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**SUBMISSION TO THE  
NATIONAL TREASURY ON THE DRAFT  
FINANCIAL SECTOR LAWS AMENDMENT BILL, 2018**

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## Introduction

The National Treasury has published, for public comment<sup>1</sup> by 7 Nov 2018, a draft Financial Sector Laws Amendment Bill which has been approved by the Cabinet.

The Treasury states that the Bill gives effect to proposals in its 2015 discussion document *Strengthening South Africa's Resolution Framework for Financial Institutions*.<sup>2</sup>

The amendments will, it is said, strengthen the ability of the Reserve Bank to manage the orderly “resolution” or winding down of a failing financial institution, with minimum disruption to the broader economy.<sup>3</sup>

The Treasury, Reserve Bank and Financial Sector Conduct Authority will be convening meetings and workshops about the Bill.

## Draft Bill in outline

The draft Bill contains 65 clauses.

Of those, 27 clauses (cls 37–63) would amend the Financial Sector Regulation Act, 2017<sup>4</sup> (“the Act”). One of the 27 clauses (cl 54) proposes inserting in that Act a new chapter (Chap 12A —Resolution of designated institutions) in eight parts comprising 59 sections.<sup>5</sup> The other 26 of those clauses would make mainly consequential amendments to the Act.

(As to the rest of the Bill, the Bill’s first 36 clauses and cl 64 would, pursuant to the proposed amending of the Act, make mainly consequential amendments to other statutes.<sup>6</sup>)

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<sup>1</sup> To be sent to Jeannine Bednar-Giyose at [CommentDraftLegislation@treasury.gov.za](mailto:CommentDraftLegislation@treasury.gov.za).

<sup>2</sup> And the Reserve Bank’s 2017 discussion paper *Designing a Deposit Insurance Scheme for South Africa*.

<sup>3</sup> The amendments are said to “ensure” that depositors’ funds are protected in a bank failure, and will be “paid out speedily to protect the most vulnerable customers”. *Media statement*: Financial Sector Laws Amendment Bill 2018 for public comment (National Treasury, 25 Sep 2018).

<sup>4</sup> Financial Sector Regulation Act 9 of 2017 (referred to as “the Act” or “that Act”).

<sup>5</sup> Chap 12A Resolution of designated institutions:

*Part 1 General provisions with respect to designated institutions* (ss 166A–166I)

*Part 2 Placing designated institutions in resolution* (ss 166J–166P)

*Part 3 Resolution matters* (ss 166Q–166X)

*Part 4 Protections* (s 166Y)

*Part 5 Banks in resolution-covered deposits* (ss 166Z–166AC)

*Part 6 Corporation for Deposit Insurance establishment, functions and governance* (ss 166AD–166BB)

*Part 7 Deposit Insurance Fund* (ss 166BC–166BE)

*Part 8 Contributions to Fund* (ss 166BF–166BG).

<sup>6</sup> The ten affected statutes would be the—

Insolvency Act 24 of 1936

South African Reserve Bank Act 90 of 1989

Banks Act 94 of 1990

Mutual Banks Act 124 of 1993

Competition Act 89 of 1998

Financial Institutions (Protection of Funds) Act 28 of 2001

Co-operative Banks Act 40 of 2007

Companies Act 71 of 2008

Financial Markets Act 19 of 2012 and

Insurance Act 18 of 2017.

This submission deals with the new chapter (Chap 12A—Resolution of designated institutions) that the Bill proposes inserting in the Financial Sector Regulation Act, and in particular with the chapter’s first four parts, dealing specifically with resolution.<sup>7</sup>

(This submission does not deal with the draft Bill’s provisions about bail-in, first loss after capital,<sup>8</sup> preference in insolvency, or deposit insurance.<sup>9</sup> We reserve the opportunity to address those matters separately if deemed necessary.)

## Summary comments

*Ministerial discretion.* The draft Bill would give the Minister discretion to put a bank in resolution, which gives scope for subjectivity and arbitrariness, against the Rule of Law.

