

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.2

FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES

SUBMISSION FROM THE JSE (JOHANNESBURG STOCK EXCHANGE)

27 FEBRUARY 1995

Chairperson : R Davies

- RD: Rob Davies
- KA K Andrew
- PW Piet Welgemoed
- BH B Hogan
- Pat Pat Fahrenfort (Secretary)
- WB W Botha
- JSE Johannesburg Stock Exchange
- GM G Marcus

CASSETTE ONE

- RD Transnet is included at the end - this document that you've got. So that's what we're dealing with this morning - sorry did I say COSAB - the JSE - sorry, its the J - sorry Ken wasn't - Ken we've decided we've got representatives of all the parties of the currently participating in parliament and on this committee. So we're starting with 15 minutes of business
- KA There's a bus broken down on de Waal Drive and turned right at Rondebosch
- RD WE can say that this morning we've got - COSAB is not coming, we've got the JSE. We seem to have a very specific submission which is a reaction to what Transnet said about the Financial Services Board and I think we may dispense with that very quickly. Then this afternoon we've got the nominees, experts, the panel of them, some of them only 4 of them who are going to come along and basically give us a 10 minute in put each on the issues which we've been discussing and then we can interact with them. So we'd have if you want as well as specific submissions, we've now got a kind of an expert.
- PW But may I ask, sorry to interrupt, explain to us more about this experts, what are they going to do, will they deal with a whole spectrum or with specific issues, each one or how are they going about -
- RD Well I think we've told them what we want in this block and we've asked them to make what ever input they feel they want to make about the issues which we're dealing with in this

block okay. What we're in the phase now is that the party submissions on the 22nd of February, Pat can just tell you which ones came in. I think most of them came in, we haven't got them yet circulated but that should happen fairly soon.

Pat Well, there's ANC, DP, em

PW National Party submitted ...

RD Ya there was a two page thing on the NP, I don't know if the Freedom Front

Pat Oh that's right, sorry

RD Everybody except IFP has put something in on the deadline. Those will be circulated as soon as possible. Now I have to move into the phase of preparing our report which I think is due in - I think was the 15th March and what I am proposing is the following, that next week on the 6th, whether its in the morning or the afternoon will depend on the - whether there's a CA next week which Pat will find out. What we will do is we will - are you from the JSE - okay we're doing about 10, 15 minutes - you can sit here, its nothing secret

PW Don't go to the press on it

BH Is that your job

PW That's my job

RD Next week we will have on the 6th of March we will have COSAB, others that were pending that we already took decisions about who wanted to come, we said we would hear them and include the Conservative Party and others, now if they don't make that slot, they effectively - we'd miss them out. The 13th of March, the week after that, I propose that we have a meeting where we'll discuss the report. The report will be drafted in the first - 13th of March. The report from the Committee will be drafted in the first instance by experts, perhaps our experts, you know they can - there's some fairly strict guidelines on what they're supposed to do with me and if Gavin Woods comes back and secretary can meet with the two of us and you know we can just brief them on anything which we may have done which they weren't at. But essentially there's a fairly strict guideline on what the report should include. Cyrus knows about it. Its supposed to be to identify contentious and non-contentious issues and things of that sort - there's a format for that. What I'm proposing that on the 13th of March we have a business meeting which should be circulated well in advance of that and that we actually go through the report and that is our report from the committee, the first cycle of our work and that we then move on into the FFC and Public Enterprises and any other questions around financial institutions which may arise. On the following week, the 20th that is, falls within the week of intense activity of Finance Committee so I think we will not have a meeting on the 20th on that Monday that will be available for the finance committee. On the 27th of March we would meet again and I'm going to ask Pat to follow up. I'm proposing that we ask the FFC itself to make a formal submission. That gives us quite a lot of time. They have been promising us a submission. That we start off

with a formal submission from the FFC and we hope we can meet perhaps more than one of the members of the FFC that day. So that's the proposed sort of work for the next few weeks, is that acceptable to people.

KA May I just - that's entirely acceptable. May I just ask, can we please try to schedule our meeting, that we generally have, but that we co-incide with the location for the Theme Committee 6.

RD Yes we'll try to do that. This morning we were stuck with having - this morning and an afternoon session. But yes we'll generally try to do that. Pat will just find out if there's a CA that meets in the afternoon then we'll obviously have to meet in the morning. But otherwise we will meet when its scheduled for.

