

REPUBLIC OF SOUTH AFRICA

**SOUTH AFRICAN NATIONAL
WATER RESOURCES
INFRASTRUCTURE AGENCY
LIMITED BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 30827 of 29 February 2008)
(The English text is the official text of the Bill)*

(MINISTER OF WATER AFFAIRS AND FORESTRY)

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BILL

To provide for the incorporation and establishment of the South African National Water Resources Infrastructure Agency Limited as a juristic person owned and controlled by the State to administer, fund, finance, provide, operate, maintain and provide advisory services in respect of national water resources infrastructure in accordance with section 27(1)(b) of the Constitution and national policy; to provide for the transfer of assets and certain liabilities to the South African National Water Resources Infrastructure Agency Limited from the Trans-Caledon Tunnel Authority; to provide for the disestablishment of the Trans-Caledon Tunnel Authority; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING—

- that National Government is responsible for and has authority over the nation's water resources and its use;

ACKNOWLEDGING—

- that it is necessary to ensure that, in relation to water resources development at national level, the required national water resources infrastructure must be developed, operated and maintained efficiently and effectively in a sustainable, equitable and reliable manner in order to make water available to water users and to water management institutions for further distribution;
- that the current water resources infrastructure asset base and associated revenue stream could be better utilised to procure funding for the development, operation and maintenance of water resources infrastructure required for meeting social needs; and

RECOGNISING—

- that a juristic person owned by the State to administer, fund, finance, implement, develop, alter, maintain, rehabilitate, refurbish, operate and manage the national water resources infrastructure, to provide advisory services relating to such infrastructure and to do all things necessary to fulfil the functions entrusted to it under this Act, must be established to meet the obligations as set out in section 27(1)(b) of the Constitution in relation to water,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,
as follows:—

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CHAPTER 1

DEFINITIONS AND PURPOSE

Definitions

1. In this Act, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the National Water Act has the meaning assigned to it in that Act, and—

“**Agency**” means the South African National Water Resources Infrastructure Agency Limited established by section 3;

“**Board**” means the Board contemplated in section 8; 45

“**Chief Executive Officer**” means the Chief Executive Officer appointed in terms of section 23(1);

- “**Chief Financial Officer**” means the Chief Financial Officer contemplated in section 23;
- “**Companies Act**” means the Companies Act, 1973 (Act No. 61 of 1973);
- “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
- “**Department**” means the Department of Water Affairs and Forestry; 5
- “**Government**” means the Government of the Republic of South Africa;
- “**incorporation date**” means the date of incorporation of the Agency as a company in terms of section 3;
- “**Minister**” means the Minister responsible for water affairs and forestry;
- “**National Water Act**” means the National Water Act, 1998 (Act No. 36 of 1998); 10
- “**national water resources infrastructure**” means a government waterwork;
- “**non-treaty functions**” means the functions contemplated in section 103(2) of the National Water Act;
- “**prescribed**” means prescribed by regulation;
- “**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999); 15
- “**public service**” means the public service contemplated in section 8 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);
- “**Registrar of Companies**” means the Registrar of Companies referred to in section 7 of the Companies Act; 20
- “**regulation**” means any regulation made under section 48;
- “**Republic**” means the Republic of South Africa;
- “**subsidiary**” means a subsidiary as contemplated in section 1(3) of the Companies Act;
- “**TCTA**” means the Trans-Caledon Tunnel Authority, a body corporate established in terms of Government Notice No. 2361 dated 12 December 1986, as amended by Government Notice No. 277 dated 24 March 2000, with powers to implement international agreements in terms of section 103 of the National Water Act; 25
- “**this Act**” includes any regulation;
- “**Treaty**” means the Treaty of the Lesotho Highlands Water Project between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho signed on 24 October 1986, including any subsequent amendments; 30
- “**Treaty functions**” means the functions that the TCTA must perform in the Republic in order to implement, operate and maintain the Treaty, which will also be transferred to the Agency upon its incorporation; 35

Purpose of Act

- 2. The purpose of this Act is—
 - (a) to establish a juristic person under the ownership and control of the State in order to acquire, dispose of, fund, provide, maintain, operate, manage and secure funding of national water resources infrastructure in an efficient and cost-effective manner to meet the social and economic developmental needs of current and future users within the framework of national government policy and in accordance with section 27(1)(b) of the Constitution. 40
 - (b) to serve and to achieve the development and transformation objectives of government through representation, service delivery and social and economic development. 45

CHAPTER 2

ESTABLISHMENT OF AGENCY

Establishment of Agency

- 3. (1) There is hereby established a juristic person to be known as the South African National Water Resources Infrastructure Agency Limited. 50
- (2) The Minister must effect the incorporation of the Agency as a company in terms of the Companies Act and in accordance with national government policy, and take all the necessary steps to form this Agency.
- (3) Despite the Companies Act— 55
 - (a) the State is the only member and shareholder of the Agency upon incorporation and at any time thereafter; and

- (b) the Registrar of Companies must, at no cost to the State—
 - (i) register the memorandum and articles of association and all other necessary documents signed by the Minister;
 - (ii) incorporate the Agency as a company under the name “South African National Water Resources Infrastructure Agency Limited”, with the State as the only member and shareholder; and
 - (iii) issue a certificate of incorporation.
- (4) The State’s rights as member and shareholder of the Agency are to be exercised by the Minister.
- (5) The Minister may not, except as provided for in an Act of Parliament, sell or otherwise dispose of any shareholding of the Agency.
- (6) The relationship between the Minister representing the State as the owner, controller, only member and shareholder of the juristic person as described in section 2(a) and the Agency must be defined in a shareholder’s compact entered into between the Minister and the Agency in terms of section 15.
- (7) The Agency is a water management institution contemplated in section 1 of the National Water Act.
- (8) The Public Finance Management Act applies to the Agency.

Memorandum and articles of association of Agency

- 4. (1) The memorandum and articles of association of the Agency must be consistent with this Act.
- (2) Despite the Companies Act, an amendment to the memorandum or articles of association affecting any provision of this Act does not have any legal force and effect unless and until the relevant provision of this Act has been amended accordingly and has come into effect.

Application of Companies Act to Agency

- 5. (1) The Minister on recommendation of the Agency may request the Minister of Trade and Industry to declare a particular provision of the Companies Act not to be applicable to the Agency in addition to those provisions contemplated in section 5(2).
- (2) Sections 32, 44(1), 54(2), 59, 60, 63(2), 64, 66, 172, 190 and 344(b) and (d) of the Companies Act, as well as the provisions contained in the Companies Act in respect of meetings, are not applicable to the Agency.
- (3) (a) A request under subsection (1) must be fully motivated and the Registrar of Companies must publish particulars about the request by notice in the *Gazette*.
- (b) The notice must invite interested parties to submit comments to the Registrar within the time period set out in the notice.
- (c) The Minister of Trade and Industry may, after consideration of the comments received, by notice in the *Gazette* declare the whole or part of the provision concerned not to be applicable to the Agency with effect from the date stipulated in the notice.
- (4) A provision of the Companies Act does not apply to the Agency if—
 - (a) any special or contrary arrangement is provided for in this Act; or
 - (b) the Minister of Trade and Industry has issued a declaration under subsection (1).

Objects of Agency

- 6. (1) The objects of the Agency are to develop and manage infrastructure to—
 - (a) ensure a sustainable, equitable and reliable supply of water from national water resources infrastructure;
 - (b) meet obligations set out in section 27(1)(b) of the Constitution and national and regional social and economic objectives of national policy;
 - (c) utilise its asset base and cash-flow to raise funds to develop infrastructure for social and economic development purposes; and
 - (d) recover in full or in part the costs of infrastructure development, operation and maintenance of the Agency by means of water tariffs and water use charges in alignment with Part 1 of Chapter 5 of the National Water Act.