*Bill does not properly define “resolution”.* The Bill proposes to define resolution merely as management of the bank’s affairs as provided in the new chapter. The Rule of Law requires laws to be more accessible and clearer than that.

*“Maintain” stability? or just “assist” in that? or only “as far as practicable”?* One clause states the Reserve Bank must act in a way that “*maintains*” financial stability, another states the Bank’s objective is just to “*assist in maintaining*” stability, and a third that it must aim at stability “*as far as practicable*”. This lack of consistency violates the Rule of Law.

*“Protect” depositors, or only “assist” in protecting them?* Different clauses say different things. This should be clarified for certainty and the Rule of Law.

*Unclear if depositors get more protection more than other creditors.* A clause states the Reserve Bank must not take a resolution action if the value of a creditor’s claim would be reduced. A bank’s depositors are creditors of the bank.

*Clauses that creditor must not receive less than in winding-up are unworkable.* The amount can only be an estimate. Assured amounts are only possible on liquidation after recovery of any impeachable dispositions and realisation of assets.

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<sup>7</sup> Chap 12A Resolution of designated institutions:

Part 1 General provisions with respect to designated institutions (ss 166A–166I)

Part 2 Placing designated institutions in resolution (ss 166J–166P)

Part 3 Resolution matters (ss 166Q–166X) and

Part 4 Protections (s 166Y).

<sup>8</sup> Referred to in the draft Bill as “flac”.

<sup>9</sup> Chap 12A Resolution of designated institutions:

Part 5 Banks in resolution—covered deposits (ss 166Z–166AC)

Part 6 Corporation for Deposit Insurance establishment, functions and governance (ss 166AD–166BB)

Part 7 Deposit Insurance Fund (ss 166BC–166BE)

Part 8 Contributions to Fund (ss 166BF–166BG).

*Bill allows Bank unilaterally to reduce contract payments.* The Bill would permit the Reserve Bank, if it determines it to be necessary for orderly resolution of an institution, to reduce any amount payable by contract by the institution to another party. This violates the Rule of Law, by permitting an institution's liabilities to be determined by the Bank instead of by law, and by authorising unequal treatment of creditors without objective justification.

*Provisions in Bill are repetitive (or unclear if they apply to different circumstances).* one clause states that, if the Reserve Bank determines it necessary for orderly resolution of a institution, it may cancel an agreement to which the institution is party and which came into effect before the institution was put in resolution. Another states that, if the Bank determines it necessary for orderly resolution of an institution, it may cancel an agreement to which the institution is party. This may be mere duplication. Or the former clause may be intended to apply only to agreements which (as it states) came into effect before the institution was put in resolution, and the latter (yet not expressed) to agreements that came into effect after it was put in resolution. The clauses violate the Rule of Law in being unclear and vague.

*Bill unclear if rights under cancelled contracts continue to be enforceable.* The Bill states the Bank's action reducing an amount payable by agreement by an institution to a party, or cancelling the agreement, will not by itself give a right to the affected party. It also says cancelling the agreement does not affect rights of the parties accrued before cancellation. The latter clause may imply that a party could claim the shortfall from the institution, but this is unclear (usually a contracting party cannot claim performance from the other party before the date performance is due.) This should be clarified in the interest of the Rule of Law.

*Bill contradictory about whether value of creditors' claims may be reduced.* The Bill, though stating that the Reserve Bank may reduce the amount payable by an institution to a party under an agreement, also states the Bank must not take action if it appears the result would be that the value of a claim of a creditor of an institution would be reduced. These two contradictory clauses violate the Rule of Law by rendering the Bill unclear.

*Requiring "pari passu" treatment of claims of creditors of same class unclear.* The Reserve Bank in taking resolution action must treat claims of the designated institution's creditors who would have the same ranking in insolvency *in pari passu*. It may add clarity to add "and in proportion to the amount of each such claim" if that is the intention.

