

Financial Advisory And Intermediary Services Act: Matrix

NOTE: The matrix is followed by a summary of the amendments relating to regulatory gaps in respect of the powers of the Registrar and consumer protection and amendments to enhance clarity & certainty. Please see page 49 and 50.

KEY TO CLASSIFICATION OF AMENDMENTS:

	Overarching amendment proposed in respect of all sector specific Acts - Website, advisory committees, clarification on Registrar & deputy Registrar, onsite visits, alignment of penalties
	Alignment with Companies, Income Tax, Banks & Financial Institutions (Protection of Funds) Act & consequential amendments
	Regulatory gap: Powers of the Registrar
	Regulatory gap: Consumer protection and amendments to enhance clarity & certainty
	Amendments proposed to principle Act not in Tabled Bill.

Clause	Section in tabled bill	Commentator	Summary of concern/ comment	Proposed response
175(h)	<p>Section 1 of the Financial Advisory and Intermediary Services Act, 2002 (in this Part referred to as the principal Act), is hereby amended –</p> <p>(h) by the substitution in subsection (1) for the definition of "product supplier" of the following definition:</p> <p>"product supplier' means any person who issues a financial product [by virtue of an authority, approval or right granted to such person under any law, including the Companies Act, 1973 (Act No. 61 of 1973)];"</p>	<p>BASA (17.04.2013)</p>	<p>Definitions in the Financial Advisory and Intermediary Services Act for 'product supplier' and 'financial product' Clause 175 of the Bill amends the definition section of the Financial Advisory and Intermediary Services Act 30 of 2002 (FAIS) by changing the definition of "product supplier". We request clarity as to the intention behind removing words "by virtue of an authority, approval or right granted to such person under any law, including the</p>	<p>The intention with the proposed amendment is to close the <i>lacuna</i> that is created by the requirement in the definition of 'product supplier' that the issuing of financial products must be authorised under a law.</p> <p>The proposed amendment will result in bringing financial services providers who renders render intermediary services in respect of e.g. contract for differences or other over-the-counter derivate instruments to comply with the provisions of the Act when rendering such services to clients.</p> <p>The proposed amendment does not extend the Registrar's jurisdiction to product suppliers and is not overbroad in</p>

			Companies Act, 1973 (Act No, 61 of 1973)" from the definition, and the application of this provision.	that it is limited to persons who issues financial products as defined in section 1 of the Act.
175(n)	<p>(n) by the substitution for subsection (4) of the following subsection:</p> <p>"(4) The [provisions of this Act only apply to the] rendering of a financial service in respect of a deposit referred to in paragraph (f) of the definition of 'financial product' in subsection (1) with a term not exceeding 12 months by a provider which is a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993), or a co-operative bank as defined in the Co-operative Banks Act, 2007 (Act No. 40 of 2007), [to the extent that such application] is regulated <u>by this Act</u> in the code of conduct contemplated in section 15(2)(b).".</p>	BASA (17.04.2013)	Clause 175 further amends the section 1(4) of the FAIS by amending the application of the FAIS Act. It is unclear what the intention of this amendment is, as if the intention was to include all deposit products then the removal of section 4 of the FAIS Act would have suffice. The implication of this amendment is that it will affect entities which use the current wording of sub-section (4) to exclude their deposit products from FAIS.	<p>The purpose of the proposed amendment is to clarify the application of the Act to banks rendering financial services in respect of deposits exceeding 12 months.</p> <p>A deposit as defined in section 1(1) of the Banks Act, 1990, is for purposes of the Act defined as a financial product. Therefore, financial services rendered in respect of any deposit, irrespective of its term, falls within the ambit of the Act. Section 1(4) merely requires that a deposit with a term not exceeding 12 months must be regulated in terms of a specific code of conduct whilst deposits with a term exceeding 12 months are regulated in terms of a general code of conduct. The licencing process, therefore, distinguishes between the aforementioned two types of products to ensure effective supervision. The commentator's response is of great concern as entities should not be excluding deposits with a term exceeding 12 months from the provisions of the Act. Such exclusion would defeat the purpose of the Act.</p>
175(g)	<p>(g) by the insertion in subsection (1) after the definition of "Minister" of the following definition:</p> <p>" 'official web site' means a web site as defined in section 1 of the</p>	ASISA (18.02.2013) (18.04.2013)	See Key Issues document.	See Key Issues document.