KA Ya because I've always - when you moved out of that slot and I'm on the Core Group of Theme Committee 3 and I've got to go to that meeting half past nine, its not possible to be there

RD Okay we'll do that and Pat will -

WB Can I make a special request, on the 13th, myself and my alternative - we're overseas. That is the date on which you discuss the report. You said that you will like to make it available far in advance. If possible, if we can have it by that Tuesday the 7th will enable us to make written input if necessary.

RD I'll have to talk to the people who are going to draft it and see if they can manage that. But we'll bear that in mind and we'll try to accommodate you as much as we can. Okay. The other thing is then, the only other piece of business is to adopt minutes, the minutes of the 14th and the 20th, I don't now if they've all been circulated to everybody but they're in your pack. Let me just say on the minutes that you'll recall that there was a proposal from the Sub-committee - it came from Ken initially that we should just say that so and so spoke. This was taken up in the Theme committee and they said to us in view of the fact that there are so many diversities that they actually did want a small summary. So we will ask to keep the minutes as they have been rather than just a very kind of brief recording that somebody had spoken. and so that is - that has happened in the SACOB. I don't know if anybody has any problems with those minutes, I can sign them.

KA May I - the minutes of the 20th - just in terms of standardization em, why has an addendum to the minutes of the SACP, thing we get their presentation included and having to omit the SACOB one, their submission is not included. Surely we should either be including in our minutes all the - certainly you know when the people give their written

submission

Pat For the report I included the SACP because I had somebody - that if you wanted to actually include a submission I would include it

RD No, I think it should be the other way round, I think we should take that out. I think the submission is in other documentation. And that we just need to - this minute of the 14th is the minute of the style that we agreed on in sub-committee and now we've gone back to the original style. I think we just have to look at it and I don't think that any submission goes as an annexure, just to take out that sentence and then - okay. Okay is that acceptable then. I think all the business and I think we're now ready to get on what we're actually here for. We've got Mr Peter Leon, he's an attorney from .. Wentzel and he's representing the Johannesburg Stock Exchange. They made a particular written submission which is right at the end of the documents here. The model Mr Leon which you've been following is that we ask people to give us a presentation of about 10 minutes just to cover what you're saying, the main points you want to highlight for the committee, sub-committee, and then we're open to questions and normally the sessions would last for a maximum of about 3 quarters of an hour. So without any further ado Mr Leon over to you and welcome to the Sub-committee.

JSE Thank you chair and thank you for this opportunity for allowing the JSE through me to address you. Chair the submission which we put in to you was sent in on the 16th of February. I'm going to really highlight what I think the major issues flow from it. Can I start off by saying the JSE made this submission as a result of a submission which was made to you the Deputy Treasurer I think it was of Transnet who gave evidence here on the 9th of February where Transnet's position was the constitution could be thing where there were two aims as I understood it. The one is that it was according to entrenched constitutionally the independence of the Reserve Bank and also to entrench constitutionally the independence of other bodies which involved in financial services regulations in South Africa. Now on the first issue of the constitutionality of the Reserve Bank then they will be a very powerful argument why that independence should be entrenched constitutionally if one looks at the ... or the Federal Reserve in America. But that's not what I'm here to address you on. The issues that concerns the JSE is the desirability or otherwise of constitutionally entrenching the independence of the Financial services Board. Mr Chair it goes further than that because as will appear from the submission I will make now that JSE not only believes that the FSB and clearly you must hear from them Mr Badenhorst should not be constitutionally entrenched. We go further than saying the

