



UNIVERSITY of the
WESTERN CAPE



2025

**Submission by the Dullah Omar Institute to the
National Assembly Portfolio Committee on
Planning, Monitoring and Evaluation on the
National State Enterprises Bill [B1 – 2024]**

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2 January 2025

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1 Introduction

1. We thank the Portfolio Committee for this opportunity to make a submission on the National State Enterprises Bill (the Bill). The Institute did extensive research on the appointment of board directors to public entities and enterprises and this culminated in a submission with recommendations to the Zondo Commission.¹
2. The Dullah Omar Institute for Constitutional Law, Governance and Human Rights (est. 1990 as the Community Law Centre) is a research institute in the Faculty of Law at the University of the Western Cape.
3. In reflecting on the state of public entities and public enterprises, one must bear in mind that their mandate and performance concerns public money; be that in the form of a budget vote or the mandate to raise money from the public, or be that in the form of a loan guarantee (colloquially referred to as bailouts).
4. Secondly, events of the past years have demonstrated that thoroughly stress-testing of draft legislation is required and stress-testing legislation must be done for the worst possible incumbents in senior positions. The current regulatory framework for public entities and public enterprises places much emphasis on the integrity of individuals (e.g. of board directors and CEO's) to ensure compliance with good governance principles. This has on more than one occasion resulted in disastrous consequences. What we should seek to ensure is that the system (i.e. the governance architecture) enables and compels adherence and compliance with the principles of good governance.
5. We also wish to draw the Committee's attention to section 195 (1) of the Constitution that sets the basic values and principles governing public administration. In particular, attention is drawn to sub-paragraphs (f) and (g) requiring the public administration to be accountable and transparent. For the purposes of the Bill, the question is then how does one operationalise these two values, or differently put, how do we give practical expression in a manner that is observable and that builds trust in public entities and enterprises.

2 Profile of all SOE

6. Before proceeding it is necessary to provide some context. Table 1 below lists the categories of public entities and public enterprises as listed in the schedules to the

¹ L Muntingh, "Submission by the Dullah Omar Institute to the Zondo Commission on the Appointment of Board Directors to State- Owned Enterprises" (Bellville: Dullah Omar Institute, 2019); R Wandrag, "Legal Framework for SOE Boards" (Bellville: Dullah Omar Institute, 2019); R Wandrag, "Legal Framework for SOE Boards: Eskom, Prasa and the SABC" (Bellville: Dullah Omar Institute, 2019); Jaap de Visser and Samantha Waterhouse, "SOE Boards and Democracy" (Bellville: Dullah Omar Institute, 2020); L Muntingh, "Appointing Directors to the Boards of State-Owned Enterprises - A Proposed Framework to Assess Suitability" (Bellville: Dullah Omar Institute, 2020).

Public Finances Management Act (PFMA). This indicates that of the 265 entities just less than 21 are major public entities and that the bulk falls in the category “national public entities”.

Table 1

| Category | N | % |
|--|------------|------|
| Major public entity | 21 | 7.9 |
| Part A: National Public Entities | 153 | 57.7 |
| Part B: National Government Business Enterprises | 22 | 8.3 |
| Part C: Provincial Public Entities | 51 | 19.2 |
| Part D: Provincial Government Business Enterprises | 18 | 6.8 |
| TOTAL | 265 | |

7. This Bill concerns 13 entities (referred to as “state enterprises” – see Definitions) falling in three categories, being major public entity, national public entity and national government business enterprise. This profile is presented below in Table 2 with some additional descriptive information. It is noted that five of the selected 13 entities function in the transport sector, three entities in the communications sector, and three entities in the energy sector. In its briefing to the Portfolio Committee on Planning Monitoring and Evaluation (the Portfolio Committee) the Department of Planning Monitoring and Evaluation (DPME) on 8 October 2024 referred to the selection as “strategic SOEs”.² No further motivation is provided for the selection made. If these were indeed selected for strategic reasons, the question must be asked: What informed the strategy and what are the objectives?

Table 2

| Nr | PFMA Schedule | Category | Name | Sector |
|----|---------------|--|---|----------------|
| 1 | 2 | Major public entity | Broadband Infraco (Proprietary) Limited | Communications |
| 2 | 2 | Major public entity | South African Post Office SOC Limited | Communications |
| 3 | 3 | Part B: National Government Business Enterprises | Sentech | Communications |
| 4 | 2 | Major public entity | DENEL | Defence |
| 5 | 2 | Major public entity | CEF (Pty) Ltd | Energy |

² Department of Planning, Monitoring and Evaluation, “Briefing on the National State Enterprises Bill - Presentation to the Portfolio Committee on Planning, Monitoring and Evaluation” (Meeting of the Portfolio Committee on Planning, Monitoring and Evaluation, Cape Town, October 8, 2024).