Functions of Agency

7. (1) The agency must, in order to fulfil its objects—
- (a) develop strategic plans approved by the Minister, taking into account national policy, to provide and maintain national water resources infrastructure that is sustainable, equitable and reliable; 5
 - (b) provide, operate and maintain national water resources infrastructure;
 - (c) secure funding and where necessary the refinancing of national water resources infrastructure;
 - (d) attract, develop and maintain appropriate skills;
 - (e) achieve and sustain efficient and effective water supply to all water users that it supplies and the collection of revenue arising therefrom; 10
 - (f) create jobs in the infrastructure development process in compliance with national policy;
 - (g) manage an asset inventory and information system associated with the infrastructure; 15
 - (h) ensure sustainable, equitable and reliable development;
 - (i) establish compliance, fraud and loss prevention mechanisms to ensure that the integrity of the Agency is maintained;
 - (j) enter into agreements with—
 - (i) water users; and 20
 - (ii) other parties for purposes of maintaining and sustaining reliable water resources infrastructure, where necessary with the approval of the Minister;
 - (k) acquire or dispose of, subject to any applicable legislation, any right in movable or immovable property as may be necessary for the Agency to fulfil its objects and functions; 25
 - (l) perform legal acts, including the instituting or defending of any legal action or collection;
 - (m) obtain by agreement the services of any person, including any organ of state, for the performance of any specific act, task or assignment for and on behalf of the Agency; and 30
 - (n) perform all non-treaty functions that the TCTA had before its dissolution.
- (2) The Agency may by agreement, where directed or mandated by the Minister—
- (a) support the management and administration of water resources infrastructure managed by national water management institutions and water service authorities or national water service providers as defined in the National Water Act and the Water Services Act, 1997 (Act No. 108 of 1997); and 35
 - (b) provide technical, management and financial advisory services, training and other support services to water management institutions, and water services authorities or water services providers as defined in the National Water Act and the Water Services Act, 1997, and to the Department. 40
- (3) In performing its functions the Agency must—
- (a) be customer-orientated;
 - (b) ensure compliance with national policy, including policies on restructuring and the restructuring of assets; and 45
 - (c) act according to its social, economic and constitutional responsibilities in terms of section 27(1)(b) of the Constitution.
- (4) The Agency must perform Treaty functions, requirements, financial and other obligations in accordance with the provisions of the Treaty.
- (5) The Agency must perform any other functions that have been assigned to it in terms of section 103(2) of the National Water Act. 50
- (6) Where the Republic and any other country have entered into an agreement in terms of which the Republic undertakes to assist the other country in connection with the planning, design, construction, operation, management, control, maintenance or rehabilitation of any water resource infrastructure of that country, the Agency may in that other country perform any function or work or undertake any operations with regard to the agreed assistance— 55
- (a) which, in terms of this Act, it is competent to perform or undertake in the Republic, if and to the extent requested thereto by the country concerned or if designated for that purpose by a provision of the agreement to which the government has agreed after consultation with the Agency; and 60

- (b) in accordance with an operating agreement entered into between the Agency, the Government and the government of that other country.
- (7) The Agency may not spend its own funds in performing any function or undertaking any operations in another country but may—
 - (a) charge a fee; 5
 - (b) claim costs; and
 - (c) claim disbursements,
 for so performing, from that country.

CHAPTER 3

GOVERNANCE OF AGENCY 10

Governance and composition of Board

- 8.** (1) The Agency acts through its Board.
- (2) The Board—
 - (a) is the accounting authority of the Agency; and
 - (b) is responsible for the strategic direction of the affairs of the Agency. 15
- (3) The Board of the Agency consists of—
 - (a) not less than seven and not more than nine non-executive and executive members appointed by the Minister; and
 - (b) the Chief Executive Officer, as one of the executive members.
- (4) The Chief Executive Officer is an executive member of the Board by virtue of his or her appointment, but may not be the chairperson or the deputy chairperson of the Board or of any committee constituted under section 16. 20
- (5) The Board must appoint a secretary to the Board who is permanently resident in the Republic and has the requisite knowledge and experience to carry out the duties of the secretary of the company as set out in section 268G of the Companies Act. 25
- (6) The Board may co-opt one or more advisers for their technical skill onto the Board, but such an adviser has no voting rights.

Role of Board

- 9.** The Board must—
 - (a) retain adequate and effective control over the Agency; 30
 - (b) give consideration to and, where appropriate, approve the strategy, policy and systems of the Agency in order to achieve the objects of the Agency;
 - (c) monitor and evaluate the implementation of strategy, policy and corporate plans;
 - (d) implement and monitor performance management systems for employees of the Agency; 35
 - (e) ensure a transparent and effective communication and stakeholder engagement policy;
 - (f) develop a code of conduct for the Board approved by the Minister;
 - (g) provide effective and transparent corporate governance; 40
 - (h) ensure compliance with all applicable laws, regulations, agreements and codes of best business practice; and
 - (i) report to the Minister.

Appointment to Board

- 10.** (1) The Minister must, by notice in two newspapers that have general circulation throughout the national territory of the Republic and by notice in the *Gazette*, invite nominations for members contemplated in section 8(3)(a). 45
- (2) The Minister may establish a committee consisting of the number of persons that the Minister may determine, one of which must be the chairperson, to make recommendations to the Minister for the appointment of members contemplated in section 8(3)(a) from the nominations received pursuant to the invitation in terms of subsection (1). 50
- (3) In establishing a committee, the Minister must ensure that the committee is constituted with special attention to relevant expertise, race, gender, disability and geographical spread. 55

- (4) The committee, in making recommendations to the Minister, must consider—
- (a) the proven skills, knowledge and experience of an applicant on issues of—
 - (i) audit, legal and risk management;
 - (ii) financial management;
 - (iii) integrated water resources infrastructure development and management; 5
 - (iv) social development and poverty eradication;
 - (v) corporate governance compliance;
 - (vi) operation and maintenance of national water resources infrastructure; 10
 - (vii) transformation, diversity and equity; and
 - (viii) environmental management and compliance,
- necessary for the efficient and effective exercising of the Board’s powers and performing its duties; and
- (b) the need for representation by previously disadvantaged persons due to past racial, gender and any other form of discrimination. 15
- (5) The committee, in making recommendations to the Minister, must recommend no less than twice the amount of the prospective number of board members required.
- (6) The Minister is not obliged to appoint members to the Board after considering the recommendations made by the committee, and may call for further nominations in the manner set out in subsection (1) if— 20
- (a) an unsuitable person is nominated; or
 - (b) the required number of persons is not nominated in terms of subsection (2).
- (8) The Minister must, by notice in the *Gazette* and within 30 days after the appointment of the members of the Board, publish the names of members and the date of commencement of their term of office. 25

Chairperson and deputy chairperson

- 11.** (1) The Minister must appoint from the members appointed to the Board a chairperson and a deputy chairperson of the Board.
- (2) (a) If the chairperson of the Board is absent or unable to perform any function of the chairperson, the deputy chairperson acts in the chairperson’s place. 30
 - (b) If both the chairperson and deputy chairperson of the Board are absent or unable to perform any function of the chairperson, the Minister may designate any other member contemplated in section 8(3)(a) to act as chairperson during such absence or incapacity. 35

Term of office and conditions of appointment of non-executive Board members

- 12.** A member contemplated in section 8(3)(a)—
- (a) holds office for a term not exceeding three years on a part-time basis;
 - (b) may be recommended for re-appointment to ensure continuity, but may not serve for more than two consecutive terms; 40
 - (c) are appointed upon such terms and conditions as the Minister may determine; and
 - (d) must be paid from the revenues of the Agency an amount of remuneration and allowances in accordance with a level of remuneration approved by the Minister in consultation with the Minister of Finance. 45