architecture -

PW Just repeat that

JSE WE say that not only should the independence of Financial Services Board not be constitutionally entrenched, we go further than that that the architecture of the Financial Services Board act is so defective that in fact what has happened in South African financial services regulation is that effective ministerial control over the financial services board has been removed and has been replaced by what we call a metaphor in privatise regulation and obviously the Financial Services Board will disagree with that submission. that you or the sub-committee chair is really a constitutional theme subcommittee and so the issue I'd like to address you on is the issue of the division of the separation of powers and the blurring of functions which results from the situation where one blurs the distinction between legislative and executive powers and one sees this in the Financial Services Board Act and really in what is flowing from the van der Horst Committee report. If I could just briefly then and its touched on in this submission, deal with the van der Horst Committee Report chair, in case some members are not aware of what its really trying to do, in 1988 as a result of the collapse of the AA Mutual, the former government set up a commission under the chairmanship of Mr Justice Malamet to look at inter alia what had caused the collapse of the AA Mutual and to make recommendations about the Financial Institutions of this which then fell under the control of the Department of Finance. That committee was chaired by Mr Jan van der Horst who was then chair of the Old Mutual, Mr Badenhorst the secretary of the committee and various other notables were on the committee. The key thing of that report came with was the need to do something about the lack of suitable staff within the office of the financial institutions office. In other words what van der Horst said is that there was acute shortage of manpower in the FIO. And that could be resolved in - and there was absolute unanimity about this from the committee which the government accepted by taking the FIO out of the civil service and putting it into a - what was known a statutory which would report to and be responsible to the minister of finance. That was really an uncontroversial recommendation and all the recommendations of the van der Horst committee were in my view and JSEs were very sensible on that, the former president of the JSE was a member of that committee. But the key things that flowed out of van der Horst was one that statutory body would be responsible to the minister of finance. Secondly that supervision itself is the responsibility of the state. Thirdly that it was necessary take the remuneration salary structure of the FIO outside the civil service and that was the idea behind the statutory body. Fourthly, the board should appoint the executive officer and that the administration of the

financial institution should be controlled by the board. And then finally and I think most importantly that the FSB then became a statutory body to the - we didn't have a name at that stage, would be financed by levies on financial institutions and partly financed by the state. But that the van der Horst saw that the basis of the statutory body's income would flow from the financial institutions concerned and there was an international precedence for that if one looks at organisations like the Securities Investment Board in the United Kingdom. So - I mean that was the - that was really in a nutshell the genesis of the FSB. So in 1990 the Financial Services Board came into being and Mr Badenhorst was appointed Executive Officer, Judge Malamet became the chairman. Em now that the - the problem is, and this is where we differ from the Financial Services Board. The Act that was created as a result of van der Horst differed from what van der Horst had itself recommended. Chair I was just going to draw your attention to a number of features that I think are very relevant here. And I appreciate that you don't have the act in front of you, the first is that we look at the functions of the board section 3 and the act has been amended since it was passed in 1990, 3 or 4 times, the functions of the board says first of all in section 3 that the function of the board are to supervise the exercise of control in terms of any law over the activities of financial institutions and over financial services. And you can see for that chair immediately the minister - its not a subject or any override by the minister. That's a very, very significant point. And although it has to advise the minister on that is concerned of financial institutions, that's the second part of the entire information, the first part. That's the - so the idea of ministerial responsibility is not even in the enabling clause. Em it - I'm afraid gets worse than that because the second aspect of the FSB act is that the executive of the board catch and functions on behalf the board between board meetings which means in reality the executive board which is the executive officer and his staff in reality run the board in between board meetings might not be a very good reason of delegation for that. But that effectively means is that the professional staff of the board to all intents and purposes represent the board.

Em, the next aspect of the FSB act to which we draw attention is the fact that the - under section 12 of the Act which is the general powers of the board, the board has very wide powers, not only to buy and own property but to enter into agreements with persons to appoint officers and to the catch or provisions to do anything which is necessary or expedient before its functions as Section 12(3)(f). The executive officer in terms of section 13 is entitled to perform functions entrusted to him by or in terms of this or any other act, and again chair, I draw attention to the fact that