| Nr | PFMA Schedule | Category | Name | Sector |
|----|---------------|----------------------------------|---|-----------|
| 6 | 2 | Major public entity | ESKOM | Energy |
| 7 | 2 | Major public entity | SA Nuclear Energy Corporation | Energy |
| 8 | 2 | Major public entity | SA Forestry Company Limited | Resources |
| 9 | 2 | Major public entity | Air Traffic and Navigation Services Company | Transport |
| 10 | 2 | Major public entity | Airports Company | Transport |
| 11 | 2 | Major public entity | South African Airways Limited | Transport |
| 12 | 2 | Major public entity | Transnet | Transport |
| 13 | 3 | Part A: National Public Entities | SA National Roads Agency | Transport |

8. No further information is provided in the briefing of 8 October 2024 on the financial and governance health of each of these entities. Without going into too much detail, it is generally accepted, and as much is reflected in the S&P Global Rating of Eskom, that there have been significant improvements in finances and governance, and that the rating has changed from CCC (*Highest risk*) to B (*More vulnerable in adverse conditions but able to meet commitments*).³ On the other hand, prospects for South African Airways look grim following the collapse of the Takatso deal.⁴ The pertinent issue here is that the 13 entities targeted in the Bill is not a homogenous group and there is indeed significant diversity, even if only assessed on their governance and financial health. The implication is that their respective legislative and governance needs may be very different at this stage.
9. A last contextual point to make is that the definitions in the Bill refer to “national state-owned commercial enterprises”, noting that these are listed in Schedules 2 and 3B to the Public Finance Management Act. See Appendices 1 and 2 to this submission for the full lists. A first issue to raise is that the SA National Roads Agency, which is included in Schedule A to the Bill, is listed under PFMA *Schedule 3 Part A: National Public Entities* and not *Schedule 3 Part B: National Government Business Enterprises*, which the definition is referring to. National Public Entities are accountable to Parliament.⁵ Secondly, the definition of “state enterprise” in the Bill refers to the entities listed in Schedule A to the Bill, which is the 13 entities listed above in Table 2 which contain three types of entities as noted already. The Bill then seeks to in effect create another

³ S&P Global, “South African Electricity Producer Eskom Upgraded,” *S&P Global* (blog), November 24, 2023, <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3094101>.

⁴ N Ebrahim, “SAA Looking for New CEO after Collapse of Takatso Deal,” *News24*, April 8, 2024, <https://www.news24.com/fin24/companies/saa-looking-for-new-ceo-after-collapse-of-takatso-deal-20240408>.

⁵ PFMA Definitions: “national public entity” means— (a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is— (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament;

category applicable to the already confusing landscape of entities and enterprises. As an aside it is noted that the existing schedules to the PFMA are already not clear cut and contain a diverse range of public entities, enterprises and regulatory structures.

3 Positives

10. We regard it as a positive development that the Bill is firm and clear and stating that it is the responsibility of the board to appoint the CEO and CFO, and not the shareholder as in terms of the PFMA.
11. It is also a positive development that the Bill expands the fiduciary duties as per the Companies Act and common law with reference to SAMSOCs (State Asset Management of State-Owned Companies) developmental objectives, business sustainability and public interest as reflected in clause 11.

4 Objects

12. Clause 2 of the Bill sets out the objects of the intended legislation and clause 2(a) reads: “enhance the operational efficiency of national commercial state-owned enterprises to achieve the State’s developmental objectives through a National Strategy to be implemented by a holding company and national commercial state-owned enterprises”. [Emphasis added]
13. Clause 2(c) reads “transfer the shareholding of state enterprises to the holding company to ensure that the holding company exercises the ownership function over its subsidiaries in accordance with the Companies Act, this Act and any applicable legislation”. [Emphasis added]
14. Clause 2(a) deals with the larger number of entities being those listed in Schedules 2 and 3B as alluded to earlier and articulates the framing of general increased efficiency as well as the formulation of a National Strategy that would then apply to the entities listed in Schedules 2 and 3B of the PFMA. Clause 2(c) then focuses on the selection of 13 entities for the transfer of shareholding.
15. In a first step the Bill targets all entities listed in Schedules 2 and 3B for the development of a National Strategy and that this would be overseen by the holding company. In a second step the focus is then narrowed to the 13 listed entities, but as already noted there is a problem with this listing (see SANRAL). Further, the list of 13 includes 11 of the 21 Major Public Entities listed in Schedule 2. It is not clear what the Bill envisages for the other ten Major Public Entities.

5 Stakeholders and shareholders

16. The Bill defines “shareholder” as “the State as represented by the President”. At least in theory the understanding is that the state represents the public and that the public is therefore by extension the shareholders. In the case of South African SOEs, the “public as stakeholders lack the power to exercise any influence over SOE governance. The typical corporate structure of shareholders having the unfettered power to appoint board members is therefore also not suited to the governance of SOEs.”⁶ King IV defines “shareholders” in terms of the Companies Act⁷ and provides a comprehensive description of “stakeholders” and “stakeholder inclusivity” as a governance value:

- Stakeholders
 - Those groups of individuals that can reasonably be expected to be significantly affected by an organisation’s business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisation to create value over time.
 - Internal stakeholders are directly affiliated with the organisation and include its governing body, management, employees and shareholders.
 - External stakeholders could include trade unions, civil society organisations, government, customers and consumers.
 - Internal stakeholders are always material stakeholders, but external stakeholders may or may not be material.
- Stakeholder inclusivity
 - An approach in which the governing body takes into account the legitimate and reasonable needs, interests and expectations of all material stakeholder sin the execution of its duties in the best interests of the organisation over

⁶ Wandrag, “Legal Framework for SOE Boards,” 5.

