ombud has jurisdiction in respect of matters not within the jurisdiction of the ombuds referred to in paragraphs *(a)* and *(b)*.

(2) *(a)* No ombud of a recognised scheme has jurisdiction to resolve a complaint or settle a matter in respect of which the Adjudicator or the Ombud for Financial Services Providers has jurisdiction in terms of a law, except in the case of any such complaint in respect of which the Adjudicator or the Ombud for Financial Services Providers has in terms of a law declined to resolve the complaint or settle the matter.

(b) If an ombud of a recognised scheme, the Adjudicator, the Ombud for Financial Services Providers or the statutory ombud does not have jurisdiction in respect of a specific complaint submitted to him or her, that ombud, Adjudicator, Ombud for Financial Services Providers or statutory ombud must submit such complaint without undue delay to the office which does have jurisdiction and must advise the client accordingly.

(3) *(a)* In the case of uncertainty in respect of whom the complaint should be referred to, the relevant ombud, Adjudicator, Ombud for Financial Services Providers or statutory ombud involved in the uncertainty, must consult in order to determine who should deal with the complaint.

(b) Failing agreement under paragraph *(a)*, the matter will be referred to the statutory ombud to determine who may exercise jurisdiction in respect of the complaint, and the statutory ombud shall advise the client accordingly.

Authority of statutory ombud to entertain certain complaints

14. (1) Subject to sections 13 and 19, the statutory ombud may deal with complaints against a financial institution in the circumstances and on the basis set out in subsections (2), (3) and (4).

(2) The statutory ombud must deal with a complaint against a financial institution if—

(a) the financial institution does not participate in a recognised scheme;

(b) the recognition of a scheme in which the financial institution participates is suspended or withdrawn in terms of section 12(1); or

(c) the financial institution participates in a recognised scheme, but the ombud concerned lacks jurisdiction in terms of the relevant scheme while the statutory ombud has jurisdiction to entertain such complaint.

(3) The statutory ombud must deal with complaints contemplated in subsection (2) in the manner and in accordance with the procedures, applied with the necessary consequential changes, provided for in Part I of Chapter VI of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002).

(4) The statutory ombud who deals with a complaint in terms of this section may determine an amount payable by the financial institution in question in order to cover the costs of dealing with the complaint in accordance with guidelines set by the board, after consultation with the Council, and published by notice in the *Gazette*.

(5) The determination of an amount in terms of subsection (4) has the effect of a civil judgment given by a court in favour of the board for a liquid debt and any amount recovered becomes part of the funds of the board.

Prescription and saving of rights

15. (1) Official receipt of a complaint by an ombud or the statutory ombud suspends any applicable time barring terms, whether in terms of an agreement or any law, or the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period from such receipt until the complaint has either been withdrawn by the complainant concerned or determined by any such ombud.

(2) No provision of this Act must be construed as affecting any right of a client or other affected person to seek appropriate legal redress by virtue of common or statutory law, before or after the consideration of a complaint by an ombud or the statutory ombud.

Report of ombud

16. (1) A recognised scheme must—

(a) within six months after the end of every financial year of the scheme, submit to the Council, in the form and with the content required by the Council, a report on the affairs and functions of the office of the ombud during the financial year in question;

(b) at the request of the Council at any time furnish the Council within a reasonable time with such information or report regarding the operation of the scheme and other matters relating to the scheme as may be necessary to ensure compliance by the scheme with the provisions of this Act.

(2) Notwithstanding subsection (1), a self-regulatory organisation contemplated in section 11(3) must submit to the Registrar of Securities Services an annual report on the affairs and functions of its scheme approved in terms of section 11(3).

(3) The Council must at the request of the board or the Minister, and may of its own accord, submit reports and information received from an ombud to the board or Minister, as the case may be, with such comment or recommendation as the Council deems necessary.

Declaration as financial institution

17. (1) The Minister may, by notice in the *Gazette* and after consultation with the board and the Council, declare any person as a financial institution.

(2) *(a)* Any person who has not been declared a financial institution and who wishes to be so declared may apply in writing to the board through the registrar for such declaration.

(b) An application contemplated in paragraph *(a)* must contain substantiating reasons for such application.

(c) The board must submit any application received by it together with its recommendation and that of the Council to the Minister for final decision.

Prohibition and exemptions

18. (1) Notwithstanding any other law, no financial institution may—

(a) participate in a scheme; or

(b) require or invite any client to submit a complaint in terms of any such scheme, unless the scheme is a recognised scheme or the financial institution is exempted from compliance in terms of subsection (4).

(2) Any participation, requirement or invitation in contravention of subsection (1) is null and void.