there's no issue here in section 13 subject to any directions or any control by the minister of finance. Em if one looks at section 14 of the act, one sees that the remuneration of the staff of the board is determined by the board itself. Chair that goes against - this section was amended in 1992, that goes against van der Horst recommendation that the state will have some - the minister will have some input into what salaries would be paid. Well, I mean everybody accepts that one has to pay members of the FSB market related salaries. The fact is that neither the institutions who are regulated, who are paying the levies, nor the minister has been an input in this regard. So the board can basically set what are the salaries it determines. And the point is, that there was a ministerial control until 1992 which has now disappeared. If one goes onto 15a the act was still levies one - this is the basis on which the board derives its income which is obviously very important, the JSE accepts that levy should be made - should be placed on financial institutions to finance the board but the problem is, there are two issues here. The one is that previously before the section was amended in 1992, there had to be first of all er consultation with the minister which has disappeared so now the board can levy whatever - place whatever it deems fit, secondly, up until 1992 the state made some contribution towards the income of the board. So now the situation is the board can determine only so and so and can also determine whatever levies they can charge the financial institutions. There's no consultation with the minister and I may say no consultation with the tax payers which effectively the financial institutions concerned - and if you look at section 16 of the act which is the funds of the board one sees the provisions which provide the contribution by the state have actually been removed. They were removed in 1992 by act 41 of 1992. Lastly, sorry, not quite lastly but the accounting responsibility - in 1992 the financial services board tried to remove the control of the auditor general over the board after vociferous opposition from the JSE and the ... Association, we insisted in the standing committee on finance then existed with that staying in the act and still there. But I just draw attention to it. For example that's a very undesirable principle. But the key thing in section 18 which is consultation with the minister, our submission is that this is defective as well because the board is obliged and it says that the board must consult with the minister on such matters as the minister may determine from time to time and it then says the executive officer shall directly consult with the minister in connection with any other matter he or she wishes to bring to the attention of the minister. But the problem about that chair is that its too vague. I mean our submission is that there should be an obligation on the board to consult with the minister on a wide variety of matters. There's no such obligation. Its basically when the minister determines from time to time and the minister wants to bring such

attention to the board, but that's defective because the minister is a very busy man, he's not always going to be - want to bring things to the attention of the board. So we suggest that that is looked at as well. Em the other aspect of the act which is defective on our submission is the requirement of the annual report. And I think this will interest all the members of this sub-committee and that is really an issue - van der Horst specifically recommended on page 11 recommendation a that there had to be an annual report in parliament. Because that's - I mean all part of the good governance, separation of powers, or the constitutional principles of all we talked. But when you look at section 21 there's no annual report to parliament. And there's an annual report for the minister. And chair our submission is that is also very defective. Ministers are under no obligation to table that annual report and so MPs and senators for that matter will have no idea necessarily unless they ask for it, what the board was doing. Em and this is all part of the fact that this is a - in our submission a defective act which doesn't fully implement the van der Horst committee recommendations and clearly needs to be looked at. Em now the - em the quote I would also like to make to you chair, is that - and I'm not going to go into detail of it because time doesn't permit me, but if one looks at the various statutes which the board administers, for example, the financial markets control act, em which deals with the non-equity markets on the JSE, in other words the South African future exchange and .. market Association, there are a number of provisions in that act and I'm specifically talking to that act and not the act that concerns the stock exchange, the Stock Exchange Control Act, where powers were given to the registrar for which the executive officer, which in our view should be given to the minister, for example, in and we're talking about the Futures Exchange and non-equity markets, there are powers given to the registrar to declare instruments, financial instruments which could be traded on Safex, those powers given to the registrar are not for the minister and you know - if one goes back to the core recommendation of van der Horst, all van der Horst was saying and he had private and public sector people on the committee with him, he's for ever saying take the FIO outside the civil service but didn't mean that you took, replaced the registrar for the minister. And if you look at the FMCA and .. and that's an older act so this one's more relevant, the FMCA act is a 1989 act, em instruments, are declared by the registrar. Em it goes further than that. The advisory board sets up the act in terms of section 3 has to advise not the minister but the registrar. Er the registrar is responsible also for the work of the - the administrative work of the advisory board which means ... chair that the board will not be independent because once you - once the secretarial work is performed by the registrar, the advisory board is really at