⁷ “Companies Act,” 71 § (2008), sec. 57(1).

time. By following this approach, instead of prioritising the interests of the providers of financial capital, the governing body gives parity to all sources of value creation, including, among others, social and relationship capital as embodied by stakeholders. Consequently, this is an inclusive stakeholder-centric approach which stands in contrast with a shareholder-centric approach.⁸

17. The developments in SOEs of the last 25 years have clearly exposed the risk posed by too much discretion held by the executive as shareholder⁹ and the absence of public participation as stakeholders in SOEs in the appointment of Board Directors. The OECD-SADC Guidelines recommend that there “There should be a clear separation between the state’s ownership function and other state functions that may influence the market conditions for state-owned enterprises, particularly with regard to market regulation and policy-making.”¹⁰ The current legal framework simply does not provide for the public as stakeholders affected by SOE operations to have their say in how well or not an SOE is performing or in appointments. A stakeholder-centric approach also appears to be absent from the current SOE landscape.

6 A centralised model

18. In the DPME presentation of 8 October motivation for a centralised model is added with reference to a global perspective, noting that successful models have emerged from other jurisdictions, being Singapore, China and Malaysia. No further evidence is presented to support the assertion of “successful models”. Nonetheless, at face value, there are significant differences between South Africa and the three listed Asian countries. Malaysia is a democracy, but it operates as a federal constitutional monarchy with a parliamentary system. The country has also been criticised with regard to basic democratic rights, such as freedom of speech. The People’s Republic of China is a one-party state and is not considered to be a democracy in the conventional sense of the word. Singapore is praised for its clean governance and low levels of corruption, but the media is tightly controlled and restrictions on freedom of speech

⁸ Institute of Directors of South Africa, “King IV Report on Corporate Governance for South Africa” (Johannesburg: Institute of Directors of South Africa, 2016), 17.

⁹ Minister of Mineral Resources and Energy v Becker and Others, No. (1199/23) [2024] ZASCA 106; [2024] 9 BLLR 893 (SCA) (SCA June 28, 2024).

¹⁰ OECD, “Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises” (OECD, 2024), 30, <https://legalinstruments.oecd.org/public/doc/323/323.en.pdf>.

are in place.¹¹ The ruling party in Singapore (People's Action Party) has also been in power since 1959. Whatever the merits may be of what has been achieved in these three countries, it must be noted that this happened in a particular context and that these countries are not emerging from the state capture experience as has been the case in South Africa.

19. The case of Singapore needs some brief reflection as a recent peer reviewed article by Thabane reflects on the prospects of the centralised model for South African SOEs.¹² Thabane highlights a number of factors to consider when assessing the suitability of a centralised model:

- The model was developed because of a need for survival, and ‘the future of the governing party and the state itself are intertwined with the future of "Singapore Inc." to such an extent that if the Temasek model fails, the governing party will likely lose power and the viability of the state will be at risk.’ This is not the case the case in South Africa.
- The Temasek model is underpinned by a near corruption-free environment where there are high standards of accountability and integrity underpinned by Confucian values emphasising ethics and order.
- The Temasek model is “sustained by a culture of meritocracy, efficiency and an exceptional work ethic in the workforce, so that where skills are unavailable locally, international talent is brought in to lead government-linked companies (GLCs) and serve on various boards.”. Patronage, nepotism and political connections are frequently informing appointments locally.
- The Temasek model is responsive, ensuring compliance with both rules and best corporate governance practices.
- The Temasek model is quintessentially commercial, placing emphasis on shareholder value creation, as opposed to the multiple objectives or mandates that characterise SOEs in South Africa.
- The Temasek model is underpinned by sheer political will to respect the separate role of the government as a shareholder from the regulatory roles played by various regulators and the control role played by various GLC boards. In South Africa, the political will to adhere to the separation of roles and non-interference in SOE affairs is almost non-existent.¹³

¹¹ E Tandoc and M Chew, “Singapore,” *Reuters Institute for the Study of Journalism* (blog), 2024, <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2024/singapore>; United States Department of State, “Singapore,” *United States Department of State Country Reports* (blog), 2023, <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/singapore/>.

¹² T Thabane, “Rebooting State-Owned Companies in South Africa: Exploring the Viability of Singapore’s State Holding Company (Temasek) Model of Ownership and Control,” *Potchefstroom Electronic Law Journal* 27 (2024): (Published on 17 October 2024) pp 1-30, <https://doi.org/10.17159/1727-3781/2024/v27i0a17022>.

¹³ Thabane, 17–18.