Removal and disqualification of Board member

- 13.** (1) A member contemplated in section 8(3)(a) must cease to be a Board member if the member—
- (a) is removed from office in terms of subsection (3);
 - (b) is disqualified in terms of the Companies Act; 50
 - (c) is convicted of an offence involving dishonesty;
 - (d) is declared to be of unsound mind by a competent court;
 - (e) is declared insolvent or is an unrehabilitated insolvent;
 - (f) is absent from two or more meetings in one calendar year without the chairperson’s permission; 55
 - (g) has acted inappropriately and such conduct brings the Agency into disrepute;
 - (h) has been removed from an office or position of trust; or

- (i) resigns after giving at least 30 days' written notice of resignation to the chairperson.
- (2) The chairperson and deputy chairperson must give written notice of resignation to the Minister.
- (3) The Minister may remove a member of the Board contemplated in section 8(3)(a) 5 from office on sound and compelling grounds.
- (4) The Minister may suspend any member of the Board during any investigation into misconduct or during a misconduct hearing against that member.
- (5) (a) The Minister may on good cause shown dissolve or suspend the Board by way of notice in the *Gazette* and appoint a new Board in accordance with section 10. 10
- (b) If the Board is dissolved in terms of subsection (5)(a), the Minister may in her or his discretion defer the reconstitution of the Board and, in the notice by which the Minister has so dissolved the Board or by any subsequent notice in the *Gazette*, appoint one or more persons, on such conditions as the Minister may think fit, to manage the affairs of the Board until the appointment of the new Board. 15

Filling of vacancies

- 14. (1) Any vacancy on the Board must be filled in the same manner in which the member who vacates the office was appointed.
- (2) In the event of the dismissal of all the members of the Board, the Minister—
 - (a) may appoint persons to act as caretakers until competent persons are 20 appointed in terms of section 10; and
 - (b) must appoint new members in terms of section 10 within three months of the dismissal.

Shareholder's compact

- 15. (1) The Minister and the Board must conclude the shareholder's compact within 25 six months of the appointment of the Board.
- (2) The shareholder's compact must—
 - (a) include the operation and performance indicators against which the performance of the Agency must be measured;
 - (b) must give direction with regard to the utilisation of any surplus revenue; 30
 - (c) must set procedures for reporting to the Minister; and
 - (d) contain such other detail as the Minister may require, including matters to be referred to Minister for approval.

Establishment of committees

- 16. (1) The Board may establish committees if it is necessary in order to support the 35 effective functioning of the Board.
- (2) The Board must—
 - (a) assign members of the Board to serve on a committee, based on their knowledge and skills;
 - (b) determine the— 40
 - (i) terms of reference of a committee;
 - (ii) composition of members of a committee;
 - (iii) tenure of members of a committee;
 - (iv) reporting mechanisms for a committee to the Board; and
 - (v) removal of any member appointed to a committee. 45
- (3) Non-executive members contemplated in section 8(3)(a) must be in the majority on any committee.
- (4) The Board may appoint appropriate specialists for technical support to a committee.
- (5) Unless specially delegated by the Board, a committee has no decision-making 50 powers and may only make recommendations for consideration by the Board.
- (6) A committee must meet as often as is necessary to perform its functions and in accordance with such procedure as the committee may decide.
- (7) A non-executive member contemplated in section 8(3)(a) must be appointed as the chairperson of a committee. 55
- (8) For committee members who are not Board members, remuneration and allowances as set out in section 12(d) apply.

Fiduciary duties of Board members

17. (1) A Board member must perform his or her functions of office in accordance with the fiduciary duties as contemplated in sections 50 and 51 of the Public Finance Management Act and the Companies Act.
- (2) A Board member must at all times exercise the utmost duty of care and diligence in performing a member’s function, and in furtherance of this duty, without limiting its scope, must—
- (a) take reasonable steps to inform himself or herself about the Agency, its business and activities and the circumstances in which it operates;
 - (b) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions;
 - (c) regularly attend all meetings; and
 - (d) exercise an active and independent discretion in respect of all matters to be decided by the Board.
- (3) A Board member must exercise due diligence in relation to the business of, preparation for and attendance at meetings of, the Board and of any committee to which the Board member concerned is appointed.
- (4) A Board member must not exceed the powers provided for in legislation or the articles and memorandum of association of the Agency.
- (5) When the member determines the degree of care and diligence required to be exercised by a Board member, regard must be had to the skills, knowledge or insight required in the circumstances and possessed by that member and to the degree of risk involved in any particular circumstances.
- (6) A Board member may not disclose any information with regard to any matter which may come to his or her knowledge in the performance of any function in terms of this Act or the underlying statutes or by virtue of the office held by him or her except—
- (a) in so far as the Constitution, this Act, the underlying statutes or any other law require or provide for access to information relating to such matter;
 - (b) subject to paragraph (a) in so far as may be necessary for the due and proper performance of any function in terms of this Act or the underlying statutes; or
 - (c) when so ordered by a competent court of law.
- (7) This section must be interpreted as adding to, and not deviating from, any law relating to the criminal or civil liability of a member of a governing body of a corporate body, and it does not prevent any criminal or civil proceedings being instituted in respect of such liability.
- (8) A member who contravenes these provisions is guilty of misconduct and commits an offence.

Disclosure of interest of Board members

18. (1) A member of the Board must upon appointment disclose to the Minister by way of a written statement any interest which could reasonably compromise the Board in the performance of its functions.
- (2) If the Board member is present at a meeting of the Board at which the matter referred to in subsection (1) is to be considered, the Board member must disclose the nature of his or her interest to the meeting immediately before the matter is considered.
- (3) If the Board member is aware that the matter is to be considered at a meeting of the Board at which the Board member does not intend to be present, the Board member must disclose the nature of his or her interest to the chairperson before the meeting is held.
- (4) The Board or committee member with such an interest must withdraw from any further involvement in the discussion of the matter where the member has such an interest.
- (5) Any disclosure made under this section must be noted in the minutes of the relevant meeting of the Board.

Recovery of improper profits

19. If a Board member contravenes section 18, the Agency, or the Minister, may recover from the Board member the equivalent amount paid to that Board member or any other person, through a competent court or by agreement or consent of persons concerned, either or both of the following:

- (a) If any Board member, or any other person, received a benefit either directly or indirectly by the action of the Board member, an amount equal to that benefit; and
- (b) if the Agency has suffered loss or damage as a result of the contravention of section 18, an amount equal to that loss or damage. 5

Validity of decisions

- 20. (1) An act or decision of the Board is not invalid merely because of—
 - (a) a defect or irregularity in, or in connection with, the appointment of a Board member; or
 - (b) a vacancy in the membership of the Board, including a vacancy resulting from the failure to appoint an original Board member. 10
- (2) Anything done by or in relation to a person purporting to act as chairperson or as a Board member is not invalid merely because—
 - (a) an occasion for the person to act had not arisen or had ceased;
 - (b) there was a defect or irregularity in relation to the appointment; or 15
 - (c) the appointment had ceased to have effect.

Delegation of functions by Board

- 21. (1) Subject to subsection (2), the Board by special resolution may delegate any of the functions entrusted to it under this Act—
 - (a) to the Chief Executive Officer; 20
 - (b) to a Board member; or
 - (c) to a committee established under section 16.
- (2) Any power delegated or function assigned must be exercised or performed subject to such conditions as the Board considers necessary.
- (3) The Board may not delegate— 25
 - (a) any power conferred in terms of section 66(6) of the Public Finance Management Act without the authority of the Minister of Finance;
 - (b) the power to appoint an adviser;
 - (c) the power to recommend the Chief Executive Officer;
 - (d) the power to approve the appointment of the Chief Financial Officer; 30
 - (e) the conclusion of the shareholder’s compact; and
 - (f) the adoption of the Agency’s corporate plan.
- (4) Any delegation by the Board—
 - (a) must be in writing; and
 - (b) does not prohibit the Board from exercising the power or performing the duty that is delegated. 35

Meetings of Board

- 22. (1) The Board may determine its own operational proceedings for meetings.
- (2) A quorum for Board meetings shall be provided for in the articles of association.