the mercy of the registrar in terms of its agendas and minutes and things like that. Em this - and this is the key thing, the list of the financial instruments which is maintained by the financial, part of the financial market that says that an executive committee of financial committee should keep a list not approved by the minister but approved by the registrar. Now that's section 14. So in this pattern recurs right through the act. Em in 1993 just as on aside there was a proposal by the FSV to remove the minister in almost entirely from all financial services legislation and replace him with the FSB or body which will be known as the Financial Investment Services Commission based on the FSA legislation. Even that was opposed by the JSE and LOA was dropped but all its saying chair that once these bodies are created, they tend to take on a life of their own - a momentum of their own and as they become more and more resourced, they will effectively become the master of the entity to which they're supposed to be a servant. I think that's true of any bureaucracy. Em - so those are the elements of the FSB, that the - the JSE really as it were constitutional submissions are really the following. The first is that we think that the em the principle we now have in South Africa with the FSB and its relationship with the minister of finance undermines the very core principle of constitutional law which is a principle of ministerial accountability to parliament. Because how can the minister of finance be properly be accountable to parliament if in reality meaning if his or her might be his functions are taken over by the FSB. And it leads to a second problem chair, and that is the old problem of power without responsibility which I think you'll see here with the FSB particularly by virtue of the fact that the FSB doesn't even have to report to parliament, it only has to report to the minister. And I really - our key submissions is that the public policy of recommendation is not an issue which can be privatised. Because legislation always reflects the public policy of the government of the day. And what you have here is that that was the first submission I made is a blurring of the legislative in the executive functions is not always clear whether the FSB is operating as a legislative power of government or the executive of government, its doing more. Our submission is its doing more than simply administer acts in a way that civil servants administer acts. We're not saying there isn't a situation where one should not allow either the minister or the FSB for that matter to delegate its functions. But what we're saying is that there should be delegation, not application. And in many respects the act that one sees in these statutes is effectively the minister is being replaced by the FSB. And you know its really the issue of the distinction between making public policy which we regard as the preserve of the executive and the political function and implement public policy which is the job of the civil service and the permanent bureaucracy. If you blur those functions, then our submission is that the

checks and balances one has between the legislature and the executive becomes confused with an inimical effect over all. Now its - and I think I need to draw this to your attention because we did a lot of research on this a little while ago is that the concept of the FSB is not without international prestige. If one looks at countries which I think - good models for us in financial services legislation, like Australia, United Kingdom or Canada, one sees to a greater or lesser extent, similar bodies because they - all those countries which are more sophisticated than South Africa and in some respects have had the same problem that if you allow the - if you keep financial services regulations simply within the civil service, one cannot afford to pay those regulators market related salaries. So you actually need to do something about it - put in an apology of regulation. But if you look at as I say if you look at Australia, they have a body called the office of the insurance ... commissioner which was set up outside the discipline of the treasury which deals with the exercise of the regulation powers. But the regulatory power itself still vests in the minister. So that Australia does not seem to have the same problems that we have in South Africa. If you look at perhaps the model which is closer to the South African model with some respects which is the Securities and Investment Board set up under the financial services act in 1986 in England, and although em a number of powers have been delegated by the secretary of state for trade and industry to the board, certain powers have been retained by the secretary of state and more importantly, the powers which are delegated can be returned or under certain conditions by the SIB to the secretary of state em and that is for example if the board is not performing properly or various other issues which would trigger that returned power. So that's a model which we might look at as well. And thirdly the Canadian example, the Canadians have an office called OFSI - Office of the Superintendent of Financial Institutions em that body again similar to the FSB is first of all quite important just on a regular basis. But more importantly again I think its a model that could be looked at in South Africa. The OFSI requires the minister's consent before it can do a number of things. So while you know the powers of certain powers are formerly invested in the office, the reality is that the ... against ministerial consent. And that body unlike ours deals with that ... I think chair .. bank supervision is not vested in the financial services board. Financial Services Board only exercises supervision over the stock exchange, the regulated financial markets, the unit trust industry, the pension fund industry and of course most important of all the insurance industry. But that supervision falls under the office of the registrar of banks and the bank supervision departments in the South African Reserve Bank. So the chair just in conclusion I know I might have exceeded my time but in conclusion our submission is that the constitutionality the constitution

entrenchment of financial services board is undesirable, we think that would create more problem than it might resolve and secondly and I know this will have to be a condition which Ms Marcus' committee would have to look at. The present situation where powers shared between the minister of financial services board under the FSB act, a lot of the powers is given to the FSB directly under that act the ministers powers have been attenuated under that act, we submit needs to be looked at, thank you.

RD Okay thank you very much Mr Leon. I think that there's just two points before we go into the debate. Em I think that Mr Leon made all these comments on the FSB act as a way of emphasising the central point was that which the autonomy of the FSB as its currently structured should not be constitutionally entrenched. I think we should realise that we are a constitutional committee and we are not amending, talking about amending the FSB act itself. So when we discuss the FSB act we should discuss it in the same kind of way that Mr Leon did. The second thing before I throw it open to comment because I think it might just be worthwhile reminding ourselves of what it was that Transnet said and I'll just read the operative paragraph from their submission by Mr van Schoor which was placed before us by Mr Hercu Bloom. Their submission reads and this is the paragraph: "any other provisions relating to financial institutions, it may be necessary to refer to the regulation of banks act. It is however highly recommended that independent nature of financial institutions be protected by the constitution. The establishment and existence of other controlling bodies like the financial services board which has the role of an umbrella body for all financial market participants may be acknowledged as well". So that's exactly what they said rather than what Business Day said. But any way its now open for members of the Committee. Dr Welgemoed.