20. In addition to these differences Thabane draws attention to three important factors which are problematic from the South African point of view:

- the model operates in a one-party state where the governing party exhibits some authoritarian tendencies, labelled by some as a "soft authoritarian" arrangement or a "restrained democracy". South Africa is a "constitutional democracy with all the trappings of constitutionalism" and that "even if a policy is beneficial, the state cannot implement it in an authoritarian fashion."
- The Singaporean GLCs [government linked companies] are "predominantly run by retired bureaucrats and political apparatchiks.". The closeness of politicians to SOEs is a major challenge in South Africa and reform of the sector should not tolerate the involvement of active or retired politicians in the governance of SOEs.
- Temasek and its GLCs are purely commercial while South Africa is still grappling with the legacies of colonialism and apartheid, resulting in structural poverty. It means that some South African SOCs may not always be motivated by profit maximisation as is the case in Singapore, and may be uncompetitive or render services below market prices to meet the state's obligations to poor citizens.¹⁴

21. The DPME presentation drawing on the merits of the Singaporean model is at best misleading as it simply does not allude to the careful and measured analysis undertaken by Thabane set out above. A centralised model is seemingly accepted uncritically without the substantial compatibility problems raised by Thabane.

22. In the same presentation the DPME (in slide 8) noted that "South Africa currently has a decentralised model with policy ministries assuming responsibility for the shareholder function of SOEs". While it may be technically true that there is a measure of decentralisation of ownership-control to the responsible minister, it remains the case that the Minister is part of the national executive and appointed by the President. There is thus in effect highly centralised control over SOEs in the current dispensation. The Bill then consequently seeks to centralise the centre even further by placing the ownership control of at least 13 entities under one shareholder company being SAMSOC where the state is the single shareholder and that the President is the representative of this shareholder. It is noted that in clause 6 (3) that the President may transfer the administration of this legislation or any other power and function referred to in the Bill to a member of cabinet in accordance with section 97 of the Constitution. If this is indeed to happen, the effect would be a return to the current situation where a minister has control over the entity.

23. This increased centralisation, motivated by aspirations linked to efficiency and effectiveness, pave the way for the extensive control that a small group of people have over very substantial public resources.

24. This centralisation of the centre would in effect seek to entrench oligarchic tendencies:

¹⁴ Thabane, 18–19.

- It would concentrate power in a small group over significant state assets and key resources (e.g. communication and transport)
- The majority of the population are excluded from decision-making processes and the role of Parliament to exercise effective oversight seems uncertain
- The Bill seeks to concentrate power in the Presidency, thus limiting opportunities and mechanisms for oversight.
- The Bill meticulously seeks to limit transparency and accountability in appointments and for performance.

7 Due diligence and good governance

25. Clause 7 of the Bill sets out the objectives of the holding company and in clause 7(b) states that it must “conduct due diligence of state enterprises as provided for in section 16. No details or guidelines are provided on the meaning of the “due diligence” and no further guidelines are provided for the governance of the subsidiaries – e.g. no details on the appointment of board members, executives etc. Clause 9 provides that the board of the holding company will exercise the rights of the sole or majority shareholder of any subsidiary. The briefing document presented on 8 October 2024 states that SAMSOC will perform the role of an active shareholder for its subsidiaries to inter alia promote political insulation, professionalism and transparency of subsidiary operations. It is not clear how this will be achieved within the provisions of the Bill, given that the President (or a delegated cabinet minister) serves as shareholder in SAMSOC. Will the President or the cabinet member also represent SAMSOC as shareholder in the subsidiaries and play this “active shareholder” role? How will such a centralisation of power serve to achieve “political insulation”?

26. The Zondo Commission also recommended:

- The need for sound and effective corporate governance of SOEs and ensuring that an appropriate, robust and transparent board appointment process is established.
- Ensuring that persons appointed to Boards must have the necessary competence, capacity, experience, integrity, reputation.

It is submitted that this Bill does not fulfil these recommendations

8 The baby and the bath water

27. Removing the PFMA as the governing legislation solved the conflict created by the definition of "ownership control" in s 1 of the PFMA that allowed the shareholder (minister) to appoint and remove both the directors and executives. However, this raises concerns around the financial governance and oversight of SAMSOC and its

subsidiaries. The Bill does provide that the board of the holding company must submit integrated annual reports to the shareholders and that the holding company and subsidiaries must be audited each year. However, there are no “accountability” provisions for non-compliance with these provisions. Chapter 10 of the PFMA provided in detail for the liability of the board (accounting authority) as well as officials for financial misconduct (non-compliance with sections of the act). This included possible criminal liability. The Board of the holding company is also tasked with establishing a reporting framework and a financial and operational performance monitoring framework for its subsidiaries (clause 9). Again, no details or specific reporting or performance standards are prescribed for these subsidiaries.