(3) Despite subsection (1), any scheme existing and in operation immediately before this section came into operation may continue in accordance with the provisions of that scheme until the expiry of a period of 18 months from the date on which this section came into operation.

(4) *(a)* The Minister may, after consultation with the board and the Council, exempt any financial institution or category of financial institutions by notice in the *Gazette* from any provision of this Act relating to the resolution of a complaint by an ombud, if—

(i) the resolution of a complaint against the financial institution or category of financial institutions by an ombud is already partially or wholly regulated by any other law; or

(ii) the granting of the exemption will not conflict with the public interest, prejudice the interests of clients or frustrate the achievement of the objects of this Act.

(b) The Minister—

(i) having regard to the factors mentioned in paragraph *(a)*, may attach to any exemption so granted reasonable requirements or impose reasonable conditions with which the financial institution or category of financial institutions must comply either before or after the effective date of the exemption in the manner and during the period specified by the Minister; and

(ii) must determine the period for which the exemption will be valid.

(c) Subject to paragraph *(d)*, a conditional exemption lapses whenever the financial institution or a financial institution in the category in question contravenes or fails to comply with any such requirement or condition.

(d) The Minister may on application condone any such contravention or failure and determine reasonable requirements or conditions with which the financial institution must comply on or after resumption of the exemption as if such requirements or conditions had been attached or imposed on the first granting of the exemption.

(5) *(a)* No financial institution may use a name or description in respect of any internal complaint resolution arrangement referred to in paragraph *(b)* of the definition of "scheme" in section 1, which represents or constitutes a "scheme" as so defined, unless the financial institution—

(i) has been authorised by the Council to do so; and 5

(ii) complies with the conditions determined by the Council.

(b) A financial institution that contravenes any provision of paragraph *(a)* is guilty of an offence and on conviction liable to a fine not exceeding the prescribed amount.

(c) Financial institutions not in compliance with this section, must be compliant within 18 months from the date fixed by the President in terms of section 20. 10

Regulations

19. The Minister may, after consultation with the board and the Council and by notice in the *Gazette*, make regulations regarding—

(a) the proceedings of the statutory ombud;

(b) the limitations on the jurisdiction of the statutory ombud, having regard to— 15

(i) the factual or legal complexity of any complaint dealt with by the statutory ombud;

(ii) the nature of the client whose complaint is dealt with by the statutory ombud;

(iii) the maximum amount involved in the dispute between the client and the 20 financial institution; and

(iv) the legal relationship between the client whose complaint is to be dealt with and the financial institution;

(c) any matter which in terms of this Act is required or permitted to be prescribed; and 25

(d) any other matter which it is necessary to prescribe in order to achieve the objects of this Act.

Short title and commencement

20. This Act is called the Financial Services Ombud Schemes Act, 2004, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 30

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL SERVICES OMBUD SCHEMES BILL, 2004

1. Background

1.1 Following an extensive consultative process, which commenced in 1999, a Bill was drafted by the Financial Services Board ("the Board"), which essentially provided for—

(a) the recognition of voluntary ombud arrangements in the financial services sector, provided they complied with certain prescribed criteria; and

(b) the resolution of consumer complaints which could not be accommodated by either voluntary or statutory ombud schemes.

1.2 For a number of reasons, principally based on the Board's experience regarding complaints received and learning of recent developments with ombud schemes in South Africa and other jurisdictions, the Board decided that it was necessary to revise the provisions of the Bill before its promotion through Parliament was proceeded with.

1.3 Thereafter in June 2003, the Minister of Finance temporarily withdrew the Bill from Parliament to further examine and ensure—

(a) the independence of the ombuds;

(b) a clear demarcation of the jurisdiction between the various statutory and voluntary ombuds; and

(c) proper ministerial oversight.

1.4 Further consultations in accordance with the policy direction of the Minister of Finance were held in July 2003. The present Bill addresses the issues raised by the Minister of Finance.

1.5 The revised Bill retains the main features of the former Bill mentioned in paragraph 1.1. above. It allows a period of grace for schemes existing on the date on which the Bill comes into operation as an Act to continue operations for 18 months, and debars the operation by financial institutions of any dispute resolution scheme other than recognised schemes. This promotes one of the main aims of the Bill, namely standard setting. As regards recognised schemes, it preserves their independence to look after their own affairs but also extends the activities of the proposed governing Financial Services Ombud Schemes Council. It also addresses the problem of consumer confusion by providing for the facilitation of the co-ordination of activities of ombuds of recognised schemes and those of ombuds created by law, as also appears from similar developments in countries such as Australia and Canada.