*Requiring "pari passu" treatment could require Bank to treat all creditors the same.* The requirement that the Bank must treat claims of an institution's creditors who would have the same insolvency ranking *in pari passu* could mean that it must treat all creditors equally in every respect: As mentioned, if the Bank determines it necessary for orderly resolution of

an institution, it may cancel an agreement to which the institution is party. The *pari passu* requirement could mean the Bank cannot cancel such an agreement, unless it cancels all the other agreements to which the institution is party, so that all its creditors are treated the same way. But this is unclear. The Rule of Law requires statutes to be clear.

*Reserve Bank discretion to determine that “pari passu” does not apply.* The *pari passu* requirement does not apply if the Bank determines that it is necessary to treat creditors’ claims differently for orderly resolution of the institution. This violates the Rule of Law by authorising unequal treatment without identifying objective differences to justify it, by allowing equal treatment to be dispensed with merely if the Bank determines this is necessary, and by not identifying objective criteria for determining when it is necessary.

## **Comments on draft Bill**

### ***Ministerial discretion***

The draft Bill states that the Reserve Bank may, if in “its opinion” a bank<sup>10</sup> is or will “likely” be unable to meet its obligations, and it is necessary to ensure its orderly resolution to maintain financial stability or protect its depositors, recommend to the Minister that the bank be placed in resolution.<sup>11</sup>

The Minister, after considering the recommendation, may, if he “considers” that the bank is or will “probably” be unable to meet its obligations,<sup>12</sup> and that it is necessary to ensure the orderly resolution of the bank to maintain financial stability or protect its depositors, make a written determination to the Governor placing it in resolution.<sup>13</sup>

It is submitted that this gives wording allows the Minister some discretion whether or not to place a bank in resolution. The broader and more loosely textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the Rule of Law.<sup>14</sup>

South Africa is founded on the Rule of Law.<sup>15</sup>

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<sup>10</sup> Whether or not it is insolvent.

<sup>11</sup> See draft Bill cl 54, inserting, in Financial Sector Regulation Act, proposed s 166J(1).

<sup>12</sup> Whether or not it is insolvent.

<sup>13</sup> Proposed s 166J(2).

<sup>14</sup> Lord Bingham, “The Rule of Law” (Sixth Sir David Williams Lecture, 2006, Centre for Public Law, Univ of Cambridge), second sub-rule (questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion).

<sup>15</sup> Constitution s 1(c).

***Bill does not properly define “resolution”***

The Bill proposes inserting in the Act a definition of “resolution” which however does not fully define resolution. It merely states that resolution of a bank<sup>16</sup> means “management” of its affairs as provided in the Chapter to be inserted.<sup>17</sup>

The Reserve Bank is the resolution authority and has “resolution functions”.<sup>18</sup> The definition of “resolution function” does not help, being merely stated to be a function or power conferred on the Bank for the purpose of<sup>19</sup> resolution.<sup>20</sup> This is circular.

And the proposed provision about “resolution objectives” states that the Bank’s objective in performing its resolution functions is to assist in maintaining financial stability and protecting bank depositors’ interests, through “orderly resolution” of designated institutions that are in resolution.<sup>21</sup> This is similarly circular. It would be preferable to refer to “orderly management” of designated institutions that are in resolution.

A “resolution function” is defined as also including a function or power conferred or “performed” (it would be preferable to say conferred or “exercised”) for the purpose of reducing the risk that a designated institution “may need to be placed in resolution”.

This implies that the exercise of a “resolution function” does not entail always placing an institution in resolution. It may assist if this were made more explicit. It is a principle of the Rule of Law that the law should be accessible and clear.<sup>22</sup>

***“Maintain” stability? or just “assist” in that? or only “as far as practicable”?***

The proposed definition “orderly resolution of a designated institution” is stated<sup>23</sup> to mean the management of the affairs of the institution in a way that “*maintains*” financial stability.

Yet the section about resolution objectives<sup>24</sup> states that the Reserve Bank’s objective in performing resolution functions is merely to “*assist in maintaining*” financial stability.