9 National Strategy

28. Clause 3 makes provision for the development of a national strategy, clause 4 deals with the contents of the national strategy and clause 5 deals with the review of the national strategy. It was already alluded to that clause 2 refers to all entities in Schedule 2 and 3B with reference to strategy development. The Bill proposes the creation of new structures in the first instance and then as a second step, adds that there needs to be a new strategy. A new structure, with particular characteristics, then appears to be a foregone conclusion. In the process of policy development, structural arrangements should follow the articulation of functional arrangements. Clarifying policy goals in the public-entity and public-enterprise landscape in the wake of the Zondo Commission (supported by a significant body of research and case law) should then rather be the priority and, following which, based on evidence and thorough analysis, our gaze can then turn to the appropriate structural arrangements.
29. A worthwhile starting point in reviewing the national strategy is to look at the composition of the Presidential Advisory Committee since it is this committee that will advise the President on the National Strategy.
30. Clause 20 of the Bill deals with the Presidential Advisory Committee membership and this is listed as follows:
- three members of the national executive appointed by the President;
 - one person appointed by organised business that is a party to NEDLAC;
 - one person appointed by organised labour that is a party to NEDLAC; and
 - sectoral experts appointed by the President a representative of SAMSOC.
31. There is no limit to the number of sectoral experts and as noted previously, the 13 identified entities cover five sectors. Two observations are necessary. The first is that the overwhelming majority of Advisory Committee members are appointed by the President and that three of these individuals are indeed cabinet members. With three cabinet members and any number of sectoral experts also appointed by the President, questions must be raised about the composition of the structure and its ability to

articulate views contrary to those of the President. The President may indeed select and appoint individuals of whom it is known that they are in agreement with his wishes and exclude others whose views are contrary to his. Indeed, the proposed membership makes no provision for civil society stakeholders that may have a real interest in such a strategy and may indeed hold views of a critical nature.

32. Clause 4(a) states that the national strategy must describe the approach to the manner in which performance of the holding company and its subsidiaries is to be measured. Clause 4 (b) and (c) sets more specific measures. While these measures are at face value unproblematic, they also lack any specificity with regards to the country's main development challenges. This high-level approach has been seen to be ineffective with reference to the National Development Plan and its ability to guide operations. Given the particular history of SOEs and the findings of the Zondo Commission, it appears that a more prudent approach would be more specific about the contents of the National Strategy and ensure that it gives practical expression to good governance standards and not leave this open-ended to a small group of people hand-picked by the President to develop. In this regard, much has already been made about the appointment of board directors and senior managers, and there is nothing preventing the content of the National Strategy to set objectively verifiable standards with regard to the character, skills and competence of board members.

10 Board appointments

33. The appointment of the first board of SAMSOC is governed by Schedule B (Transitional Provisions). This provides for the appointment of an "independent panel" to call for nominations and interview candidates.
34. It should be noted and pointed out that this process of the panel refers only to the appointment of the first board. In terms of clause 10, further appointments are to be done "after implementing the prescribed transparent process," but no details are provided on this process as to what it should entail, set timelines, and so forth. The board must then "recommend the appointment by the shareholder of persons as directors on grounds of their skill, knowledge, experience and integrity, which, when considered collectively, will enable them to fulfil the objectives of the holding company." Again, no details are presented as to how to operationalise compliance with this requirement.
35. At Clause 10(2) it reads "If the shareholder decides not to appoint a person recommended by the Board, the Board must recommend an alternative person to be appointed as a director". There is no requirement set for the "shareholder" (President or Minister) to motivate and provide reasons for non-appointment. The President or Minister can continue to decline nominations and make appointments to their liking without presenting reasons. This simply does not meet the standard of transparency

set in Section 195(1)(g) of the Constitution, namely to provide the public with “time, accessible and accurate information”.

36. The Portfolio Committee’s attention is drawn to the composition of the panel:
- a retired judge appointed by the President as chairperson;
 - two members of the national executive appointed by the President;
 - a person from organised business and a person from organised labour, both of which are parties to NEDLAC;
 - and three persons appointed by the President who have been or are chief executive officers of public companies.
37. As is the case with the Presidential Advisory Committee, six of the eight members of this “independent panel” are appointed by the President. The members of the panel are selected and appointed by the President against criteria formulated by the President to identify suitable candidates to be appointed by the President to the first board of SAMSOC. It may be argued that a panel chaired by a judge is assured of independence. In the event that the President decides not to appoint any person recommended by the panel, the panel must recommend an alternative person.
38. It is submitted that the panel is not sufficiently independent based on its composition as well as the terms and conditions of service. A number of Constitutional Court decisions have dealt with independence of institutions and place the emphasis on structural and operational independence, and that this must be present in order to prevent political interference.¹⁵ The composition of the panel strongly favours the executive and excludes civil society as representatives of those who are directly affected by the performance of SOEs. As noted earlier, it is important to stress test for worst-case scenarios and the recent case law found that a commission of enquiry headed by a judge may still fail to fulfil its mandate properly.¹⁶
39. Section 6 of Schedule B then mandates the panel to determine its own rules to govern its proceedings subject to the requirements that nominations are publicly called for, the names of candidates are published, and candidates’ right to privacy are respected. Section 10 (1) of the Bill then requires that the board recommends to the President, for appointment, board directors based on the grounds of their skill, knowledge, experience and integrity. The transparency requirement was already reflected on above. It is submitted that the standards are not specific enough and that the values and principles listed in section 195 (1) of the Constitution provide better guidance.

¹⁵ Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others, No. [2014] ZACC 32 (Constitutional Court November 27, 2014); Glenister v President of the Republic of South Africa (Glenister II), No. [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (Constitutional Court of South Africa March 17, 2011); Economic Freedom Fighters and Others v Speaker of the National Assembly and Another, No. [2017] ZACC 47 (Constitutional Court December 29, 2017).