PW Mr chairman I would like some advice from the word go. In this document, presentation given to us by MR Leon, now that is a question I would like to ask. Ms Marcus must tell us, must be not from this committee, also refer just to her committee that we received it, and that she must have a look at the act. That is the question I am asking. Is that the way we can deal with the problem. I know, I was sitting in cabinet in those days and I had also problems with certain issues with my friend Derek Keyes with that act but that is another fight that was somewhere else. As I had fights with the delegated role fund, where I was the only single voice in the desert. But that's also another - but while we got it now back that is a disagreement from people in front of us. The question I'm asking, must we not decide there's a constitutional committee, the word constitutional committee has really the die ..word. I would like to suggest that we, if we can and if its possible

that we ask if she is here, that she takes it up from us and just deal, I think it is worthwhile just having another look from that committee. Because what they decide I would like to hear back that she report back then to us. The viewpoint of that committee as well on this whole issue. Because we've got two really opposite viewpoints at the moment. And I would like to hear what is the viewpoint of the portfolio committee, is that right one. Because Portfolio committee of finance says about this, that's the first point. I'm asking if that is possible. That is my first question, I'll carry on after we discuss this.

RD Can I just say that em I think we discussed as a subcommittee when we had the presentation from SACOB that there were various items that fell out of our purviews of the constitutional committee that we would refer, before we refer and we ask that be done, if it hasn't already been done we referred their submission to the finance committee. I think we can also agree to refer this submission to the finance committee. I have no problem with that. I think we should not say that our decision is dependent on what the finance committee does however. So I think we just agree that we refer this as it raises issues which fall within the purview of the finance committee and I think we should do this formally even though the chairperson happens to be in this committee as well. But we will do that. But nonetheless there is the constitutional point which we need to deal with and you want - carry on -

PW Then secondly, I do agree with you we're not, we will take note of their views but we were not - we will not be bound by their views and that they report -

GM I wouldn't want it to be looked at that you take note of my views because you're reporting by the 15th and we won't necessarily have an opportunity as a committee to discuss it before that. So I think the question should be as the chairperson said, its referred to us. I think we would take it seriously but I'm not sure that we would be able to do it prior to your report going off.

PW But Mr Chairman as far as I know that financial institutions if you do it in the last part in the 26th of June July somewhere there, isn't that - let's say in our second group to be discussed by the -

RD Well in fact we can deal with any other proposals in that block. So if there was a proposal for dealing with constitutional provisions around other institutions I think we could deal with it in that block. But I think that none the less I mean its up to the finance committee how it wants to deal with it, if it wants to deal with it at all. But I don't

think we can say that we are dependent on a report from them. They may or may not want to deal with it. I think all we can do as a subcommittee is to refer it. And you know we ourselves I think have to deal largely with the constitution implications. I think we've had one argument which has come from Transnet and we've another argument which has now come from the JSE. I think we're going to have to weigh them up and see if there's any other arguments that you want to take on board. Do you want to carry on. Have you got another -

PW I want to come now to what we are here for today. I would like to ask Mr Leon as a legal - I do - in which way, let me put it this way, in which way he would like if we accept - let's say we accept it, that we must put something in the constitution from Financial Institutions. Must it be - the question I would like ask is it a broad type of article that you would like to see or is it one that deals only with the financial board specifically in the constitution, if we decide, we're not yet in a position where we can we want to make it, but what are your views on it, must it cover everything in the financial work or are you for it that it must be more specific. For example, the JSE, then later on let's say the banks and another one, the pension funds and life saving associations in another one etc or do you think it must be one sentence covering all financial institutions in this country.