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<sup>16</sup> Or other designated institution.

<sup>17</sup> Draft Bill cl 38 (to amend Financial Sector Regulation Act s 1(1) by inserting *inter alia* proposed definition “resolution” read with proposed definition “designated institution”) and cl 54 (inserting proposed Chap 12A including *inter alia* s 166J(2)).

<sup>18</sup> Proposed s 166A(1).

<sup>19</sup> Or performed by it in connection with.

<sup>20</sup> Of a designated institution. Proposed definition “resolution function”.

<sup>21</sup> Proposed s 166B.

<sup>22</sup> Bingham “The Rule of Law” *supra*, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>23</sup> Draft Bill cl 38 (proposing amendment of Act s 1(1) by inserting *inter alia* definition “orderly resolution of a designated institution” par (a)).

<sup>24</sup> Proposed s 166B).

And still yet, the proposed section about the Bank's resolution functions states that, to achieve that objective, the Bank must ensure that the affairs of a designated institution in resolution are managed so as to maintain financial stability "*as far as practicable*".<sup>25</sup>

This lack of clarity would violate the Rule of Law. It is a principle of the Rule of Law that the law must be intelligible and clear.<sup>26</sup>

***"Protect" depositors, or only "assist" in protecting them?***

The proposed definition "orderly resolution of a designated institution" refers to<sup>27</sup> the management of the affairs of a bank in a way that "*protects*" the interests of depositors.

But the section about resolution objectives<sup>28</sup> states merely that the Bank's objective in performing resolution functions is to "*assist in protecting*" the interests of depositors.

This anomaly should also be clarified for the sake of certainty and the Rule of Law.

***Unclear if depositors get more protection more than other creditors***

It is unclear if the Bill protects depositors of a bank in resolution more than its other creditors.

As mentioned, "orderly resolution of a designated institution" is defined as management of a bank's affairs in a way that "*protects*" the interests of depositors.<sup>29</sup>

This seems to be reinforced by the proposed section which states that the Bank "*must not take a resolution action*" if it appears to it that the result would be that the value of a claim of a "*creditor*" of the institution "*would be reduced*".<sup>30</sup>

This implies that the value of depositors' claims should not be reduced. (A bank's depositors are in law mere creditors of the bank.<sup>31</sup>

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<sup>25</sup> Proposed s 166C(1).

<sup>26</sup> Bingham "The Rule of Law" *supra*, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>27</sup> Draft Bill cl 38 (proposing amendment of Act s 1(1) by inserting *inter alia* definition "orderly resolution of a designated institution" par (b)).

<sup>28</sup> Draft Bill cl 54 (proposing insertion in Act of s 166B).

<sup>29</sup> Draft Bill cl 38 (proposing amendment of Act s 1(1) by inserting *inter alia* definition "orderly resolution of a designated institution" par (b)).

<sup>30</sup> Draft Bill cl 54 (proposing insertion in Act of s 166U(1)).

<sup>31</sup> In all Anglo-American and European legal systems.



(The basic relationship between a bank and its depositors is one of debtor and creditor.<sup>32</sup> Though a bank customer is said to “deposit” money with the bank,<sup>33</sup> the transaction is one of loan<sup>34</sup> and the customer is a creditor with a claim against the bank.<sup>35</sup>)

***Clauses that creditor must not receive less than in winding-up are unworkable***

The Bill states that the Reserve Bank “must not” take resolution action i.r.t. a designated institution in resolution that “*would result*” in a creditor of the institution receiving less than the creditor “*would have received if the institution had been wound up*”.<sup>36</sup>

Before the Reserve Bank takes a “resolution action” (i.e., any particular transaction that the Bank determines is necessary for orderly resolution of the institution<sup>37</sup>), it must obtain “*a valuation*” of the liabilities involved, which must state the amount that “*in the valuator’s opinion, would be payable*” on the liability, in a winding-up of the institution.<sup>38</sup>