CHAPTER 4 40

CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER

Appointment of Chief Executive Officer and Chief Financial Officer

- 23. (1) (a) The Minister must, after considering the recommendations of the Board, appoint a Chief Executive Officer within six months of the appointment of the Board to ensure that the Agency meets its objects. 45
- (b) The Board must recommend no less than two persons for the appointment of Chief Executive Officer.
- (c) The Minister may call for further recommendations from the Board—
 - (i) if the recruitment process did not meet the requirements set out in subsection (2)(a); 50
 - (ii) if in the opinion of the Minister, the persons recommended by the Board are not suitable for appointment.

- (2) The Chief Executive Officer must—
 - (a) be appointed after an open and transparent recruitment process;
 - (b) be a fit and proper person with appropriate qualifications and experience to carry out the functions of chief executive officer; and
 - (c) not be disqualified in terms of the Companies Act for appointment as a director. 5
- (3) The Chief Executive Officer must—
 - (a) manage the affairs and day-to-day business of the Agency;
 - (b) implement the policies and strategies and carry out the decisions of the Board;
 - (c) recruit and manage the employees of the Agency; 10
 - (d) develop an efficient and cost-effective administration; and
 - (e) act subject to the general specific instructions and directives that the Board may issue.
- (4) The Chief Executive Officer must, with the approval of the Board, appoint a Chief Financial Officer. 15
- (5) The Chief Financial Officer must—
 - (a) ensure that risk management policies and procedures of the Agency are in place;
 - (b) assist the Board to comply with its responsibilities in terms of the Public Finance Management Act; 20
 - (c) ensure that all money payable to the Agency is properly collected;
 - (d) ensure that all money spent by the Agency is properly spent and authorised;
 - (e) ensure that there is adequate control over all assets acquired for the purposes of the Agency;
 - (f) ensure that all liabilities incurred on behalf of the Agency are properly authorised; 25
 - (g) ensure the efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;
 - (h) ensure that the financial system is in line with generally accepted accounting practices and procedures; and 30
 - (i) ensure that an adequate budgeting and financial system is in place.

Term of office and condition of appointment of Chief Executive Officer and Chief Financial Officer

- 24.** (1) The Chief Executive Officer and the Chief Financial Officer are appointed on a full-time basis for a term not exceeding three years. 35
- (2) The Chief Executive Officer may be re-appointed at the discretion of the Minister on the recommendation of the Board.
- (3) The Chief Financial Officer may be re-appointed at the discretion of the Chief Executive Officer with the approval of the Board.
- (4) (a) The Chief Executive Officer holds office on the terms and conditions, including those relating to remuneration and allowances, as the Minister, after considering the recommendations of the Board and in consultation with the Minister of Finance, may determine in writing. 40
- (b) The Chief Financial Officer holds office on the terms and conditions determined by the Chief Executive Officer with the approval of the Board. 45
- (5) An annual performance agreement must be entered into with the Chief Executive Officer and the Chief Financial Officer, stipulating measurable objectives relating to the performance of that officer’s functions under this Act.
- (6) The Chief Executive Officer is accountable to the Board.
- (7) The Minister may on recommendation of the Board terminate the services of the Chief Executive Officer— 50
 - (a) for any sound and compelling reason;
 - (b) in accordance with fair labour practice; and
 - (c) in terms of his or her contract of employment.

Appointment of acting Chief Executive Officer and Chief Financial Officer

25. (1) If the Chief Executive Officer is absent for a period of more than two months or is unable to carry out her or his duties, or if a vacancy in the office of the Chief Executive Officer exists, the Board may, with the concurrence of the Minister, appoint any person who meets the requirements determined in subsection 23(2) to act as Chief Executive Officer until the Chief Executive Officer is able to resume those functions or until the vacant position of Chief Executive Officer is filled. 5

(2) If the Chief Executive Officer is absent for a period of less than two months the Board may, without the concurrence of the Minister, appoint any person to act as Chief Executive Officer. 10

(3) (a) If the Chief Financial Officer is absent for a period of more than two months or is unable to carry out her or his duties or if there is a vacancy in the Office of the Chief Financial Officer, the Chief Executive Officer may, with the concurrence of the Board, appoint any person who meets the requirements determined in section 24 to act as Chief Financial Officer until the Chief Financial Officer is able to resume the duties. 15

(b) An acting Chief Executive Officer or Chief Financial Officer may exercise all the powers and must perform all the duties of the Chief Executive Officer or Chief Financial Officer, as the case may be.

Interim Chief Executive Officer

26. The Minister may appoint an interim Chief Executive Officer— 20
 (a) until such appointment as contemplated in section 23(1)(a) is executed; or
 (b) when the Chief Executive Officer is suspended as contemplated in section 27.

Suspension from office of Chief Executive Officer

27. The Minister may suspend the Chief Executive Officer from office during any investigation into misconduct against the Chief Executive Officer. 25

Delegation by Chief Executive Officer

28. (1) The Chief Executive Officer may delegate to an employee of the Agency any function entrusted to that office under this Act.

(2) Any delegation— 30
 (a) must be in writing;
 (b) does not prohibit the holder of the office that made the delegation from performing that function; and
 (c) may at any time be withdrawn or amended in writing.

Appointment of employees

29. (1) Subject to the general or special directions of the Board, the Chief Executive Officer may appoint staff for the Agency to perform the work necessary for or arising from the performance of the Agency’s functions in terms of this Act. 35

(2) An employee is employed subject to the terms and conditions determined by the Chief Executive Officer in accordance with labour legislation and any directions set out in subsection (1). 40

CHAPTER 5

FINANCIAL MATTERS, REPORTING AND ACCOUNTABILITY

Financing

30. (1) The funds of the Agency consist of— 45
 (a) monies appropriated by Parliament;
 (b) revenue from water use charges contemplated in Chapter 5 of the National Water Act;
 (c) loans raised;
 (d) income derived by it on investments in terms of subsection (3);
 (e) income derived by it in the performance of its functions; and 50

- (f) donations received by the Agency.
- (2) The Agency must utilise—
 - (a) its funds to cover costs in connection with the performance of its functions in terms of this Act, as well as any additional functions that may be assigned or delegated to it by the Minister from time to time; 5
 - (b) any donation or contribution in accordance with any conditions that may be imposed, provided it is not inconsistent with the purpose of this Act; and
 - (c) any money appropriated under subsection (1)(a) with the prior approval of the Minister for the purpose for which it was granted.
- (3) The Agency may invest any of its funds not immediately required by the Agency, 10 with such directions as the Minister may determine.

Borrowing by Agency

- 31. (1) Subject to the Minister’s approval the Agency may borrow money from any lawful source other than from the National Treasury at the most favourable terms and conditions on which it is able to secure such funding to give effect to the objects and functions of the Agency. 15
- (2) The Agency—
 - (a) may borrow money, subject to the Minister’s approval, for any purpose necessary for the performance of any of its functions; and
 - (b) may use assets of the Agency as security for loans contemplated in this 20 section.
- (3) The Agency must ensure that its obligations under a loan are fulfilled on due date.

Annual budget and corporate plan

- 32. (1) The annual budget and corporate plan of the Agency must be submitted to the Minister, as the owner and controller, for approval. 25
- (2) The financial year of the Agency is for the period 1 April to 31 March in the following year, except that the first financial year of the Agency begins on the incorporation date and ends on 31 March.
- (3) The corporate plan must in addition to the matters specified in the Public Finance Management Act contain— 30
 - (a) financial and performance indicators and targets considered by the Board to be appropriate, based on indicators and targets contained in the shareholder compact;
 - (b) any other information that the Board considers necessary; and
 - (c) such information as may be directed by the Minister. 35
- (4) In preparing or revising a financial and performance indicator and target referred to in subsection (3), the Board must have regard to—
 - (a) the shareholder’s compact entered into with the Minister;
 - (b) the need to maintain the Agency’s financial viability;
 - (c) the need to maintain reserves, at a level determined by the Minister from time 40 to time, especially to provide for—
 - (i) the development of water resources infrastructure as instructed by the Minister;
 - (ii) any estimated future demand for the services of the Agency; and
 - (iii) any need to improve the accessibility of, and performance standards 45 for, the services provided by the Agency;
 - (d) the need to meet the developmental objectives of government and in accordance with section 27(1)(b) of the Constitution; and
 - (e) any other matter determined by the Minister.