JSE Thank you chair. Chair that's an interesting question. Em I have in mind - my inclination would be to say that one would require some broad formulation in the constitution that - you know one has to be careful here because if you look, you're dealing with - even with the Stock Exchange, that's not always appreciated, one's dealing with an institution which really, although it operates in the public law field, its essentially the private sector. I mean the JSE is not a statutory body, one needs to bear that in mind. Its - the Stock Exchange Control act is a licence act statute and its a licence body under that statute. So you're not dealing with a public sector or authority of something like that although it does exercise a very powers over listed companies and over stock brokers and issues like that. So coming back to Dr Welgemoed's comment I would have thought that if you're going to deal with it, I'm not sure how you would deal with it in the constitution. It should be done in a fairly general way without getting into the business specifics because all you're trying to - I assume all you're trying to protect is the continuation of those institutions that for example, I think this might be a controversial point, I mean I don't speak for the banks but you might want a provision in the constitution depending on your economic philosophy, the banks shouldn't be nationalised. This is nothing to do with Stock exchange which protects independence of the banks. ... reserve bank - not the independence ,really the economic independence of the banks.

But that would depend on the political philosophy of this committee. I obviously can't speak to that. But I do want to say, unless you're dealing with the regulators which the financial services board and banks supervision which is the banking regulator and the financial markets regulator, any of the other bodies are ... in the private sector, if they exercise some public authority, so one needs to bear that in mind before one makes any recommendations.

RD Is the JSE calling for any such clause, a clause in the constitution. For example if you say protecting the banks against nationalisation. Is it calling for any such clause or is it seen in the Bill of Rights and so and so forth in that regard or what.

JSE Chair, we have not formulated any view on that. I have to go back to my constituency as it were and get a view on that. I think that as a lawyer that I would advise the JSE that there are rights in the constitution which the banks would have JSE - well the JSE's rights in the constitution are not clear. The banks position would be different from the Stock Exchange - would be slightly different to the Stock Exchange because they created out of the banks act - although again they're not statutory bodies, the Stock Exchange is simply licensed under an act. and that is an issue we need to look at.

PW Sorry can I just follow from - you see

RD Is that a follow up

PW Yes a follow up you see, that's why I'm asking you. Stupid economists do not understand and I am a stupid economist. I do not understand. You see we are working with the JSE as an example. And the JSE has got such an influence in our total economy and also what people think of this economy. That you can't really say yes that the stock exchange is a character and the banks a b character and the life insurance industry is a c character and that's why I'm asking you and we don't want to put ... we know you are here on behalf of the JSE. But while we've got you here let's use your brain. Is the big problem is how must we accommodate - that's why I'm coming back to my first question, how do we accommodate if we're going to accommodate. And I would like to ask Mr chairman if it is possible that you want to go back and think about again and submit another addendum in your report ... on these issues.

RD Okay Barbara Hogan is next

BH I'm concerned about the notion that the - because the academy called financial institutions that we must immediately ... to see what we do about a constitution ... I think as its here pointed out the financial institutions covers a broad spectrum

of bodies. And I would say that at this stage we need to deal only with the identifications of the constitution and not into every aspect of financial institutions. I also think a covering - covering institutions is meaningless from a constitutional point of view. I mean I just think we need to be specific. And as about the financial services board, my personal feeling is that it should not be incorporated in the constitution, any comment on that. That's an issue to be dealt with on legislation.

RD I think I'll take a couple of inputs here and then you respond to that. There's Willy Botha and then there's Gill Marcus.

CASSETTE TWO

WB ... what I'm going to say now that financial services for - the important function is to exercise control over the activities on the institutions falling under it. Now we have empowered the FSB to pay market related salaries etc, etc, Now it seems to me that they have difficulties in doing the job properly if you look at the latest Owen Williams by ... if I can call it like that where about or the participation bonds are in the arrears, some of the participants finding out now for the first time that bonds are in the arrears etc and I get the feeling that despite they being empowered to employ suitable personnel, its not the solution to the problem. We still get this problems - what can we do about it, because I don't think that its painting a good picture of the economy if things like this happens.

JSE Mr chair if I can just respond to Dr Welgemoed before I deal with Mr Botha's comment. I just want to make one comment. I think Dr Welgemoed's suggestion that we with your permission ... a further submission on the position of the JSE under the constitutional ... is adequately ... But I just want to make one point that we - and we have looked at this from the Stock Exchange - the Stock Exchange's position on the constitutions is extremely unclear, that whether or not it is a body which falls within the constitutional view and what position it has on the constitution, although juristic persons have rights on the constitution in terms of chapter 3 of the constitution, its not clear whether or not the Stock Exchange vis-a-vis its members in outside bodies falls within the chapter - before chapter 3 of the constitution because its not a statutory body. That's the problems. As I said earlier its a body .. a license under a licensing act which is the Stock Exchange control act, so that position is a bit blurred. WE need to consider whether or not we are going to ask for a constitutional entrenchment of the JSE then I need to know from Dr Welgemoed what he was thinking of in particular. Not speaking as a lawyer but speaking as economist.