1.6 The Bill makes specific provision that the ombud schemes may not deal with complaints subject to the jurisdiction of the Pension Funds Adjudicator and the Ombud for Financial Services Providers ("the FAIS Ombud"). This is necessary in order to enable the Adjudicator and the FAIS Ombud to develop expertise in their fields and to avoid forum arbitrage. The functional approach of having all complaints of the same nature resolved by a dedicated ombud established by law for such purpose will avoid consumer confusion.

2. Primary objects

2.1 The primary objects pursued by the Bill are summarised by the long title of the Bill, which reads as follows:

> "To provide for the recognition of financial services ombud schemes; to lay down minimum requirements for ombud schemes; to promote consumer education with regard to ombud schemes; to co-ordinate the activities of ombuds of recognised schemes with the activities of the Pension Funds Adjudicator and the Ombud for Financial Services Providers; to develop and promote best practices for complaint resolution; to empower the Ombud for Financial Services Providers to act as a statutory ombud in certain cases; and to provide for matters connected therewith.".

2.2 The Bill proposes to achieve these object through an independent council, which will exercise authority in applying the provisions of the Bill.

3. Salient provisions of Bill

(a) Clause 1, which is the definition clause, defines the principal words and expressions used in the Bill. It appears from this clause that banks, including mutual banks, and all financial institutions over which the Board has jurisdiction (as appears from the definition thereof in the Financial Services

Board Act, 1990 (Act No. 97 of 1990),) are to be the financial institutions covered by the provisions of the Bill. Any other person may also be declared a financial institution for purposes of the Act, either on own initiative by the Minister of Finance or on application by the person.

(b) Clause 2 provides for the establishment of the Financial Services Ombud Schemes Council ("the Council"), a body representative of consumers, the financial services industry and others, which will function as a committee of the Financial Services Board ("the Board") and be responsible for the application of the Act. The majority of members of the Council must be independent of the financial services industry. As appears from other clauses, the executive officer of the Board (the "registrar" under the Bill), will serve as a member of the Council and the administrative work of the Council will be the responsibility of the Board which will also fund the activities of the Council. The Council is empowered to charge service fees in respect of any service rendered by it.

(c) Clause 8 sets out the functions of the Council, which essentially are:

(i) To consider and grant or refuse applications for recognition of financial services ombud schemes;

(ii) to monitor the compliance by recognised schemes with the requirements of the Act;

(iii) to request independent assessments and audits of recognised schemes and their compliance with the Act;

(iv) to promote consumer education with regard to available complaint resolution forums;

(v) to facilitate co-ordination of the activities of recognised schemes and those of the Adjudicator and FAIS Ombud; and

(vi) to develop and promote best practices for complaint resolution by recognised schemes.

(d) Clause 10 lays down the minimum requirements for recognition of an ombud scheme. These include:

(i) Majority support by those financial institutions in whose sector of industry the scheme will operate;

(ii) the appointment of the ombud by a body not controlled by scheme participants, and to which body the ombud must be accountable;

(iii) specified minimum requirements for the ombud in relation to qualifications, competence, knowledge and experience;

(iv) sufficient financial, operational and human resources;

(v) specific requirements with regard to the procedures under which the ombud will operate, especially that they should be informal, fair and cost-effective; and

(vi) provision for the effective enforcement of determinations of the ombud.

(e) Clause 11 sets out the procedures to be followed when application is made for recognition of a financial services ombud scheme. The Council has to be satisfied in the respects laid down by the Act and will be entitled to either grant or refuse the application.

(f) Clause 12 provides for suspension or withdrawal of an authorisation granted to a scheme in certain circumstances.

(g) Clause 13 deals with the jurisdiction of the ombuds of recognised schemes. It also deals with cases of uncertainty regarding jurisdiction over specific complaints.

(h) Clause 14 empowers the FAIS Ombud to entertain client complaints if those complaints cannot be accommodated by an ombud of any of the recognised schemes. That would for example be the case if the financial institution that is complained against does not participate in a recognised scheme.

(i) Clause 15 provides for the suspension of barring clauses or prescription while a complaint is in the hands of an ombud of a recognised scheme or the FAIS Ombud, and further makes clear that a complainant's rights to institute action through the courts are not affected.

(j) Clause 16 requires the ombuds of recognised schemes to submit annual reports to the Council and further to furnish any information which the Council may require from time to time. The Council in turn must submit the reports and information to the Board or the Minister, with such recommendations as it deems necessary.