Submission of quarterly reports and corporate plans 50

- 33. (1) The Board must submit quarterly reports to the Minister—
 - (a) not later than 60 working days after each quarter; and
 - (b) which must illustrate how national government policy is complied with.
- (2) When the Board revises a corporate plan, it must— 55
 - (a) take national policy into consideration; and
 - (b) within 30 working days make a copy available to the Minister.

- (3) The Minister may—
 - (a) within 60 working days after receiving a copy of a prepared plan; or
 - (b) within 30 working days after receiving a copy of a revised plan,
 make comments on the plan to the Board.
- (4) The Board must consult in good faith with the Minister, following communication to it of the Minister’s comments, and must make any changes to the plan that are agreed upon by the Minister and the Board. 5
- (5) The Minister may, from time to time, direct the Board to include in, or omit from, a corporate plan, any matter, including a financial matter.
- (6) Before giving a directive under this section, the Minister must consult with the Board as to any matter to be included or omitted in the directive. 10
- (7) The Board must comply with a directive given under this section.

Financial statements and annual report

- 34.** (1) The Board must prepare and submit financial statements to the Minister in accordance with established accounting practice, principles and procedures, comprising— 15
 - (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Agency during the preceding financial year;
 - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year. 20
- (2) Within six months after the end of each financial year of the Agency, the Board must prepare and submit to the Minister an annual report in the prescribed form.
- (3) Where required, the financial records must indicate separate activities or projects of the Agency.
- (4) The Agency must publish its annual report and make copies available at the offices of the Agency for inspection. 25

Tabling in Parliament

35. The Minister must table in Parliament the Shareholder’s Compact contemplated in section 15 and the annual report contemplated in section 34.

Board to notify Minister of significant events 30

36. If any matter arises that might prevent or materially affect achievement of the objects of the Agency in terms of the corporate plan or financial targets contained in the corporate plan, the Board must immediately notify the Minister of the existence of such matter.

CHAPTER 6 35

**TRANSFER OF NATIONAL WATER RESOURCES INFRASTRUCTURE AND
DISESTABLISHMENT OF TCTA**

Transfer of national water resources infrastructure

- 37.** (1) (a) Section 115(1) and (2) of the National Water Act apply in respect of the transfer of a government waterwork to the Agency. 40
- (b) The Minister may declare by notice in the *Gazette* which government waterworks are deemed to be national water resources infrastructure.
- (2) Subject to subsection (1) the Minister may after the incorporation date and in consultation with the Agency transfer national water resources infrastructure to the Agency. 45
- (3) A transfer contemplated in subsection (1) includes—
 - (a) all assets and associated liabilities;
 - (b) all water user agreements, contractual and non-contractual rights and obligations, functions, directives, duties and non-Treaty functions of the TCTA; 50
 - (c) operation and maintenance responsibilities of the waterworks;
 - (d) treaty functions in accordance with the Articles of the Treaty;

- (e) functions executed in terms of directives issued by the Minister in terms of section 103(2) of the National Water Act;
 - (f) financial and treasury advisory services; and
 - (g) the transfer of employees and officials of the Department and the TCTA contemplated in section 49, associated with the national water resources infrastructure being transferred. 5
- (4) A transfer is—
- (a) free of any outstanding water use charges and any liability that may be associated with the transfer of employees and officials contemplated in section 49; and 10
 - (b) without any royalty or dividend, if any, associated with the transfer.
- (5) The Minister must, either by way of a written directive or in the shareholder's compact, give direction in respect of the utilisation of any surplus revenue, if any, towards capital improvements or social projects of the asset being transferred.
- (6) Subject to the State Land Disposal Act, 1961 (Act No. 48 of 1961), the Minister acts on behalf of the State for the transfer of all assets, land and rights that are transferred to the Agency. 15
- (7) With reference to the TCTA and with effect from the incorporation date—
- (a) the whole of the commercial enterprise of the TCTA , including all assets, liabilities, rights and obligations of whatsoever nature and howsoever arising, is transferred to the Agency, who acquires such enterprise as a going concern; 20
 - (b) the transfer referred to in paragraph (a) is effective by virtue of this Act, and notwithstanding the delegation of any obligations, no consent for such delegation is required to be obtained from any party;
 - (c) by virtue of the transfer referred to in paragraph (a), the Agency becomes the owner of all moveable and immoveable property, which immediately prior to the incorporation date— 25
 - (i) was registered in the asset registers of the TCTA;
 - (ii) fell under the control or custody of the TCTA;
 - (iii) was possessed, occupied or used by the TCTA as if it was the owner thereof; and 30
 - (iv) was registered with any Registrar of Deeds in the name of the TCTA;
 - (d) in all pending litigation, including arbitrations, the Agency must be substituted as a litigating party for the TCTA, as if the Agency was a litigant from the commencement thereof; 35
 - (e) in all contracts to which the TCTA is a party, the Agency must be substituted as the contracting party in place of the TCTA, as if the Agency had been a contracting party from the negotiation and conclusion thereof;
 - (f) in all guarantees issued in respect of the financial obligations of the TCTA, including any guarantees issued under section 66 or 70 of the Public Finance Management Act, the Agency must be, and is hereby, substituted as the contracting party for the TCTA, as if the Agency had been the entity guaranteed from the beginning; 40
 - (g) all existing financial instruments of the TCTA must be regarded as having been issued by the Agency; and 45
 - (h) notwithstanding any enactment to the contrary, any reference to the TCTA or a representative in any law, contract, register or record created in terms of a statute, contract or other legal document, must with effect from the incorporation date be regarded as being a reference to the Agency or a representative thereof. 50

Disestablishment of TCTA

- 38.** (1) Subject to section 37, the Minister may disestablish the TCTA as a statutory body after the incorporation date, and may take steps to wind up the TCTA.
- (2) Disestablishment of the TCTA must be by notice in the *Gazette* after consultation with the Minister of Finance, the Board of the TCTA, the Board of the Agency and all other applicable parties. 55
- (3) Clause 30 of Government Notice No. 21017 dated 24 March 2000 is hereby repealed.
- (4) The Minister may direct the transfer of any function or service of the TCTA prior to its disestablishment to the Agency. 60

(5) Any guarantee or indemnity express or implied by the State in favour of any contractual obligation or associated liability by the TCTA remains valid.

Registering of real rights

39. The relevant Registrar of Deeds must make the necessary entries in the register in terms of the Deeds Registration Act, 1937 (Act No. 47 of 1937), when a real right of the State has passed to or becomes vested in the Agency. 5

Transfer of personal servitude

40. (1) Despite any law to the contrary, a personal servitude, whether registered or not, held by the Minister or a water management institution may be transferred from— 10
 (a) the Minister to the Agency; or
 (b) a water management institution to the Agency.
 (2) The relevant Registrar of Deeds must register a notarially executed deed of cession to transfer a registered personal servitude in terms of subsection (1).

Disposing of national water resources infrastructure by Agency

41. National water resources infrastructure may not be transferred, sold or disposed of by the Agency without the approval of the Minister if its value exceeds an amount specified from time to time by the Minister, in concurrence with the Minister of Finance. 15

Acquiring State land

42. (1) Upon request by the Agency, in consultation with the Minister and the Ministers of Public Works or Land Affairs, as the case may be, land may be made available by the State for transfer or registration of a servitude over any State land for the performance of any function by the Agency under this Act. 20
 (2) Any disposal of a national water resources infrastructure under section 41, or acquisition under this section, must be in compliance with national policy.

