OPINION LIMITATION OF LIABILITY

1. The National Treasury requested legal advice on the extent of liability which should appropriately attach to financial sector regulators such as the Financial Services Board (FSB) and the SA Reserve Bank (SARB) currently, and the prudential and market conduct regulators in future, in the event of damage caused to a person in the exercise of powers and functions conferred on such regulators. The request stems from discussions in the Standing Committee on Finance on section 67 of the Financial Services Laws General Amendment Bill which proposes to amend section 23 of the Financial Services Board Act, as follows:

> *"**Limitation of liability**"*
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> ***23**. No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the bona fide **[, but not grossly negligent,]** exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act, the Acts referred to in the definition of 'financial institution', the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001)."*

2. The aim of section 23 is obviously to immunise the FSB and its officials from liability for loss or damage that may be caused to other persons when the FSB and its officials perform their official functions under the FSB statutory umbrella in a bona fide but not grossly negligent way. The proposed amendment retains the principle that the FSB and its officials are not liable for the bona fide exercise of their powers but proposes to delete the reference to gross negligence.

3. The FSB is of the view that the reference in the section to gross negligence unnecessarily and unjustifiably complicates the liability issue where statutory functions are exercised in good faith and suggests that the principle embodied in the section rather be brought into line with section 88 of the Banks Act administered by the SARB, which reads as follows:

> "**88**. *No liability shall attach to the South African Reserve Bank or, either in his or her official or personal capacity, to any member of the board of directors of the said*

Bank, the Registrar or any other officer or employee of the said Bank, for any loss sustained by or damage caused to any person as a result of anything done or omitted by such member, the Registrar or such other officer or employee in the bona fide performance of any function or duty under this Act."

4. Although the wording of section 88 differs from its counterpart in the FSB Act, the principle of non-liability for acts done in the bona fide performance of a function is exactly the same except for the absence of any reference to gross negligence. The FSB also refers to a whole host of other laws where this principle is not qualified by the exclusion of gross negligence, such as the Labour Relations Act, the Social Services Professions Act, the Social Services Professions Act, the Prevention of Public Violence and Intimidation Act, the Sea Birds and Seals Protection Act, and the Public Audit Act.

5. One could add numerous other important laws, such as the Municipal Finance Management Act, various tax laws, etc., to prove the point the FSB is making, viz. that section 23 of the FSB Act is an unnecessary deviation from the well-established principle throughout our statute book that administrative authorities are not liable for loss or damage caused in the exercise of their statutory functions as long as they act in good faith. Qualifications as to the degree of blameworthiness (such as gross negligence) is uncommon in liability provisions of this kind and to this end section 23 is the exception rather than the rule.

6. The proposal to bring section 23 into line with the accepted norm of liability in the exercise of statutory functions, is not of mere passing importance. The National Treasury, in cooperation with the SA Reserve Bank and the FSB, is currently preparing legislation to give effect to the Twin Peaks concept of financial regulation which envisages the splitting of regulatory functions between a "prudential" and a "market conduct" regulator. These proposed regulators will replace the Reserve Bank and the FSB in the performance of the financial regulation function. In preparing the new legislation, the question will inevitably arise whether the new legislation should follow the generally accepted norm of liability as set out in section 88 of the Banks Act or the exception to the principle as set out in the current section 23 of the FSB Act.

7. In my view the point of departure should be to follow the common principle that regulatory authorities should not be liable for loss or damage caused by the exercise of their statutory functions in good faith as stated in section 88 of the Banks Act rather than to clutter the issue with gross negligence as was done in section 23 of the FSB Act, unless, of course, there are sound reasons specific to financial regulation that section 23 should be followed. I am not informed nor can I think of any reasons why different rules should apply to liability in the financial regulation sector.

8. There are also other compelling reasons why gross negligence in section 23 should be deleted. Action against the financial regulator and its officials for compensation lies in the case of both sections when they perform their functions otherwise than in good faith (bona fide), i.e when they act in bad faith (mala fide). An act in good faith implies an acceptable standard of conduct such as what one would expect from the prudent official, an openness and absence of prejudice. An act performed in bad faith implies conduct one would not expect from a person in public office. As intentional, malicious or reckless non-compliance with the requirements of the law amounts to bad faith, the question arises whether gross negligence could ever be claimed to be in good faith.

9. What constitutes “gross negligence” as opposed to ordinary negligence has been considered in numerous cases. In **C.S.A.R. v Adlington & Co.** 1906 TS 964 at 973 Wessels J stated that a person “is guilty of gross negligence who gives no consideration whatever to the consequences of his act, as where a person who takes charge of property leaves it so exposed that thieves may carry it off. This is known as *culpa or negligentia lata, crassa, summa.* A person is guilty of ordinary negligence (*culpa levis*) who, though not grossly negligent, omits to take that care which ordinary people usually take in similar circumstances…. **"**

10. In **Rosenthal v Marks** 1944 TPD 172 Murray J said at p180 that gross negligence denotes "recklessness, an entire failure to give consideration to the consequence of his actions, a total disregard of duty". In **Philotex (Pty) Ltd & Others v Snyman & Others** 1998(2) SA 138 (SCA), Hovie JA echoed these sentiments and followed **S v Dhlamini** 1988(2) SA 302(A) at 308 in describing gross

negligence as an attitude or state of mind characterised by 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. (at 143 F).