(k) (i) Clause 18(1) and (2) provides that no financial institution may (as from the day on which the Bill comes into operation as an Act) participate in a financial services ombud scheme, or require or invite any client to submit a complaint to a scheme, unless the scheme is a recognised scheme, and that any such participation in, requirement or invitation, without the scheme having obtained recognition as such a scheme, will be null and void.

(ii) Clause 18(3) provides that any financial services ombud scheme existing immediately before the date on which the Bill comes into operation as an Act may continue in accordance with the provisions of that scheme until the expiry of 18 months from the date on which the Act came into operation.

(iii) Clause 18(4) provides for exemptions, subject to reasonable requirements or conditions, from the provisions in the Bill on resolution of complaints where such resolution is already dealt with in any other law or the exemption will not frustrate the achievement of the objects of the Bill.

(l) Clause 19 enables the Minister, after consultation with the Board, to make regulations on a number of aspects in order to achieve the objects of the Bill.

(m) Clause 20 deals with the short title and commencement of the Bill.

4. Consultative process

(a) The first draft of the Bill was preceded by an extensive consultative process with the financial services industry and other roleplayers such as the existing financial services ombud schemes and consumer bodies.

(b) When the Bill was revised to address the problem of consumer confusion with regard to where complaints must be lodged, the consultative process was resumed with the parties who had previously commented on the contents of the Bill.

(c) Thereafter the Bill was placed on the Board's website with public notification that the revised Bill was available there for scrutiny. A list of the parties consulted when the Bill was first released and approved by Cabinet (annexure A) was attached.

(d) Further consultations, in accordance with the specific policy direction of the Minister of Finance, were held with the voluntary and statutory ombud offices and their industry associations in July 2003. The present Bill addresses the issues raised by the Minister of Finance, and also reflects the combined efforts of the drafters of the Bill and those of the commentators.

5. Financial, organisational and personnel implications for State

The Bill has no financial, organisational and personnel implications for the State, except that the statutory recognition of ombud schemes, all funded by industry, is likely to alleviate the burden of the courts.

6. Constitutional implications

Client complaints lodged with an ombud are submitted on a voluntary basis and any client may still elect to take recourse to law through the ordinary judicial process of court, rather than following the ombud route. In these circumstances the provisions of the Bill are not seen to be in contravention of any constitutional right.

7. Communication implications

The Bill does not have communication implications other than the commencement of the Bill as an Act of Parliament being published in the *Gazette*.

8. Parliamentary procedure

The State Law Advisers, National Treasury and the Financial Services Board are of the opinion that the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

ANNEXURE A

PARTIES CONSULTED

ABSA Fund Managers Ltd
ABSA Trust Participation Bond
Actuarial Society of SA
African Harvest Management Company Ltd
Afrikaanse Handelsinstituut
Allan Gray Unit Trust Management Ltd
Anglo American Property Fund Managers Ltd
Arthur Andersen & Company
Association for the Advancement of Black Accountants
Association of Banking Lawyers of SA
Association of Black Securities and Investment Professionals
Association of Bond Issuers of SA
Association of Chartered Certified Accountants
Association of Corporate Treasurer of SA
Association of Participation Mortgage Scheme Managers in SA
Association of Property Trust Management Companies
Association of Retired Persons and Pensioners
Association of Trust Companies in SA
Association of Unit Trusts
Banking Council of SA
BDO Spencer Steward
Black Management Forum
Black Lawyers Association
BOE Investment Administrators
BOE Unit Trust Management Company Ltd
Boland Bank Beleggingsdiens Bpk
Bond Exchange of SA
Brait Management Company Limited
Business Practices Committee: Department of Trade and Industry
Business South Africa
CFL
Chartered Institute of Management Accountants
Commercial Union Unit Trust Management Company Ltd
Commission of Inquiry into the Affairs of the Masterbond Group
Community Growth Management Company Ltd
Consulting Actuaries Society of Southern Africa
Consumer Institute SA
Coronation Management Company Ltd
Corporate Lawyers Association of SA
Cosatu
Cover Magazine
Deloitte & Touche
Department of Economic Affairs: Eastern Cape
Department of Economic Affairs: Free State
Department of Economic Affairs: Gauteng
Department of Economic Affairs: KwaZulu-Natal
Department of Economic Affairs: Mpumalanga
Department of Economic Affairs: Northern Cape
Department of Economic Affairs: Northern Province
Department of Economic Affairs: North West
Department of Economic Affairs: Western Cape
Department of Economics: WITS
Department of Finance
Department of Health
Department of Mercantile Law: Unisa
Department Mercantile Law: University of Pretoria
De Swardt, Dr C J
Ernst & Young
Fairheads Bond Managers (Pty) Ltd