CHAPTER 7 25

POWERS OF MINISTER

Delegation by Minister

43. (1) The Minister may, in writing and subject to any condition, delegate a function entrusted to the Minister in terms of this Act to the Director-General of the Department. 30
 (2) The Minister may not delegate the power—
 (a) to make a regulation;
 (b) to appoint a member of the Board;
 (c) to determine performance objectives and the strategic direction for the Agency; and
 (d) to approve annual reports and financial statements. 35
 (3) The Minister is not relieved of any function that is delegated in terms of subsection (1).
 (4) A delegation—
 (a) does not prohibit the Minister from performing the function so delegated; and
 (b) may at any time be withdrawn or amended in writing by the Minister. 40
 (5) The Minister may give a directive to the Director-General in relation to the delegation contemplated in subsection (1).
 (6) The Director-General must give effect to the directive.

Additional functions

44. (1) (a) The Minister may request the Agency in writing to plan, design and construct national water resources infrastructure or to maintain or rehabilitate any particular national water infrastructure, despite the fact that such a project has not been budgeted for by the Agency and is not included in its corporate plan. 45

- (b) The Minister must identify from where a project referred to in subsection (1)(a) is to be funded.
- (2) The Agency may perform any additional function if—
 - (a) it does not limit its capacity to perform its functions;
 - (b) it is not to the financial prejudice of the Agency; or
 - (c) it is not likely to detrimentally affect another water management institution or if it is not likely to be to the financial prejudice of its clients or stakeholders.
- (3) The Minister may in consultation with the Minister of Finance and after consultation with the Ministers for Public Enterprises and of Trade and Industry request or authorise the Agency to perform its functions outside of the Republic of South Africa.

Expropriation by Minister

- 45.** (1) (a) Subject to section 25 of the Constitution of the Republic of South Africa, the Minister, if satisfied that the Agency requires—
- (i) land for national water resources infrastructure or other purposes connected with a national water resources infrastructure, may request Minister of Public Works to expropriate that land for the Agency;
 - (ii) the right to use land temporarily for any of the purposes which the Minister of Public Works is competent to expropriate land under subparagraph (i), may expropriate that land for the Agency; and
 - (iii) gravel, stone, sand, clay, water or any other material or substance on or in the land required for the construction of national water resources infrastructure or for any waterwork or any other purposes referred to in subparagraph (i), may expropriate such gravel, stone, sand, clay, water or any other material or substance for the Agency.
- (b) Where the Minister expropriates any land for the Agency in terms of paragraph (a), the Agency becomes the owner thereof on the date of such expropriation.
- (c) The Expropriation Act, 1975 (Act No. 63 of 1975), applies to any expropriation required in terms of this Act.

Taking possession of books, records, assets and provision of information by Agency

- 46.** (1) The Minister may direct the Board to furnish the Minister with information requested by the Minister.
- (2) The Board must comply with a directive referred to in subsection (1).
- (3) The Board must provide the Minister, or any person authorised by the Minister, with—
- (a) the information which the Minister requests;
 - (b) access and possession of books, accounts and documents of the Agency; and
 - (c) access to assets.
- (4) The Minister may appoint a person to investigate the affairs or financial position of the Agency and recover the reasonable fees and disbursements of that person from the Agency.

Intervention by Minister

- 47.** (1) The Minister may direct the Agency to take any action specified by the Minister if the Agency—
- (a) fails to comply with the Public Finance Management Act;
 - (b) is unable to perform its functions effectively;
 - (c) has failed to comply with any directive given by the Minister under this Act; or
 - (d) has obstructed the Minister, or a person authorised by the Minister, in performing a function in terms of this Act.
- (2) A directive contemplated in subsection (1) must state—
- (a) the nature of the deficiency;
 - (b) the steps that must be taken to remedy the situation; and
 - (c) a reasonable period within which those steps must be taken.
- (3) If the Agency fails to remedy the situation within the given period, the Minister may take over the relevant function of the Agency—
- (a) after having given the Agency a reasonable opportunity to be heard; and
 - (b) after having afforded the Agency a hearing on any submissions received.

- (4) If the Minister takes over a function of the Agency—
- (a) the Minister may, do anything or delegate to the person or persons as contemplated in section 13(5)(b) to do all that the Agency might otherwise be empowered or required to do in terms of this Act, to the exclusion of the Agency; 5
 - (b) the Board may not, while the Minister performs the function, perform that function;
 - (c) an employee or a contractor of the Agency must comply with a directive given by the Minister;
 - (d) the Minister must cease performing such function when satisfied that the Agency is able to perform the function effectively; and 10
 - (e) the Minister may recover from the Agency all reasonable costs incurred in terms of this section.

Regulations

48.(1) The Minister may make regulations regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act. 15

(2) Any regulation that has financial implications may only be made in consultation with the Minister of Finance.

CHAPTER 8 20

MISCELLANEOUS PROVISIONS

Transfer of staff

49. (1) Employees and officers of the Department employed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and employees employed by the TCTA may, by agreement between the Agency and the Department or the TCTA, in terms of labour laws, as the case may be, and with their consent, be transferred to the service of the Agency with effect from the incorporation date, on terms and conditions not less favourable than those on which they were employed immediately before such transfer. 25

- (2) On appointment of an employee or officer, his or her— 30
- (a) salary or salary scale;
 - (b) conditions of employment;
 - (c) service benefits; and
 - (d) retirement date,

may not be less favourable than those payable or due to the employee or officer by the Department or the TCTA, as the case may be, immediately before the date of the transfer. 35

(3) (a) Employees under contract to the Department in terms of section 76 of the National Water Act may by agreement between the Agency and the Department and with their consent, be transferred to the service of the Agency with effect from the incorporation date, on terms and conditions not less favourable than that on which they are employed immediately before such transfer. 40

- (b) Upon transfer—
- (i) the terms and conditions may not be less favourable than the terms and conditions of any contract entered into under the National Water Act immediately before the date of transfer; and 45
 - (ii) the provisions relating to pension funds and to accumulated vacation leave set out in subsections (4) to (7) apply to the employees referred to in subsection (3)(a), where applicable.

- (4) An employee or officer of the Department may elect— 50
- (a) to remain a member of the Government Employees Pension Fund; or
 - (b) to become a member of an approved pension fund from the date of transfer.

(5) (a) The period of pensionable service with the Department must be regarded and treated as the period of pensionable service benefits to be transferred to an approved pension fund of which the employee or official becomes a member from the date of transfer. 55

(b) The amount of the transfer benefit must be calculated according to the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), and the Rules of the Fund.

(6) The Department or the TCTA, as the case may be, must at the date of transfer pay the cash value of any accumulated vacation leave due to an employee or officer of the Department or the TCTA. 5

(7) Any payment or condition of transfer referred to in this section must be in compliance with national policy and the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), and the Rules of the Fund.

(8) The Minister may, with the consent of the person concerned, place any person in the service of the Department at the disposal of the Agency by virtue of section 15(3) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), for a particular service for such a period and on such terms as the Minister determines necessary. 10

Subsidiary company

50. The Agency may only establish a subsidiary company in terms of the Companies Act— 15

- (a) by a special resolution of the Board; and
- (b) in consultation with the Minister, the Minister for the Public Service and Administration and the Minister of Finance.

Liquidation 20

51. Despite any other law, the Agency or any subsidiary company, as the case may be, may not be placed under judicial management or in liquidation except on the authority of an Act of Parliament adopted specially for that purpose.

Documents relating to litigation against Agency

52. The Agency must provide the Minister with copies of all summonses and applications in its possession relating to any legal proceedings brought against the Agency. 25

Transitional provisions and savings

53. Anything done under the National Water Act and which is still valid at the commencement of this Act, remains in force— 30

- (a) to the extent that it is consistent with this Act; and
- (b) until anything done under this Act overrides it.