¹⁶ *Corruption Watch and Another v Arms Procurement Commission and Others*, No. (81368/2016) [2019] ZAGPPHC 351 (North Gauteng High Court August 21, 2019).

Appendix 3 is an example of how the requirements in section 195(1) of the Constitution can be used to apply to the appointment process of board directors.

40. Fundamentally the Bill proposes an appointment procedure that remains highly centralised, opaque and exclusive. It is submitted that to ensure transparency and accountability that the legislation should provide the necessary details and minimum standards to be followed in identifying fit and proper persons to occupy board director positions. Furthermore, this Bill deals with 13 of the 265 entities and enterprises (see Table 1 above), where reform in respect of board appointments is desperately needed.
41. It is furthermore submitted and based on evidence from elsewhere that dispersing decision-making in the identification, selection and appointment of board directors yields better results measured in the quality of appointments and contribution to good governance. Practically this may mean that identifying a larger group of suitable candidates is done by one body and this may be preceded by a clearinghouse to verify that candidates meet a minimum set of requirements. In a next step a different body would then identify candidates meeting the particular requirements set for the specific vacancy. A selection process, typically through interviews open to the public, will then whittle down suitable candidates to a small number (for example 2 or 3), which is then submitted to the person making the appointment; the President in this case. The Bill at present allows the President to disregard the panel's recommendation of a person and request an alternative. It is submitted that in such an instance, the President needs to provide reasons publicly.
42. It is submitted that the legislature should be proactive in formulating minimum standards for transparency in the appointment process of board directors to SOEs. This is not restricted to what is currently on the table as articulated in the Bill, but more generally applying to SOE board appointments. These could cover, but is not limited to the following:
 - all persons who wish to serve on the board of a public entity and or enterprise need to go through an initial clearing process to verify, for example, qualifications, financial and non-financial interests, criminal record, declaration as a delinquent director, and insolvencies.
 - Board vacancies to be advertised publicly and that the appointment criteria to fill specified vacancies be disclosed in advance. The circumstances may further dictate that public input is invited on the criteria; for example, an entity may be in the process of strategic realignment which may require a particular skills set.
 - The applications of candidates and their CVs to be placed in the public domain to allow members of the public sufficient time to peruse them.
 - Hearings by the selection and appointment panels to be open to the public.

11 Transfer of property between subsidiaries

43. The committee's attention is drawn to clause 18 of the Bill over which provides for the transfer of property between subsidiaries. If while subsection 2 deals with the duties of the Registrar of Deeds pertaining to such a transfer, the first subclause lacks in any requirements or standards or defined needs or why such a transfer would be needed and justified. We submitted the committee request clarification from the Department.

12 Conclusion

44. It is common cause that South Africa's SOEs are in desperate need for reform and that such reform can to a great extent be addressed in reshaping the legislative framework. The recent history has shown that the centralisation of decision-making, as it relates to SOEs and in particular the appointment of board directors, has had disastrous consequences. This not only resulted in significant financial losses, but also eroded trust in SOEs and the state more generally. There needs to be a dispersal of decision-making and discretion. Furthermore, where it concerns public money, as is the case with SOEs, there must be clear and firm standards to ensure transparency and accountability. It is simply not enough to state in the legislation that a transparent process must be followed or due diligence applied. The standards for that transparency must be explicitly stated. It is perhaps a more general concern that in several areas the Bill simply does not provide the necessary detail.

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Appendix 1 – Schedule 2 of the PFMA (Major Public Entities)

Air Traffic and Navigation Services Company
Airports Company
Alexkor Limited
Armaments Corporation of South Africa
Broadband Infracore (Proprietary) Limited
CEF (Pty) Ltd
DENEL
Development Bank of Southern Africa
ESKOM
Independent Development Trust
Industrial Development Corporation of South Africa Limited
Land and Agricultural Bank of South Africa
SA Broadcasting Corporation Limited
South African Express (Proprietary) Limited
SA Forestry Company Limited
SA Nuclear Energy Corporation
South African Post Office SOC Limited
South African Airways Limited
Telkom SA Limited
TransCaledon Tunnel Authority
Transnet

Appendix 2 – Schedule 3B of the PFMA (National Government Business Enterprises)

Amatola Water Board
Aventura
Bloem Water
Council for Scientific and Industrial Research (CSIR)
Export Credit Insurance Corporation of South Africa Limited
Inala Farms (Pty) Ltd
Lepelle Northern Water
Magalies Water
Mhlathuze Water
Mintek
Ncera Farms (Pty) Ltd
Onderstepoort Biological Products
Overberg Water
Passenger Rail Agency of South Africa
Public Investment Corporation Limited
Rand Water
SA Bureau of Standards (SABS)
Sasria Limited
Sedibeng Water
Sentech
State Diamond Trader
Umgeni Water

Appendix 3

In order to apply the principles in the appointment process it is necessary to unpack them in a methodical manner, indicating for each the following:

- What is the policy goal flowing from the constitutional principle?
- What is the outcome being sought?
- What is the operational definition?
- Why is it important to measure this?
- What is the indicator and measure to collect the correct and relevant information?