PW I don't think the power is the opposite, we are asking questions Mr chairman - you must protect me, I haven't got anything particular in mind. What I would like to hear - I would like hear as many view points on this issue and then I would like to make up my mind, what we will discuss from our side in this committee whether we discuss the report that we would like to send through to the constitution on the ... What I'm trying to ask you is, give me your views as broad as possible. That will help me to make up my mind what you want in the - that is why I ask Mr Chairman to rule that you can submit later on

RD Let me just say the following, we are in the midst of our first cycle of work which particularly concerns issues like the Reserve Bank, the Auditor General and so on, the issue cropped up as an addendum to the submission which is in principle dealing with those issues. We are going to be dealing at the end of our cycle of work which deals with the finance and fiscal commission with any other proposals which may come up for constitutional provisions. Now you are welcome to give us another submission which would deal with any other proposals on financial institutions and public enterprises which you think should be included in the constitution with the motivation as to why they ... a general clause, what it should be, what its content should be - that you are welcome to do that. Not specifically I think in response to anything that's been said to you by the committee here but because you feel from your own point of view that you want to do something, that's basically what we want from organisations in society in general. I don't know if you want to respond now to Mr Botha's question, okay.

JSE Sorry Mr Chairman, when will that - when will you need that response by?

RD Well, we're probably going to put another ad out at some stage but we have a dead line which goes into June. So there's a little bit of time now. Say if it could come in the next three or 4 weeks it will probably be good time for us to consider it.

JSE Sorry to have kept Mr Botha waiting for a response. Mr Botha's raised a very important point here and has raised it in relation ... the same point could be made in relation to Masterbond which is in the memory in many people and the issue has not gone away. You see the problem is that although the van der Horst committee in 1989 recommended successful, recommended government that the FSB - that ... taken out of the civil service with market related salaries would be paid to the FSB staff and those salaries are paid. The biggest I think weakness in relation to the FSB is that although it is paying those salaries, in fact all that has happened is most

of the FSB staff are people who were with the civil service, who are now in FSB, who are now being paid more. And so the FSB had not succeeded in its basic aim of attracting people from the private sector into the FSB. To me chair, and this I want to - to make this point, is not the JSE's submission, this is my own view as somebody involved in the financial services business, is that to me that is the biggest, my personal view is that its the biggest failure of the FSB as the entity, is that it has not succeeded in attracting top quality people, the calibre of people from the private sector, that's not to say that people working in the FSB aren't competent or are inadequate or any of those things. I'm not making that submission. The point is that most of the senior staff at the FSB are from the ranks of the civil service. There are exceptions - there are actually people like that. So until the FSB is in a situation like the Securities Investment Board where its main consists of private sector experts it will not succeed in its main goal which is to be a financial regulator, financial services supervisor which has people coming from the private sector or economics or any of those disciplines which are very irrelevant to financial services supervision. And so to answer Mr Botha's point that that is the problem the FSB has. Well its staff - I think the staff .. is adequate. They haven't succeeded in that ...

RD I just wanted to say one thing from the chair. I think that we've had an extremely important submission here from an extremely important role player in society. And what's happened is I think the press has been advised of this meeting but er one of our friends of the press has been able to get here. Em and I think he missed any way one quite important decision which we took as a committee. So I'm just going to repeat what we did. That the ... of the representation here is to suggest that the constitution entrenched that of the independence of the FSB as it stands is inappropriate because of the grey problems in the FSB act - that there was a lot of discussion around that submission. And what we decided to do as a committee was to refer - formerly refer the submission to the standing committee on finance - portfolio committee on finance for it to take on board the points which were made about the FSB Act. We're a constitutional committee so we'll do that. and I think that it was a very important submission that we had here today and I thank Mr Leon for it very much. Unless there are - perhaps any body - can I just remind members of the committee that we are meeting in Room E249 at 2 o'clock where we will hear our panel of experts on the matters which we've been dealing with as a sub-committee. So until 2 o'clock thank you very much.

Transcriber: Pat Fahrenfort