Offences and penalties

54. Any person who—

- (a) fails to provide access to any book, account, document or asset when required to do so under this Act; 35
- (b) fails to comply with a directive issued under this Act;
- (c) fails or refuses to give data or information, or gives false or misleading data or information, when required to give information under this Act;
- (d) refuses to perform a duty, or obstructs any person in the performance of any of that person’s functions, in terms of this Act; 40
- (e) makes personal gains or accepts any unauthorised fee or reward, either directly or indirectly, as a result of his or her position with the Agency;
- (f) uses the Agency’s name, logo or design without authority to do so;
- (g) contravenes any provision of this Act, 45

may be found guilty of an offence and liable to a fine or to imprisonment or to both a fine and such imprisonment for a period not exceeding five years.

Short title and commencement

55. This Act is called the South African National Water Resources Infrastructure Agency Limited Act, 2008, and comes into effect on a date determined by the President by Proclamation in the *Gazette*. 50

**MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN
NATIONAL WATER RESOURCES INFRASTRUCTURE AGENCY
LIMITED BILL, 2008**

1. BACKGROUND

- 1.1 The Bill emanates from a project of the Department of Water Affairs and Forestry to restructure the South African national water resources infrastructure. Over the past few years there has been an emerging recognition of the need for a stronger public sector in the key area of infrastructure development, effective maintenance, operation and management of existing infrastructure to support social and economic development.
- 1.2 The importance of water for social and economic development has been a high priority of Government since 1994. In order to meet the constitutional obligations of section 27(1)(b) of the Constitution and to achieve the strategic objectives of Government to eradicate poverty and to ensure sustainable and equitable development, the National Water Resources Infrastructure Agency Limited (the Agency) must be established. The importance of national water resources infrastructure as an element of South African economic infrastructure has also been increasingly recognised.
- 1.3 While the social and economic dimensions of water resources management are fundamentally linked, the financing and development of large-scale water resources infrastructure is driven by the requirements for economic use, which can be used to leverage supply for social purposes development and assessing viability of the investment.
- 1.4 In addition to the development, operation and maintenance of national water resource infrastructure, there is a need to ensure that the value of this national asset is effectively maintained and sustained in order to minimise the risk to end-users.
- 1.5 Currently, the Department of Water Affairs and Forestry cannot raise capital directly on the financial markets, and is reliant on special-purpose vehicles, such as the Trans-Caledon Tunnel Authority, to finance and implement viable economic projects.
- 1.6 The establishment of the Agency, therefore, fulfils the requirement of the management of water resources infrastructure to achieve the economic, social and water resources management objectives of Government and obligations in terms of section 27(1)(b) of the Constitution.
- 1.7 The establishment of the Agency has the advantage of an institution that separates the policy development and regulatory responsibilities of the Department, as the custodian of the national water resources, from the development and implementation responsibilities for infrastructure management.
- 1.8 The Bill seeks to incorporate and establish the Agency as a juristic person under the sole ownership of the State. The Agency is to be registered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and will be known as the South African National Water Resources Infrastructure Agency Limited. The rights of the State will be exercised by the Minister of Water Affairs and Forestry. The governance of the Agency will vest in the Board of the Agency.

2. OBJECTS OF BILL

2.1 The objects of the Bill can be summarised as follows:

- (a) To establish a juristic person under the ownership and control of the State in order to administer, fund, finance, develop, operate, maintain, manage and provide advisory services in respect of national water resources infrastructure in an efficient and cost-effective manner to meet the social and economic developmental needs of current and future water users within the framework of national government policy and in accordance with section 27(1)(b) of the Constitution;
- (b) to ensure the sustainable, equitable and reliable supply of water to meet nationally and regionally defined social and economic objectives of government;
- (c) to transfer national government waterworks to the Agency;
- (d) to alleviate the burden on the State's resources in water resources development;
- (d) to provide for the disestablishment of the Trans-Caledon Tunnel Authority (TCTA) and the transfer of all its assets, liabilities, rights, obligations, powers, Treaty and non-Treaty functions as a going concern into the Agency.

2.2 The Bill contains the following:

- (a) A long title: a short description of the contents of the Bill.
- (b) A preamble: setting out that National Government is responsible for and has authority over the nation's water resources and its use and acknowledging that it is necessary that national water resources infrastructure must be funded, developed, operated and maintained efficiently and effectively in a sustainable and reliable manner to make water available to water users and that this can be more commercially viable by providing for the utilisation of private sector funds to achieve social and economic objectives of Government and meet the obligations of section 27 of the Constitution.
- (c) **Clause 1:** definitions.
- (d) **Clause 2:** the purpose of the Act, with special reference to the fact that the Agency as a juristic person, owned and controlled by the State, will take over all aspects dealing with the operation and maintenance of national water resources infrastructure and serve and achieve the development and transformation objectives of Government relating to service delivery, social and economic development.
- (e) **Clause 3:** the establishment of the Agency as a company.
- (f) **Clause 4:** the registration of the Agency's memorandum and articles of association in terms of the Companies Act, 1973;
- (g) **Clause 5:** the application of the Companies Act, 1973, to the Agency.
- (h) **Clause 6:** the objects of the Agency which detail that the Agency must develop and manage infrastructure to ensure the sustainable, equitable and reliable supply of water from national water resources infrastructure.
- (i) **Clause 7:** the functions of the Agency. Extensive powers are conferred upon the Agency in order to enable it to realise the purpose of the Bill. The Agency may also carry out functions by giving support to other water management institutions and water services providers. This support will not include financial support but will be technical and advisory in its nature. Further, with the required approval the Agency may perform its functions outside the Republic of South Africa. This Clause also sets out that the Treaty functions of the TCTA will be taken over by the Agency.
- (j) **Clause 8:** the governance and composition of Board. This Clause sets out that the Agency is governed by and acts through its Board which is its accounting authority and is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999). The Board will consist of between seven and nine executive and non-executive members and the Chief Executive Officer, being the executive member.

- (k) **Clause 9:** the role of the Board. This includes, among others, that the Board must retain effective control over the Agency and approve the strategy, policy and systems of the Agency to achieve the objectives of the Agency.
- (l) **Clause 10:** appointment to the Board. The non-executive members will be appointed by the Minister on the recommendation of a nomination committee. Due consideration must be given to the need for representation by previously disadvantaged persons due to past racial, gender and other discrimination.
- (m) **Clause 11:** The chairperson and deputy chairperson. The Minister will make these appointments.
- (n) **Clause 12:** The terms of office and conditions of appointment of Board members. Terms are for three years, with the right of re-appointment and with the remuneration approved by the Minister in consultation with the Minister of Finance.
- (o) **Clause 13:** removal and disqualification of Board member.
- (p) **Clause 14:** filling of vacancies.
- (q) **Clause 15:** the shareholder's compact. A shareholder compact need to be concluded within six months from the date on which the Board is appointed.
- (r) **Clause 16:** establishment of committees. The Board may establish committees to support the effective functioning of the Board.
- (s) **Clause 17:** the fiduciary duties of Board members.
- (t) **Clause 18:** the disclosure of interest of a Board member.
- (u) **Clause 19:** the recovery of improper profits.
- (v) **Clause 20:** the validity of decisions.
- (w) **Clause 21:** delegation of functions by Board. The Board may delegate certain of its functions to the Chief Executive Officer, a Board member or a committee. Certain powers may not be delegated.
- (x) **Clause 22:** meetings of Board. The Board will regulate on procedures for its meetings. A quorum of the Board will be provided for in the articles of association.
- (y) **Clause 23:** the appointment of the Chief Executive Officer and the Chief Financial Officer. The Chief Executive Officer is appointed by the Minister upon the recommendation of the Board. The Chief Financial Officer is appointed by the Chief Executive Officer with the approval of the Board. The functions of these officers are also set out in this Clause.
- (z) **Clause 24:** the term of office and condition of appointment. The Chief Executive Officer and the Chief Financial Officer are appointed for a term of three years with re-appointment for a further period of three years at a time. Remuneration is determined by the Board.
- (za) **Clause 25:** appointment of acting Chief Executive Officer and Acting Chief Financial Officer.
- (zb) **Clause 26:** interim Chief Executive Officer.
- (zc) **Clause 27:** the suspension from office of Chief Executive Officer.
- (zd) **Clause 28:** the delegation by Chief Executive Officer.
- (ze) **Clause 29:** the appointment of employees. The Chief Executive Officer can appoint the staff necessary for the Agency to perform the work arising from the provisions of this Act, subject to the directions of the Board.
- (zf) **Clause 30:** financing. The funds of the Agency are, amongst others, money appropriated by Parliament, from water charges and tariffs in terms of the National Water Act, 1998 (Act No. 36 of 1998), income received from additional services performed, and loans raised in terms of the Public Finance Management Act, 1999.
- (zg) **Clause 31:** borrowing by the Agency. The Agency, subject to the Minister's approval, may borrow funds in accordance with the Public Finance Management Act, 1999. Funds may also be raised by other lawful sources at the most favourable terms and conditions. The Agency may use its assets as security for loans with the approval of the Minister.
- (zh) **Clause 32:** the annual budget and corporate plan. These must comply with the Public Finance Management Act, 1999. The Minister as the only shareholder, owner and controller on behalf of the State must approve the