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| Policy goal | (1) A high standard of professional ethics must be promoted and maintained. |
| Outcome | Directors of SOEs seek responsibility and welcome accountability, demonstrate customer care principles, interacts with colleagues in a professional manner (e.g. treats colleagues as customers and generates enthusiasm) is self-critical, and listens. |
| Definition | In the identification and appointment of SOE directors, care is taken to identify candidates meeting requirements of professional knowledge and personal integrity. (see <i>Democratic Alliance v President of the Republic of South Africa and others</i> (263/11) [2011] ZASCA 241; 2012 (1) para. 116). ¹⁷ |
| Motivation | Professionalism is highly reliant on expertise (knowledge) and self-regulation, and less dependent on compliance management. It is reasonable to have high expectations of expertise and a history of behaviour that is untarnished by unethical behaviour or behaviour lacking integrity. |
| Indicator(s) | <ul style="list-style-type: none"> • The appointment criteria are clear in specifying honesty, integrity and expertise as key considerations for a position as director of an SOE. • The appointment process is reviewed on a regular basis to assess if it has promoted a high standard of professional ethics. • Thorough background checks are performed to establish if candidates comply with a high standard of professional ethics. • The appointment process considers all information when selecting candidates for shortlisting and invites submissions. • Candidates not meeting the requirements of a high standard of professional ethics are not appointed. • Candidates should have a demonstrable level of knowledge of the sector of the SOE, or other specialist knowledge directly relevant to and needed by the SOE. |

¹⁷ [116] I disagree with the view that in applying s 9(1)(b) of the Act the President is entitled to bring his subjective view to bear. First, the section does not use the expression 'in the President's view' or some other similar expression. Second, it is couched in imperative terms. The appointee 'must' be a fit and proper person. Third, I fail to see how qualities like 'integrity' are not to be objectively assessed. An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In *The Shorter Oxford English Dictionary on Historical Principles* (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'

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| | <ul style="list-style-type: none"> • Candidates should have a demonstrable level of knowledge and experience of corporate governance. • Has the candidate ever been reported to a Chapter 9 institution, a professional body or employer for criminal, unethical and/or unprofessional behaviour? If so, what was the finding? • Did the candidate proactively disclose any matters that might raise questions about his or her professionalism and ethics? |
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| Policy goal | (2) Efficient, economic and effective use of resources must be promoted. |
| Outcome | Budget is utilised in line with the strategic plan. |
| Definition | The budget, as approved by the Board, is used to fund pre-determined activities. |
| Motivation | In order to have maximum value for money it is important that the budget is utilised in the correct and approved manner. |
| Indicator(s) | <ul style="list-style-type: none"> • Has the candidate ever been directly associated with a finding of unauthorised, wasteful and/or fruitless expenditure in a public or private entity? • Has the candidate ever been directly associated with an adverse audit finding in a public or private entity?¹⁸ • Does the candidate have demonstrable experience in the efficient and effective use of a similarly sized budget? • Has the candidate ever been declared a delinquent director? |

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| Policy goal | (3) Public administration must be development-oriented. |
| Outcome | SOE's understand and fulfil their role in a developmental state in an accountable and transparent manner. |
| Definition | Vision 2030 requires a capable and developmental state: capable in that it has the capacity to formulate and implement policies that serve the national interest; developmental in that of poverty and inequality, and building the state's capacity to fulfil this role. |
| Motivation | It is a requirement of the Constitution to address the imbalances of the past and improve the quality of life of all. |
| Indicator(s) | <ul style="list-style-type: none"> • Candidates have a clear understanding of the position and functions of the SOE in a capable and developmental state. • Candidates have demonstrable experience in entities supportive of building a capable and developmental state. • The selection criteria emphasise the role of the SOE in building a capable and developmental state. |

¹⁸ The Auditor-General can express one of the following audit opinions: (a) Clean audit outcome: The financial statements are free from material misstatements (in other words, a financially unqualified audit opinion) and there are no material findings on reporting on performance objectives or non-compliance with legislation. (b) Financially unqualified audit opinion: The financial statements contain no material misstatements. Unless the Auditor General expresses a clean audit outcome, findings have been raised on either reporting on predetermined objectives or non-compliance with legislation, or both these aspects. (c) Qualified audit opinion: The financial statements contain material misstatements in specific amounts, or there is insufficient evidence for the Auditor-General to conclude that specific amounts included in the financial statements are not materially misstated. (d) Adverse audit opinion: The financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial statements. (e) Disclaimer of audit opinion: The auditee provided insufficient evidence in the form of documentation on which to base an audit opinion. The lack of sufficient evidence is not confined to specific amounts, or represents a substantial portion of the information contained in the financial statements.