Fedsal
Fedsure Unit Trust Management Company Ltd
Fedsure Participation Mortgage Bond Managers (Pty) Ltd
Fedusa
Fidelity Bank Ltd
Financial Intermediaries Federation of South Africa
First National Asset Management & Trust Co (Pty) Ltd
Fisher Hoffman Sitole
Fleming Martin Management Company Ltd
Franklin Templeton Management Company Limited
Free Market Foundation
Fund Managers Association of SA
General Council of the Bar of SA
Gillman, Mr Neil
Gobodo Associates
Graaffs' Trust Ltd
Grove Property Fund Managers Ltd
GuardBank Management Corporation Ltd
Institute of Bankers in SA
Institute of Financial Markets
Institute of Life and Pensions Advisors
Institute of Pension Consultants and Advisors
Institute of Pension Consultants and Administrators
Institute of Loss Adjusters of SA
Institute of Retirement Funds of SA
Insurance Brokers Council
Insurance and Financial Services
Insurance Law Society of SA
Insurance Institute of SA
Investec Guinness Flight Management
Johannesburg Stock Exchange
Kessel Feinstein
KMMT Brey & Co
KPMG Aiken & Peat
Law Society of SA
Lawyers for Human Rights
Leveton Boner Horwath
Linked Investment Services Providers' Association
Marriott Property Fund Managers Ltd
Marriott Property Services (Pty) Ltd
Marriott Unit Trust Management Company Limited
Masterbond Deelnemingsverbande Trust Bestuurders (Edms) Bpk
M Cubed Capital Unit Trusts Management Company Ltd
Melboard Property Fund Managers Ltd
Mercantile Participation Mortgage Bond Managers (Pty) Ltd
Metboard Ltd
Metropolitan Life Unit Trust Management Company Ltd
Moores Rowland
MSGM Masuku & Jeena
National African Federated Chamber of Commerce and Industry
National Black Consumer Union
National Consumer Forum
National Consumers Affairs Office
National NGO Coalition
National Council of Trade Unions
NBS Participation Bond Managers (Pty) Ltd
Nedcor Bank Management Company Limited
Nehawu
Nexia Levitt Kirson
NIB Management Company Ltd
NIB Property Fund Managers Ltd
NIB Private Asset Unit Trust Management Company Ltd
Nkonki Sizwe & Ntsaluba

Office for Public Enterprises
Office of the Auditor-General
Old Mutual Unit Trust Managers Ltd
Owen Wiggins Trust Participation Managers (Pty) Ltd
Pagdens Incorporated
Pension Lawyers Association
Policy Board for Financial Services and Regulation
Prestasi Unit Trust Managers Ltd
Price Waterhouse Coopers
Prima Eiendomstrustbestuurders Bpk
Property Fund Managers Ltd
PSG Management Company Ltd
Public Accountants and Auditors Board
Public Property Syndication Association
P W Harvey & Co
Quantim Consultancy Group (Pty) Ltd
Regal Treasury Unit Trust Management Company Ltd
RMB Unit Trusts Ltd
SA Consumer Union
SA Futures Exchange
SA Institute of Chartered Secretaries and Administrators
SA Insurance Association
SA Law Commission
SA Property Owners' Association
SA Reinsurance Brokers Association
SA Reinsurance Offices' Association
SA Risk and insurance Management Association
SA Society of Claims Administrators
SA Society of Medical Underwriters
Sage Property Trust Managers Ltd
Sage Unit Trusts Ltd
Sanlam
Sanlamtrust-Bestuurders Bpk
SARS
School of Management: University of Pretoria
Securities Regulation Panel
Select Committee on Finance (National Council of Provinces)
Select Committee on Public Accounts
Shareholders' Association of SA
Society of Risk Managers (SA)
South African Chamber of Business
South African Institute of Chartered Accountants
South African Insurance Brokers Association
Southern Unit Trusts Management Company Ltd
Stabilitas Deelnemingsverbandskema (Edms) Bpk
Standard Bank Bond Investments Ltd
Standard Bank Fund Managers Ltd
Standing Committee on Public Accounts
Supreme Participation Mortgage Managers (Pty) Ltd
Syfrets Participation Bond Managers Ltd
The Board of Executors
The Committee Clerk: Portfolio Committee on Finance (National Assembly)
The Life Offices' Association of South Africa (LOA)
The Life Underwriter's Association of South Africa (LUASA)
The Ombudsman for Banking
The Ombudsman for Long-term Insurance
The Ombudsman for Short-term Insurance
The Pension Funds Adjudicator
The Registrar of Medical Schemes
The Registrar of Banks
The Registrar of Companies
Trustee Board Limited
Zodwa Manase & Associates