- corporate plan. The corporate plan must set out the criteria for preparing or revising its financial and performance indicators and targets.
- (zi) **Clause 33:** submission of quarterly reports and corporate plans. The corporate plan must be in compliance with the Public Finance Management Act, 1999, and quarterly reports submitted to the Minister. All revised plans must also be given to the Minister and must incorporate any comments or directives by the Minister.
 - (zj) **Clause 34:** the financial statements and annual report. This must be in compliance with the established accounting practice, principles and procedures and where necessary must indicate separate activities or projects of the Agency.
 - (zk) **Clause 35:** tabling in Parliament. The shareholder's compact and annual report must be tabled in Parliament.
 - (zl) **Clause 36:** the Board must notify the Minister of significant events.
 - (zm) **Clause 37:** the transfer of national water resources infrastructure. The Minister must declare any government waterwork as a national water resources infrastructure. Furthermore, the Minister must, in consultation with the Agency and after its incorporation date, transfer the national water resources infrastructure to the Agency. A transfer includes, among others, all assets and associated liabilities, water supply agreements, contractual and non-contractual rights and obligations and Treaty and non-Treaty functions of the TCTA, as well as functions executed by the TCTA in terms of directives issued by the Minister. Employees and officials of the Department and the TCTA may also be transferred.
 - (zn) **Clause 38:** the disestablishment of the TCTA. The Minister must disestablish the TCTA as a statutory body after the date of incorporation of the Agency as a company (the Incorporation Date) and may take steps to wind up the TCTA. Functions and services of the TCTA may be transferred to the Agency prior to its disestablishment. Clause 30 of Government Notice No. 21017 dated 24 March 2000 is repealed.
 - (zo) **Clause 39:** the registration of real rights. Real rights will be registered in the name of the Agency.
 - (zp) **Clause 40:** the transfer of personal servitudes. Personal servitudes, whether registered or not, will also be transferred to the Agency.
 - (zq) **Clause 41:** the disposing of national water resources infrastructure. This may only be carried out by the Agency after the approval of National Treasury and the Minister.
 - (zr) **Clause 42:** acquiring State land. With the necessary approval, land may be made available for the Agency to carry out any of its functions.
 - (zs) **Clause 43:** delegation by the Minister. Subject to certain functions that may not be delegated, the Minister may delegate functions to the Director-General of the Department and to the Agency.
 - (zt) **Clause 44:** additional functions. The Minister may, in consultation with the Agency, authorise the Agency to perform additional functions, including functions outside of the Republic. Funding arrangements must be made in these circumstances.
 - (zu) **Clause 45:** expropriation by the Minister.
 - (zv) **Clause 46:** possession of books, records, access to assets and provision of information.
 - (zw) **Clause 47:** intervention by the Minister. Under certain circumstances the Minister may direct the Agency to take action specified by the Minister. Failure to do so could result in the Minister taking over a particular power or duty.
 - (zx) **Clause 48:** regulations by the Minister.
 - (zy) **Clause 49:** the transfer of staff. Employees and officials of the Department and the TCTA will by agreement be transferred upon terms and conditions no less favourable than at the time of their transfer. Employees and officials of the Department may elect to remain with the Government Employees Pension Fund or to become members of any approved pension. Payment will also be made for any accumulated vacation leave.

- (zz) **Clause 50:** subsidiary company. With the required approval, the Agency may establish a subsidiary company.
- (zza) **Clause 51:** liquidation. The Agency may not be placed into liquidation without an Act of Parliament.
- (zzb) **Clause 52:** documents relating to litigation against the Agency. The Agency must inform the Minister of legal action against it.
- (zzc) **Clause 53:** transitional provisions and savings
- (zzd) **Clause 54:** offences and penalties. Contravention of provisions that require performance or where personal gains are made, among others, is an offence.
- (zze) **Clause 55:** short title and commencement.

3. FINANCIAL IMPLICATIONS FOR STATE

Based on assumptions set out in the Business Case, including R16 billion of infrastructure to be fully financed by the Agency from commercial sources and revenue in its first fifteen years of existence, the Agency should be financially viable. This would also imply that R2,5 billion less will be required from the fiscus for capital expenditure. However, in the first two years before it could borrow, the Agency would require working capital from the fiscus to finance ongoing infrastructure projects and backlog refurbishment. This would not be more than the funds currently provided for in the MTEF for water resources infrastructure development. Thereafter the fiscus would only contribute to specific social projects which the Agency may be directed to implement or manage.

Funding shall be from business income, State subsidies and borrowings, but borrowing is subject to approval by the Minister of Water Affairs and Forestry and the Minister of Finance, and in terms of the Public Finance Management Act, 1999.

4. CONSULTATION

- 4.1 The following stakeholders and statutory bodies have been consulted:
 - The Economic and Employment Cluster.
 - The Departments of Agriculture, Environmental Affairs and Tourism, Land Affairs, Provincial and Local Government, Public Enterprises, Public Service and Administration, Public Works, Trade and Industry and Transport.
 - Organisations: Eskom, Sasol (through Chemical and Allied Industries Association), Business Unity South Africa, National Economic Development and Labour Council, the Trans-Caledon Tunnel Authority, Chamber of Mines, AGRI-South Africa, National African Farmers Union, South African Non-Governmental Organisation Coalition, South African Water Utilities, Rand Water, Umgeni Water.
- 4.2 The National Treasury has been consulted in line with the Public Finance Management Act, 1999.
- 4.3 The Bill was also published for public comment and comments received taken into consideration.

5. IMPLICATIONS FOR PROVINCES

None.

6. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Department has established a Branch under a Deputy Director-General with administration and support staff. This component, together with all employees of the TCTA, will be transferred to the Agency. The necessary arrangements will have to be made for the proposed Agency to be accommodated and equipped in order to perform its functions properly.

7. COMMUNICATION IMPLICATIONS

Appropriate communication measures may be implemented by the Government Communication and Information System. A communication strategy will be implemented to inform roleplayers in the financial markets about the Agency and to ensure the integrity of the TCTA's existing loans.

8. CONSTITUTIONAL IMPLICATIONS

None.

9. PARLIAMENTARY PROCEDURE

- 9.1 The Department of Water Affairs and Forestry and the Office of the Chief State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the parliamentary procedure established by section 75 of the Constitution since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 9.2 The State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003), since it does not contain any provisions pertaining to customary law or customs of traditional communities.

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