As soon as the Bank receives this valuation, it must “*consider having regard to the valuation*” whether a creditor of the institution received i.r.o. resolution action less than it “*would have received if the designated institution had been wound up*”, and “*if it considers*” that the creditor indeed received less than if the institution had been wound up, determine the amount of the shortfall, which the creditor is “*entitled to recover*” from the institution.<sup>39</sup>

Yet all these provisions, to the effect that a creditor must not receive less than he “would have received” if the institution had been wound up, are unworkable in practice:

The provisions can only aim at a mere estimate, which might well not be capable of being arrived at with any degree of accuracy, and can never be a calculation of an assured

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<sup>32</sup> *Foley v Hill* (1843–60) All ER Rep 16 ((1848) 2 HL Cas 28; *S v Kearney* [1964] 2 All SA 564 (A) 572; *Standard Bank of S A Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) 530G–532E; *Liebenberg v Absa Bank Limited t/a Volkskas Bank* [1998] 1 All SA 303 (C) 308; *ABSA Bank Ltd v Intensive Air (Pty) Ltd (in liquidation) and others* [2011] 3 All SA 2 (SCA) [20].

<sup>33</sup> To the credit of his account.

<sup>34</sup> Not of deposit.

<sup>35</sup> He has a right to have it make payments to him or his order up to the amount by which his account is in credit. *White v Standard Bank* (1883) 4 NLR 88 91–92; *Est Ismail v Barclays Bank DCO* 1957 (4) SA 17 (T) 26.

If a depositor’s account is not a current account, but a fixed deposit or on special terms such that he has not the right to have the bank make any such payment until after expiry of a stated time or a stated period of notice or some other condition, he nevertheless has a claim against the bank, deferred though it may be. *Ormerod v Deputy Sheriff, Durban* [1965] 4 All SA 330 (D) 334.

<sup>36</sup> Proposed s 166V (‘No creditor worse off’ rule) ss (1).

<sup>37</sup> Including transferring or dealing in any way with its assets and liabilities; or an amalgamation or merger involving the institution or an arrangement to consolidate different classes of its securities, divide its securities into different classes, expropriate securities from holders, or exchange securities. Proposed s 166S(1) and (2)(a) and (b)) read with cl 38 (proposed definition “resolution action”) and Companies Act 2008 Ch 5 (Fundamental transactions etc) Pt A (Approval for certain fundamental transactions) ss 112–114.

<sup>38</sup> Proposed s 166Q (‘Valuation’) ss (1)(a) and (b).

<sup>39</sup> Proposed s 166V (‘No creditor worse off’ rule) ss (4)(a) and (b) and (5).

amount, for the simple reason that this is only possible with a finalised liquidation and distribution account after liquidation:

It may, for example, be impossible to establish if any impeachable dispositions have taken place and, if so, the extent of the liability and likelihood of success in litigation, let alone the dividend which might be realised on execution of any judgment.

And estimates of the value of assets may not be realised on insolvency.

These factors<sup>40</sup> impair an expert's ability to make an accurate determination.<sup>41</sup>

***Bill allows Bank unilaterally to reduce contract payments or cancel contracts***

The draft Bill (in its proposed section on resolution action<sup>42</sup>) states that, “*if the Reserve Bank determines that it is necessary*” for the orderly resolution of a designated institution, it may<sup>43</sup> “*reduce the amount that is or may become payable*” by the institution to another party under an agreement between them,<sup>44</sup> or cancel the agreement.<sup>45</sup>

This would allow the Reserve Bank to reduce the amount that a designated institution has contracted to pay the other party to the contract, or to cancel the contract.

The Bill states that this action by the Bank will not “by itself” give rise to any right by the affected party.<sup>46</sup> This implies that the affected party will have no right to claim the shortfall from the designated institution.<sup>47</sup>

Such a provision violates the Rule of Law, by in effect providing that the extent of the legal liabilities of a designated institution will be determined by the Reserve Bank in its discretion, instead of by application of law.<sup>48</sup>

It also violates the Rule of Law by authorising unequal treatment of creditors, without identifying objective differences to justify the differentiation.<sup>49</sup>

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<sup>40</sup> And probably others as well.