11. It stands to reason that conduct on the part of an official in reckless disregard of the consequences of his/her actions will probably be very difficult if not impossible to be passed off as conduct in good faith. An official who carries out his duties in total disregard of what he is supposed or required by law to do, would more likely than not be acting in bad faith. Such conduct will in terms of section 23 already expose the official and his organisation to remedial action without resorting to proving that the official acted grossly negligent. In other words, once conduct otherwise than in good faith is proven, the statutory immunity falls away and the ordinary requirements for delictual liability apply. It is therefore doubtful whether deletion of gross negligence in section 23 would make any material difference in the scope and effect of the section.

12. The point that gross negligence in section 23 is probably superfluous can best be illustrated with reference to section 88. The same conduct, whether grossly negligent or not, that falls outside the sphere of immunity in terms of section 23 will equally fall outside the sphere of immunity in terms of section 88 despite the fact that section 88 does not contain any reference to gross negligence.

13. Apart from the considerations above, the proposed amendment raises a constitutional issue that will also have to be taken into account. The aim of both section 23 and 88 is to regulate the delictual liability of organs of state and officials in the performance of their functions as opposed to the constitutional obligations of such functionaries to act administratively fair and reasonable in terms of section 33 of the Constitution. It is clear that whatever sections 23 and 88 say, any conduct, whether in good faith or not, that is not consistent with the Constitution would be unconstitutional and invalid and may be undone on review by a court. The Promotion of Administrative Justice Act which gives effect to section 33 provides in section 6 the grounds on which a court may review administrative action, including in circumstances when action was taken in bad faith. It is to be noted that neither

section 23 nor 88 affects or limits the right anyone has to fair and just administrative action in terms of the Constitution.

14. In **Steenkamp vs Provincial Tender Board of the Eastern Cape**, 2006, the Constitutional Court considered the question whether an action for delictual damages against a tender board which exercised its powers in good faith but negligently is a constitutional matter. The Court found that this was indeed a constitutional matter mainly because a tender board wielded public power that materially affected the legal interests or rights of tenderers. As such the affected tenderers have a right to just administrative action as provided in section 33 of the Constitution. Moseneke DCJ who delivered the majority judgement made the following observations:

> "[28] I intimated earlier that since the advent of our constitutional dispensation administrative justice has become a constitutional imperative. It is an incident of the separation of powers through which courts review and regulate the exercise of public power. The Bill of Rights achieves this by conferring on "everyone" a right to lawful administrative action that must also be reasonable and procedurally fair. In this regard in *Bato Star Fishing*, O'Regan J writing for a unanimous court reminded us that:
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> > "The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution."
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> [29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper

administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

[30] Examples of public remedies suited to vindicate breaches of administrative justice are to be found in section 8 of the PAJA. It is indeed so that section 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are "just and equitable". Yet it is clear that the power of a court to order a decision-maker to pay compensation is allowed only in "exceptional cases". It is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by section 8 are in the main of a public law and not private law character. Whether a breach of an administrative duty in the course of an honest exercise of a statutory power by an organ of state ought to be visited with a private law right of action for damages attracts different considerations to which I now turn."
[Footnotes omitted]

15. The Court then proceeded to consider on considerations of public policy whether it should allow a claim for delictual damages. It rejected the claim because the interests of public policy to protect the state's tender board system outweighed the narrower economic interests of the claimant in instances where the board acted negligently but in good faith. The question whether gross negligence on the part of the tender board would have altered the outcome was not discussed. What is clear though is that the constitutional imperative of just administrative action will in future be an important issue in delictual claims against the state when public power is abused or improperly exercised in circumstances where there is a duty of care on the relevant organ of state or public official to act prudently.

16. Sections 23 and 88 are purely about claims for compensation for loss or damage caused by statutory functionaries in performing their official functions, but because of the Constitutional Court's ruling that delictual claims against organs of state for the bona fide but negligent exercise of their functions must be considered in the context of the right to just administrative action, provisions such as sections 23 and 88 will in future have to be construed and applied in their constitutional and not mere common law context. Courts will consider such claims not merely in the light of good or bad faith but will also have to take into account of what is just and equitable in the circumstances as measured against the wider considerations of public policy. In this scenario where the enquiry will embrace all relevant matters, specific references to gross negligence in provisions such as section 23 as criteria for liability may have little value and only clutter an already complicated matter even further.

17. It is also to be noted that in terms of section 8(1)(c)(ii) of PAJA a court may in reviewing administrative action, set aside a decision and "in exceptional cases" order the organ of state to pay compensation to an aggrieved person if it considers it "just and equitable" to do so.

18. Conclusion

The deletion of the reference to gross negligence in section 23 is supported for the reasons set out above, viz:

1. The deletion is necessary to align the section with other provisions throughout our statute book regulating state immunity against loss or damage in the bona fide exercise of statutory powers. In particular, laws regulating the financial sector should be consistent with a view to a uniform approach in the proposed Twin Peaks legislation.
2. The mentioning of gross negligence in section 23 is superfluous as conduct by officials amounting to gross negligence would probably always be in bad faith. As such, gross negligent conduct would hardly ever fall within the sphere of immunity afforded by the section to the FSB and its officials.
3. The constitutional right to administrative justice may require provisions such as sections 23 and 88 to be interpreted not only in their common law context but in their constitutional context as well, which will allow a court to decide the question whether an organ of state or official should be liable for the bona fide

but negligent exercise of their powers on considerations of what is just and equitable in the circumstances. Such an enquiry would involve the weighing of the affected person's interests against wider issues of public policy whether the organ of state should be liable. As the enquiry will embrace all relevant matters, specific references to gross negligence in provisions such as section 23 as criteria for liability may have little value and only clutter an already complicated matter even further.

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5 August 2013