Twin Peaks Signed into Law

News 24 reported that President Jacob Zuma signed into law the Financial Sector Regulation Act 2017 on 21 August.

The legislation – also known as Twin Peaks - was passed by Parliament in June and sent to Zuma for ratification. It makes provision for a so-called Twin Peaks model of financial regulation. The SA Reserve Bank (SARB) will be responsible for regulating all financial institutions – banks, insurance houses and the asset management sector.

Financial conduct will be governed by a new entity, called the Financial Sector Conduct Authority, which will replace the current Financial Services Board (FSB).

The Presidency said in a statement issued on Monday that the Financial Sector Regulation Act aims to achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in South Africa.

Industry views differ vastly from that of the Presidency.

Professor Robert Vivian, of Finance & Insurance at the University of the Witwatersrand and a member of the Free Market Foundation's Rule of Law Advisory Board has some rather scathing views on the matter in an article in Fin24 titled *Twin Peaks: Another government-induced calamity. Why fix what isn't broke?*

He referred to National Treasury's Socio-Economic Impact Assessment (SEIA) as a "…kind of cost-benefit analysis, on the Financial Sector Regulation Bill (FSR). Cabinet and MPs should reject this half-baked attempt outright and insist that it be returned whence it came, before SA has another self-imposed calamity visited upon it."

Amongst other criticisms, Vivian condemns the establishment of "legislative instruments" as a "…violation of the Constitution and the rise of a unitary state with the state".

"… the FSR Act and the additional Acts that are promised to follow, will empower civil servants to tax by decree without so much as a nod from Parliament. They are to be empowered to raise their own funds through regulatory levies and to pass their own "laws" euphemistically referred to as "legislative instruments".

They will have their own courts ("Enforcement Committees"), will impose their own fines, and keep and spend the proceeds themselves. They are what have been referred to as a unitary state within the state, violating the Constitutional requirement of a proper separation of powers between legislature, executive and judiciary."

The other side of the coin

In an informative assessment of the Financial Sector Regulation Bill, Alan Holton, an associate of Moonstone Compliance, wrote in February this year:

"The Bill makes provision for the Prudential Authority and Financial Sector Conduct Authority to create 'legislative instruments'. This term is defined and means subordinate legislation made in terms of a financial sector law, and includes regulations, prudential standards, conduct standards or joint standards. These standards have the same effect as the actual legislation and the most important of these is, arguably, the authority to create Conduct Standards."

"Conduct standards must be made in order to ensure the protection and fair treatment of financial customers and to enhance the efficiency and integrity of and confidence in the financial system. These standards may also be made to promote financial literacy and financial capability and to assist in maintaining financial stability."

Consultation Requirements

Holton feels quite strongly about criticism that this approach undermines parliament's role in law making:

"The financial sector regulator who makes a legislative instrument must, prior to making a legislative instrument, publish a draft of the instrument that must be accompanied by a statement explaining the need for the instrument and the intended operation of the instrument, a statement of the expected impact of the regulatory instrument and a notice stating that any person may make a submission about the need for, and the content of, the instrument.

The notice must indicate where and how submissions may be made, and the period for making submissions, which must be at least 6 weeks.

Before making a regulatory instrument the maker of the regulatory instrument must submit the regulatory instrument to Parliament together with a report on the consultation process. Then, in deciding whether to make a regulatory instrument, the maker must take into account all submissions received within the 6-week period and must also take into account any deliberations of Parliament.

Holton's article also expands in detail on Guidance notices and Interpretation rulings which form an equally important part of the checks and balances foreseen in the Act to ensure fair outcomes for all.

The above article was written and published online on 24 August by Paul Kruger, Editor and Writer-in-chief of Moonstone Monitor.

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