<sup>41</sup> See *DH Brothers Industries (Pty) Ltd v Gribnitz NO and others* [2014] 1 All SA 173 (KZP) par [55].

<sup>42</sup> Proposed s 166S (resolution action).

<sup>43</sup> The proposed section states (inconsistently) that the Reserve Bank may take this action by “written order” or by “notice to a party to the agreement”.

<sup>44</sup> Proposed s 166S(7)(a).

<sup>45</sup> Proposed s 166S(7)(b).

<sup>46</sup> Proposed s 166S(10).

<sup>47</sup> Whether during or after resolution, or in winding-up proceedings.

<sup>48</sup> Bingham “The Rule of Law” supra, second sub-rule (questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion).

<sup>49</sup> Bingham “The Rule of Law” supra, third sub-rule (laws should apply equally to all, save to the extent that objective differences justify differentiation).

(It is also inconsistent with the Bill's provision, discussed above, that the Reserve Bank must not take a resolution action if it appears to it that the result would be that the value of a claim of a creditor of the designated institution would be reduced.<sup>50</sup>)

***Provisions in Bill are repetitive (or unclear if they apply to different circumstances)***

In one provision<sup>51</sup> the Bill states that, if the Reserve Bank determines that it is necessary to do so for the orderly resolution of a designated institution in resolution, the Bank may, by notice to the other parties to an agreement to which the institution is party, and that came into effect before the institution was put in resolution, “cancel the agreement”.<sup>52</sup>

The cancellation does not affect parties' rights which accrued before cancellation.<sup>53</sup>

In another provision<sup>54</sup> the Bill states (similarly) that, if the Reserve Bank determines that it is necessary for the orderly resolution of a designated institution, it may i.r.t. an agreement to which the institution is party “cancel the agreement”.<sup>55</sup>

The cancellation (likewise) does not affect rights of the parties which accrued before the date of cancellation.<sup>56</sup>

It is not clear if this is mere duplication due to draftsman's oversight.

Or it may be (although this is not clear) that the two sets of provisions deal with different circumstances. In particular, it may be that the former applies to agreements which (as the provision states) came into effect *before* the institution was put in resolution, and that the latter is intended to apply (although this is not expressed) to agreements that came into effect only *after* the institution was put in resolution.

To this extent the Bill violates the Rule of Law in being unclear and vague.<sup>57</sup>

***Bill unclear if rights under cancelled contracts continue to be enforceable***

As mentioned, the Bill states that an action by the Reserve Bank reducing the amount payable by a designated institution to a party under an agreement, or cancelling the agreement) will not “by itself” give rise to any right by the affected party.<sup>58</sup>

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<sup>50</sup> Draft Bill cl 54 (proposing insertion in Act of s 166U(1)).

<sup>51</sup> Proposed s 166R (powers).

<sup>52</sup> Proposed s 166R(1)(a).

<sup>53</sup> Proposed s 166R(3).

<sup>54</sup> Proposed s 166S (resolution action).

<sup>55</sup> Proposed s 166S(7)(b).

<sup>56</sup> Proposed s 166S(8).

<sup>57</sup> Bingham, “The Rule of Law” *supra*, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>58</sup> Proposed s 166S(10).

But it also says that cancellation of the agreement “*does not affect the rights of the parties*” that “*accrued before the date the cancellation takes effect*”.<sup>59</sup>

This could imply that a contracting party affected by the Reserve Bank’s reduction of the amount due to him could indeed still claim the shortfall from the institution in resolution.