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| Policy goal | (4) Services must be provided impartially, fairly, equitably and without bias. |
| Outcome | The SOE Board oversees an organisation that behaves in a manner that is fair, equitable and without bias. |
| Definition | Objectivity requires that the SOE Board is able to express itself or deal with perceived facts or conditions, without distortion by personal feelings, prejudices, or interpretations, and not use its powers to favour individuals or groups. |
| Motivation | The Constitution is clear in its equality requirements and the prohibition of unfair discrimination. |
| Indicator(s) | <ul style="list-style-type: none"> • Is there any historical evidence that the candidate has acted in a manner that would not be fair, equitable and without bias? <i>Note: Evidence constitutes preferably a clear finding, but it is at least more than a mere allegation.</i> • Is there any historical evidence that the candidate has made a demonstrable contribution to address imbalances of the past? <i>Note: This refers to, but is not limited to race and gender.</i> • The selection process must be fair, impartial and without bias, based on objective criteria. |

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| Policy goal | (5) People's needs must be responded to, and the public must be encouraged to participate in policy-making. |
| Outcome | The appointment process for SOE directors is transparent and the views of the public are taken into account in a meaningful way. |
| Definition | The process of appointment is clear and documented. There are opportunities for stakeholder input and this is a matter of public record. |
| Motivation | Transparency is a constitutional requirement and a transparent appointment process will build trust in SOE's and thus their legitimacy. At minimum this means that those affected by decisions of the identifying body, office bearers in SOEs and departments as well as other stakeholders with an interest or mandate in respect of SOEs, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials and office bearers in SOEs have a duty to act visibly, predictably and understandably. |
| Indicator(s) | <ul style="list-style-type: none"> • The appointment process is a known and documented process with clear timelines. • The public is given sufficient opportunity to make inputs. • The candidate can demonstrate how he/she would reasonably incorporate transparency and public engagement into the board's operations. |

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| Policy goal | (6) Public administration must be accountable. |
| Outcome | The Nominations Committee and the Appointments Committee are able to explain their decisions in a manner that is rational when called to do so, and are similarly able to take responsibility and make amends for mistakes. This means that they are able to understand the mistake that was made and implement corrective measures. |
| Definition | Corder et al explain it as follows: "Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future." Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives |

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| | aimed at monitoring the executive. While accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing. |
| Motivation | There can be no accountability without transparency. Since the government is a shareholder (if not majority shareholder) in an SOE, for which tax payer money is used, it follows that the government and SOE must account to the public for their decisions. |
| Indicator(s) | <ul style="list-style-type: none"> • The Nominations Committee and the Appointments Committees are willing and able to explain their decisions against a set of predetermined objective standards. • The number of appointments that have been taken on review (e.g. judicial or administrative) and set aside. |

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| Policy goal | (7) Transparency must be fostered by providing the public with timely, accessible and accurate information. |
| Outcome | The appointment process for SOE directors is transparent and the views of the public are taken into account in a meaningful way. |
| Definition | The process of appointment is clear and documented. There are opportunities for stakeholder input and this is a matter of public record. |
| Motivation | Transparency is a constitutional requirement and a transparent appointment process will build trust in SOE's and thus their legitimacy. At minimum this means that those affected by decisions of the identifying body, office bearers in SOEs and departments as well as other stakeholders with an interest or mandate in respect of SOEs, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials and office bearers in SOEs have a duty to act visibly, predictably and understandably. |
| Indicator(s) | <ul style="list-style-type: none"> • The public is kept informed of vacancies, appointments and dismissals, as well as the reasons thereto concerning SOEs. • The public is kept informed of the processes concerning the filling of vacancies. • There are clear requirements for the vetting process and this is public. • The public is kept informed of the processes concerning the dismissal of SOE board members. • The public has access to the CVs of long listed and short-listed candidates. • There is sufficient time to review candidate CVs. • Recommendations for appointment are clearly motivated and based on rational grounds. • Following an appointment, there must be a published record on how the public was consulted and involved in the appointment. |

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| Policy goal | (8) Good human-resource management and career-development practices, to maximise human potential, must be cultivated. |
| Outcome | The SOE shows results through competent performance and excellence through the effective and efficient management of staff in its recruitment and skills development practices. |
| Definition | Human resource management, HRM, is the department of a business organization that looks after the hiring, management and firing of staff. HRM focuses on the function of people within the business, ensuring best work practices are in place at all times.) |

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| Motivation | This is a constitutional requirement with reference to the transformative goal of the Constitution. Investing in human potential stands central to the NDP. |
| Indicator(s) | <ul style="list-style-type: none"> • Has the candidate ever been accused of unfair labour practice? • Does the candidate have a track record in developing people's potential? |

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| Policy goal | (9) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation. |
| Outcome | The board of the SOE and its staff are representative of the people as required by the Constitution. |
| Definition | The profile of board members and staff reflect the race, gender and other constitutionally defined (see unfair discrimination) variables of the public. |
| Motivation | This is a constitutional requirement and obligation of all public sector institutions and large private institutions. |
| Indicator(s) | <ul style="list-style-type: none"> • Calls for applications and appointments to SOE Boards reflect the representivity requirement. • The composition of the Nominations Committee and the Appointments Committee reflects the representivity requirement. • There is a clear plan in place to ensure representivity. • Candidates must have a track record of promoting transformation and/or show an understanding of the issues of representivity and transformation. |