	<u>Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), set up by the Board:";</u>			
177	General Comment	Ms Dlamini-Dubazana	Ms Dlamini-Dubazana said that then there was a problem. These officers must be defined as to what qualified them to perform their duties.	Section 17 of the Act, in detail, provides for the functions a person must perform and the requirements a person must comply with in order to be approved as a compliance officer. It is, therefore, not necessary to define the phrase "compliance officer" as such a definition would merely provide for a brief description of the functions to be performed by a person to qualify as a compliance officer.
177(b)	<p>Section 4 of the principal Act is hereby amended—</p> <p>(b) by the substitution in subsection (5)(a) for subparagraph (i) of the following subparagraph:</p> <p>“(i) authorise any suitable person in the employ of the Board or any other suitable person to conduct an on-site visit of the business and affairs of a provider [or], representative or compliance officer [to determine compliance with this Act]; or”;</p>	FSB	See Key Issues document.	 It is proposed that section 4(5)(a) be amended as follows: <p>(b) by the substitution in subsection (5)(a) of the following paragraph:</p> <p>“(5) (a) The Registrar may—</p> <p>(i) [authorise any suitable person in the employ of the Board or any other suitable person to] conduct an on-site visit <u>under Chapter 1A of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) [of the business and affairs of a provider or, representative to determine compliance with this</u></p>

				<p>Act]; or</p> <p>(ii) instruct an inspector under [section 3 of] the Inspection of Financial Institutions Act, 1998 (Act <u>No.</u> 80 of 1998).”;</p>
<p>177(c) to (e)</p>	<p>(c) by the substitution in subsection (5)(b)(i) for items (aa) and (bb) of the following items, respectively:</p> <p>“(aa) enter the premises of the provider [or], representative <u>or compliance officer</u> and the provider [or], representative <u>or compliance officer</u> must upon request provide any document, record, information or explanation necessary for purposes of the on-site visit;</p> <p>(bb) search the premises of the provider [or], representative <u>or compliance officer</u> for any document;”;</p> <p>(d) by the substitution in subsection (5)(b)(i) for item (dd) of the following item:</p> <p>“(dd) <u>against the issue of a receipt</u> seize any document [against the issue of a receipt,] which may furnish proof of any failure to comply with the <i>provisions of this Act</i>;”;</p>	FSB	See Key Issues document.	<p> It is proposed that section 4(5)(b) be deleted from the principle Act as follows:</p> <p>“Section 4 of the principal Act is hereby amended by the deletion of paragraph (b) of subsection (5).”</p>

	<p>(e) by the substitution in subsection (5)(b) for subparagraph (ii) of the following subparagraph:</p> <p>“(ii) require the provider [or], representative <u>or compliance officer</u> to produce at a specified time and place any specified documents or documents of a specified description in the possession or under the control of the provider [or], representative or compliance officer;”;</p>			
177(g)	<p>(g) by the substitution in subsection (7) for paragraph (c) of the following paragraph:</p> <p>“(c) the outcome and details of an on-site visit if disclosure is in the public interest, by notice [in the Gazette] <u>on the official web site</u> or by means of any other appropriate public media.”.</p>	FSB	The information sharing provisions are consolidated into the FSB Act under section 22 of that Act.	 It is proposed that section 4(7) be deleted from the principle Act as follows: “Section 4 of the principal Act is hereby amended by the deletion of subsection (7).”
180	<p>The following section is hereby inserted in the principal Act after section 6:</p> <p>"Fit and proper requirements</p> <p><u>6A. (1) The registrar, for purposes of this Act, by notice in the Gazette—</u></p> <p><u>(a) must—</u></p> <p><u>(i) classify financial services providers into different categories;</u></p> <p><u>(ii) determine fit and proper requirements for each category of</u></p>	BASA (17.04.2013)	Section 6A(4) allows the Registrar to amend the fit and proper requirements from time to time and requires those affected by the FAIS Act to comply with them, there is no indication whether these amendments will be done in consultation with those affected and the section does not make provision for a draft to first be published and comments	The consultation process as prescribed in the Code of Engagement as determined by the Minister of Finance under the FSB Act will apply. It is not necessary to repeat said process. In addition, the Registrar is subject to PAJA as the issuing of directives constitutes an administrative action.

<p>providers; and</p> <p><u>(iii) in each category of providers determine fit and proper requirements for—</u></p> <p><u>(aa) key individuals of providers;</u></p> <p><u>(bb) representatives of providers;</u></p> <p><u>(cc) key individuals of representatives of providers; and</u></p> <p><u>(dd) compliance officers; and</u></p> <p><u>(b) may determine fit and proper requirements for providers, key individuals, representatives, key individuals of representatives and compliance officers in general.</u></p> <p><u>(2) Fit and proper requirements may include, but are not limited to, appropriate standards relating to—</u></p> <p><u>(a) personal character qualities of honesty and integrity;</u></p> <p><u>(b) competence, including—</u></p> <p><u>(i) experience;</u></p> <p><u>(ii) qualifications; and</u></p> <p><u>(iii) knowledge tested through examinations determined by the registrar;</u></p> <p><u>(c) operational ability;</u></p> <p><u>(d) financial soundness; and</u></p> <p><u>(e) continuous professional development.</u></p>		<p>received.</p>	
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	<p>(3) <u>Different fit and proper requirements may be determined for providers, representatives and compliance officers that are natural persons and for those that are partnerships, trusts or corporate or unincorporated bodies.</u></p> <p>(4) <u>The registrar may, by notice in the <i>Gazette</i>, amend the fit and proper requirements from time to time and a provider, key individual, representative, key individual of a representative and compliance officer must comply therewith within such period as determined by the registrar."</u></p>			
<p>182(d)</p>	<p>Section 8 of the principal Act is hereby amended—</p> <p>(d) by the substitution in subsection (3) for paragraphs (a) and (b) of the following paragraphs, respectively:</p> <p>“(a) [if] <u>grant the application if the registrar—</u></p> <p>(i) <u>is satisfied that [an] the applicant [complies] and its key individual or key individuals comply with the requirements of this Act[, grant the application]; and</u></p> <p>(ii) <u>approves the key individual or key individuals of the applicant, in the case of a</u></p>	<p>FSB</p>	<p>Correction of spelling mistake in paragraph (b)(ii) of subsection (3)</p>	<p> It is proposed that paragraph (b)(ii) of subsection (3) be amended as follows:</p> <p>“(i) <u>is not satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; or</u>”</p>

	<p><u>partnership, trust or corporate or unincorporated body; or</u></p> <p>(b) [if not so satisfied,] refuse the application <u>if the registrar—</u></p> <p>(i) <u>is not satisfied that the applicant and its key individual or key individuals comply with the requirements of this Act; or</u></p> <p>(ii) <u>does not approve the key individual or key individuals of the applicant in the case of a partnership, trust or corporate or unincorporated body.”;</u></p>			
<p>184(f), (g) and (i)</p>	<p>(f) by the substitution in subsection (2) for paragraph (d) of the following paragraph:</p> <p>"(d) Where the licence is suspended or withdrawn, the registrar must make known the reasons for the suspension or withdrawal and any terms attached thereto by notice [in the Gazette] <u>on the official web site</u> and may make known such information by means of any other appropriate public media.";</p> <p>(g) by the substitution in subsection (3) for paragraph (b) of the following paragraph:</p> <p>"(b) make known such provisional suspension or withdrawal by notice [in the Gazette] <u>on the official web site</u> and, if necessary, by</p>	<p>BASA (17.04.2013)</p>	<p>Clause 182 allows for notices of withdrawals and suspension of authorisation to be published on the official website and not in the Gazette. The comments in regards to the official website referred to above, apply hereto.</p>	<p>It is assumed that that the commentator refers to Clause 184 and not Clause 182 as the first mentioned clause provides for the withdrawal and suspension of an authorisation.</p> <p>See Key Issues document.</p>

	<p>means of any other appropriate public media.";</p> <p>(i) by the substitution in subsection (4) for paragraph (b) of the following paragraph:</p> <p>"(b) The registrar must make known the terms of and reasons for such final suspension or withdrawal, or the lifting thereof, by notice [in the Gazette] <u>on the official web site</u> and, if necessary, in any other appropriate public media."</p>			
186(a)	<p>Section 13 of the principle Act is hereby amended-</p> <p>(a) by the substitution in subsection (1)(b)(i) for the words preceding item (aa) of the following words:</p> <p>"[is able to provide] prior to rendering a financial service, provides confirmation, certified by the provider, to clients-";</p>	FSB	Insertion of omitted paragraph number.	 It is proposed that subsection (1)(b)(i) be amended as follows: “(i) [is able to provide] prior to rendering a financial service, provides confirmation, certified by the provider, to clients-“;
186(c)	<p>(c) by the substitution in subsection (1)(b) for subparagraph (ii) of the following subparagraph:</p> <p>"(ii) if debarred as contemplated in section 14, complies with the</p>	FSB	Correction of punctuation.	 It is proposed that subsection (1)(b)(i) be amended as follows: “(ii) if debarred as contemplated in

	requirements determined by the registrar [, after consultation with the Advisory Committee,] by notice in the Gazette, for the reappointment of a debarred person as a representative.";			section 14, complies with the requirements determined by the registrar [, after consultation with the Advisory Committee,] by notice in the Gazette, for the reappointment of a debarred person as a representative[.]; <u>or</u> ";
190(d)	<p>CLAUSE</p> <p>Section 17 of the principle Act is hereby amended-</p> <p>(d) by the substitution for subsection (4) of the following subsection:</p> <p>"(4) (a) A compliance officer or, in the absence of such officer, the authorised financial services provider concerned, must submit reports to the registrar in the manner and regarding the matters, as from time to time determined by the registrar by notice <u>on the official website [in the Gazette]</u> for different categories of compliance officers[, after consultation with the Advisory Committee].</p> <p>(b) <u>A failure by a compliance officer to submit reports to the registrar as contemplated in paragraph (a), is deemed to be a failure by the provider.</u>"</p>	FSB	The proposed wording in the tabled Bill did not achieve the desired result i.e. to clarify that the financial services provider is ultimately responsible for the submission of the compliance reports.	 It is proposed that subsection (4) be amended as follows: "(4) (a) A compliance officer or, in the absence of such officer, the authorised financial services provider concerned, must submit reports to the registrar in the manner and regarding the matters, as from time to time determined by the registrar by notice <u>on the official website [in the Gazette]</u> for different categories of compliance officers[, after consultation with the Advisory Committee]. (b) <u>An authorised financial services provider must ensure that the reports referred to in paragraph (a) are submitted in accordance with the provisions of that paragraph.</u> "

<p>201</p>	<p>The following sections are hereby inserted in the principal Act after section 38:</p> <p>"Business rescue</p> <p>38A. (1)(a) <u>Notwithstanding the provisions of the Companies Act or any other law under which a provider is incorporated, Chapter 6 of the Companies Act shall subject to this section and with the necessary changes apply in relation to the business rescue of a provider whether or not it is a company.</u></p> <p>(b) <u>This section does not apply if another registrar is authorised in terms of Financial Services Board legislation as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), or in terms of banking legislation, to make an application for the business rescue of a provider.</u></p> <p>(2) <u>The registrar may make an application under section 131 of the Companies Act in respect of a provider if the registrar is satisfied that it is in the interests of the clients of the provider or the financial services industry.</u></p> <p>(3) <u>The resolution of a provider to begin business rescue proceedings, the appointment of a business rescue practitioner, the adoption of a business rescue plan and exercise of power by the business rescue practitioner under the Companies Act, are subject to the</u></p>	<p>BASA (17.04.2013)</p>	<p>Clause 201 amends the FAIS Act by introducing sections 38A, 38B and 38C, which deals with business rescue, sequestration or liquidations and directives. The comments in regards to business rescue provided above, apply hereto. Section 38B(1) provides that after an on-site visit, if the Registrar considers it, that the interests of the clients of a financial services provider or of members of the public so require, may apply for sequestration or liquidation, whether or not the provider is solvent. The section creates a wide discretion on the part of the Registrar. Interest is a wider concept and embodies more than rights, further the application can be made without taking into account the solvency of the provider. The clause should be amended to be in line with the common law requirements for liquidation and sequestration. It is</p>	<p>Disagree with commentator that an application by the Registrar to place a provider under business rescue provides the Registrar with wide discretion and that such an application can be made without having cognisance of a provider's solvency. The requirements applicable to an application to place a company under business rescue as provided for in Chapter 6 of the Companies Act, 2008, are applicable to an application by the Registrar. This means that the Registrar, <i>inter alia</i>, will have to show that the provider is financially distressed (as defined in section 128 of the Companies Act), in other words, that the provider is unable to pay all of its debts and it appears that the company will become insolvent.</p> <p>The reference in subsection (2) of the proposed new section actually places an additional requirement on the Registrar namely; that the Registrar must show that it would be in the interest of clients of the provider or the financial industry to place such provider under business rescue. This requirement is separate and in addition to the requirement that a provider must be financially distressed. This section, therefore, does not provide the Registrar with wide powers which could be exercised unilaterally.</p> <p>It is further important to note that this section does not apply if another Registrar is authorised in terms of Financial Services Board legislation or in terms of banking</p>
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<p>approval of the registrar.</p> <p><u>(4) In _____ the application of chapter 6 of the Companies Act—</u></p> <p><u>(a) any reference to the Commission shall be construed as a reference also to the registrar;</u></p> <p><u>(b) the reference to creditors shall be construed as a reference also to clients of the provider;</u></p> <p><u>(c) any reference relating to the ability of a provider to pay all debts, shall be construed as relating also to the provider's inability to comply with the financial soundness requirement under section 8(1)(c) of this Act;</u></p> <p><u>(d) there shall be considered, in addition to any question relating to the business of a provider, also the question whether any cause of action is in the interests of the clients.</u></p> <p><u>(5) If _____ an application to a Court for an order relating to the business rescue of a provider is made by an affected person other than the registrar—</u></p> <p><u>(a) the application shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar, before the application is set down for hearing;</u></p> <p><u>(b) the registrar may, if satisfied that the application is not in the interests of the clients of the provider, join the application as a party and file affidavits and other documents in</u></p>		<p>accepted that Parliament can change the common law by enacting statute but it is argued it would be undesirable to change the common law requirements for insolvency. Further the section does not confine the concept of interests, it is submitted that if the section is retained then the 'interests' referred to, should be confined to 'financial interests'.</p>	<p>legislation, to make an application for the business rescue of a provider.</p>
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	<p><u>opposition to the application.</u></p> <p><u>(6) As from the date upon which a business rescue practitioner is appointed, the business rescue practitioner of a provider shall not conduct any new business unless the practitioner has been granted permission to do so by a Court.</u></p>			
<p>NEW</p>	<p>42. Exchange of information</p> <p>The registrar may disclose information obtained in the course of performing functions in terms of this Act, unless such disclosure will not be in the public interest, but subject to any guidelines issued by the Board to the registrar -</p> <p>(a) to any department of state or organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), foreign financial or investment services regulatory or supervisory authority, or any other regulatory or supervisory authority for financial or investment services in the Republic, including the Registrar of Medical Schemes and a representative body of the financial services industry or self-regulatory organisation approved by the Board, if such information is likely to be of interest to the relevant department or organ of state, regulatory or supervisory authority, Registrar of Medical Schemes, representative body or selfregulatory organisation; or</p> <p>(b) to any foreign financial or investment services regulatory or</p>	<p>FSB</p>	<p>The information sharing provisions are consolidated into the FSB Act under section 22 of that Act.</p>	<p> It is proposed that section 42 be deleted from the principle Act as follows: “The principal Act is hereby amended by the deletion of section 42.”</p>

	<p>supervisory authority, where the information is required in terms of any agreement, communique or memorandum of understanding concluded by the Board or the registrar with any such authority:</p> <p>Provided that the Board or the registrar may impose conditions relating to the use of any information and the preservation of confidentiality in respect thereof.</p>			
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SUMMARY OF REGULATORY GAPS

Overarching amendment proposed in respect of all sector specific Acts - Website, advisory committees, clarification on Registrar & Deputy Registrar, onsite visits,

- Deletion of provisions relating to the “advisory committee”: sections 1(1),1(2),1(3), 5, 6(4)(a), 13(1)(b), 15, 21, 26, 34, 35.
- Provisions enabling publication of certain of the registrar’s actions on the “official website of the FSB”: sections 1, 4(7), 6(4)(b)(i), 9(2)(d), 9(3)(b), 9(4)(b), 11(2), 19, 14, 14A, 41, 45.
- Clarification of the powers of the Registrar and Deputy Registrar: sections 1 and 2.
- Extend the Registrar’s powers to request information and of on-site visits to compliance officers: sections 4(2) and 4(5).
- Disclosure of information relating to inspections and on-site visits: section 4(7).
- Increase out-dated criminal sanctions: section 36

Alignment with Companies, Income Tax, Banks, Financial Institutions (Protection of Funds) Act & Financial Markets Act

Companies Act

- Section 1, 38: Reference to Companies Act No. 71 of 2008.
- Section 19, 45: Alignment of definitions.
- Section 38A: Provide for business rescue.
- Section 38B: Provide for application by registrar for sequestration or liquidation.

Financial Markets Act

- Section 1: Amendment of reference to Securities Services Act.

Financial Institutions (Protection of Funds) Act:

- Section 33: Removal of civil remedies (section 33) as similar outcomes can be achieved by enforcement remedies in the Financial Institutions (Protection of Funds Act).
- Section 9, 37: Consequential amendments due to removal of civil remedies.
- Section 9: Alignment of terminology.

Regulatory Gap: Consumer protection and amendments to enhance clarity & certainty

1. Section 1 - Definition of “continuous professional development”: To insert a definition of “continuous professional development” to facilitate the introduction of a new section on fit

and proper requirements and to provide an overarching indication as to what is meant with the term.

2. Section 1 - Definition of “fit and proper requirements”: to facilitate the introduction of a new section on fit and proper requirements and to provide an overarching indication as to what is meant with the term.
3. Section 1 - Definition of “product supplier”: To make the definition more general by removing the requirement that issuing of products must be authorised under a law.
4. Section 1 - Definition of “publish”: To insert a definition of “publish” to clarify what constitutes publish by persons, other than the registrar, under the Act.
5. Clarity on section 1(4): To amend subsection (4) to clarify the application of the FAIS Act to banks rendering financial services in respect of deposits exceeding 12 months.
6. Section 6A: To clarify the application of fit and proper requirements by the registrar in respect of authorised or approved persons.
7. Section 7(1): To clarify that a person may not act as a representative of an authorised financial services provider unless such person has been appointed as such.
8. Section 8: To clarify the application of fit and proper requirements by the registrar in respect of authorised or approved persons and to provide for the prohibitions under subsection (9) to prohibit persons from making use of their licences where they no longer have such authorisations or from publishing documentation which is misleading or contrary to the public interest or contains an incorrect statement of fact.
9. Section 8A: To require continued compliance with the fit and proper requirements.
10. Section 9(a), (c) & (d): To provide clarity as to the grounds and terms for withdrawal or suspension of an FSP licence.
11. Section 9(b): To provide clarity that the reference is to a provisional suspension of an FSP licence.
12. Section 13: To ensure that only lawfully appointed and fit and proper representatives are able to render financial services and to clarify that a representative can only render financial services on behalf of financial services provider.
13. Section 17: To clarify the appointment criteria and role of compliance officers and to provide clarity regarding responsibilities of FSP in respect of the submission of compliance reports.
14. Section 23: To determine who the accounting authority for the FAIS ombud is and to clarify that the accounting authority must comply with the PFMA.
15. Section 34: To extend the prohibition not to carry on an undesirable business practice to representatives.
16. Section 40: To rectify the omission of a reference to this Act in this section.

Powers of the Registrar (new)

1. Section 38C: To authorise the registrar to issue directives to ensure compliance with the Act.
2. Section 38B: Right to apply for liquidation or sequestration (see also alignment with Companies Act).

Amendments proposed to principle Act not in Tabled Bill.

1. Section 42: The information sharing provisions are consolidated into the FSB Act under section 22 of that Act.