But this is unclear. (As a rule, a contracting party cannot claim performance from another contracting party before the date on which performance is due.<sup>60</sup>)

This doubt should be clarified in the interest of the Rule of Law.<sup>61</sup>

### ***Bill contradictory about whether value of creditors’ claims may be reduced***

The Bill, though stating<sup>62</sup> in its provision on resolution action<sup>63</sup> that the Reserve Bank may “*reduce the amount that is or may become payable*” by a designated institution to a party under an agreement,<sup>64</sup> also states (contradictorily) that the Bank must “*not take*” a resolution action if it appears to it that the result would be that the value of a claim of a creditor of a designated institution “*would be reduced*”.<sup>65</sup>

The latter clause (that the Bank must not take action the apparent result of which would be that the value of a claim of a creditor of a designated institution would be reduced) is inconsistent with the first-mentioned one (that the Bank may reduce the amount payable by the institution to a party under an agreement).

This inconsistency violates the Rule of Law, by rendering the draft Bill unclear and contradictory.<sup>66</sup>

### ***Requiring “pari passu” treatment of claims of creditors of same class unclear***

The Bill states that the Reserve Bank, in taking resolution action i.r.t. a designated institution in resolution, must treat claims of the institution’s creditors and shareholders who would have the same ranking in insolvency “*in pari passu*”.<sup>67</sup>

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<sup>59</sup> Proposed s 166S(8).

<sup>60</sup> *Law of South Africa* vol 9 3 ed “Contract” (A D J van Rensburg et al, revd R D Sharrock) par 359.

<sup>61</sup> Bingham, “The Rule of Law” supra, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>62</sup> As mentioned.

<sup>63</sup> Proposed s 166S (resolution action).

<sup>64</sup> Proposed s 166S(7)(a) and (b).

<sup>65</sup> Proposed s 166U(1).

<sup>66</sup> Bingham, “The Rule of Law” supra, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>67</sup> Proposed s 166U(4)(a).

It may add clarity to add<sup>68</sup> “*and in proportion to the amount of each such claim*”, if that is the intention.

***Requiring “pari passu” treatment could require Bank to treat all creditors the same***

This bald requirement, that the Reserve Bank must treat claims of creditors who would have the same ranking in insolvency “*in pari passu*”,<sup>69</sup> could mean that the Bank must treat all creditors equally in every respect:

For example and as mentioned, the Bill states that, if the Reserve Bank determines it necessary for orderly resolution of a designated institution, it may cancel an agreement to which the institution is party.<sup>70</sup>

The “*in pari passu*” requirement could mean that the Bank cannot cancel such an agreement, unless it cancels all the other agreements to which the designated institution is party, so that all its creditors<sup>71</sup> are treated the same way.

But it is not clear if this is the intention. The Bill should clarify this doubt.

The Rule of Law requires that statutes be clear and unambiguous.<sup>72</sup>

***Reserve Bank discretion to determine that “pari passu” does not apply***

The Bill states that the “*in pari passu*” requirement does not apply “*if the Reserve Bank determines that it is necessary to treat the claims differently*” to effect the orderly resolution of the designated institution.<sup>73</sup>

This violates the Rule of Law, by authorising unequal treatment, without identifying objective differences to justify the differentiation between creditors.<sup>74</sup>

It also violates the Rule of Law, by providing that the need for equal treatment can be dispensed with on the mere ground the Bank determines it is “*necessary*” to treat claims differently to effect the “*orderly*” resolution of the institution, and without identifying objective criteria within which the Bank may exercise this discretion. A discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.<sup>75</sup>

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<sup>68</sup> Using wording borrowed from Insolvency Act s 103(1)(a) and (b).

<sup>69</sup> Proposed s 166U(4)(a).

<sup>70</sup> Proposed s 166S(7)(b).

<sup>71</sup> I.e., all contractual creditors of the designated institution concerned.

<sup>72</sup> Bingham, “The Rule of Law” *supra*, first sub-rule (the law must be accessible and so far as possible intelligible, clear and predictable).

<sup>73</sup> Proposed s 166U(4)(c).

<sup>74</sup> Bingham “The Rule of Law” *supra*, third sub-rule (laws should apply equally to all, save to the extent that objective differences justify differentiation).

<sup>75</sup> Bingham “The Rule of Law” *supra*, second sub-rule (questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion).