

REPUBLIC OF NAMIBIA

NATIONAL ASSEMBLY

**STATE OWNED ENTERPRISES
BILL**

(As read a First Time)

(Introduced by the Prime Minister)

BILL

To **make provision for the efficient governance of State-owned enterprises and the monitoring of their performances; to make provision for the restructuring of State-owned enterprises; to establish the State-owned enterprises Governance Council and define its powers, duties and functions; and to make provision for incidental matters**

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

ARRANGEMENT OF SECTIONS

Section

PART I PRELIMINARY

1. Definitions

PART II STATE-OWNED ENTERPRISES GOVERNANCE COUNCIL

2. Establishment of Council
3. Constitution of Council
4. Functions of the Council
5. Meetings of the Council
6. Disclosure of interest by members of Council
7. Committees of the Council
8. Confidentiality in relation to functions of Council

PART III SECRETARIAT

9. Administrative personnel
10. Expenditure
11. Consultants
12. Preservation of secrecy

PART IV PROCEDURE FOR APPOINTMENT OF BOARD MEMBERS AND OBLIGATIONS OF STATE-OWNED ENTERPRISES

13. Application of this Part
14. Council's function in relation to boards of State-owned enterprises
15. Procedure for appointment of board members and alternate board members of State-owned enterprises
16. Appointment of temporary board members
17. Governance agreement with board
18. Performance agreements with board members individually
19. Business and financial plan
20. Approval of annual budget of State-owned enterprises
21. Performance agreements of management staff of State-owned enterprises

22. Remuneration of board members and management staff of State-owned enterprises
23. Council to be notified of significant affecting events
24. Duty to furnish information
25. Dividends
26. Annual reports of State-owned enterprises
27. Obligations concerning investments
28. Obligations concerning subsidiaries

**PART V
SPECIAL INVESTIGATIONS**

29. Power to direct special investigation
30. Appointment of special investigator
31. Powers of special investigator
32. Publication
33. Reports
34. Expenses of special investigation
35. Offences in relation to special investigation

**PART VI
RESTRUCTURING OF STATE-OWNED ENTERPRISES**

36. Provisional identification of State-owned enterprises for restructuring
37. Proposal for restructuring
38. Consultation
39. Interim measures
40. Determination of restructuring
41. Information and reports

**PART VII
GENERAL**

42. Communications to be notified to portfolio Minister
43. Regulations
44. Limitation of liability
45. Exemptions
46. Provisions of this Act prevail
47. Power to amend Schedule 1
48. Transitional provisions
49. Amendment of laws
50. Short title and commencement

- Schedule 1 - State-owned enterprises
Schedule 2 - Amendment of Laws

**PART I
PRELIMINARY**

Definitions

1. In this Act -

“board”, in relation to a State-owned enterprise, means the members of the board of

directors or other governing body of the State-owned enterprise, by whatever name called, holding positions comparable with those of the board of directors of a company;

“chief executive officer”, in relation to a State-owned enterprise, means the person who, either alone or jointly with one or more other persons, is responsible under the direct authority of the board of the State-owned enterprise for the conduct of the business of the State-owned enterprise;

“company” means a company registered in terms of the Companies Act, 1973 (Act No. 61 of 1973);

“constituent document”, in relation to a State-owned enterprise which is an unincorporated business, means the constitution, contract or other document under which the business was established and exists;

“Council” means the State-owned Enterprises Governance Council established by section 2;

“establishing Act”, in relation to a State-owned enterprise, means any law by or under which the State-owned enterprise was established and which governs its functions;

“executive member”, in relation to the board of a State-owned enterprise, means a member of the board who holds a salaried office in the State-owned enterprise;

“portfolio Minister”, in relation to a State-owned enterprise -

- (a) which is not a State-owned company, means the Minister responsible for the administration of the law governing the establishment and functions of the State-owned enterprise; and
- (b) which is a State-owned company, means the Minister holding the shares and exercising the rights attached to the shares in the company on behalf of the State;

“prescribe” means prescribe by regulation under section 43;

“secretariat” means the secretariat of the Council referred to in section 9(1);

“State-owned company” means a company incorporated under the Companies Act 1973, (Act No. 61 of 1973) in which the State is the sole or majority shareholder;

“State-owned enterprise” means an entity that is named in Schedule 1 to this Act;

“this Act” includes any regulation made under section 43.

PART II

STATE-OWNED ENTERPRISES GOVERNANCE COUNCIL

Establishment of Council

2. (1) There is established a Council to be known as the State-owned Enterprises Governance Council.

(2) The Council is a committee of Cabinet and performs the functions assigned to it by this Act under the supervision, and subject to the approval, of the Cabinet.

Constitution of Council

3. (1) Subject to subsection (2), the Council consists of the following members, namely -

- (a) the Prime Minister, who is the chairperson of the Council;
- (b) the member of the Cabinet responsible for finance;
- (c) the member of the Cabinet responsible for trade and industry;
- (d) the Attorney-General of Namibia appointed under Article 32(3)(i)(cc) of the Namibian Constitution; and
- (e) the Director-General of Planning appointed under Article 32(3)(i)(dd) of the Namibian Constitution.

(2) Whenever a matter is to be discussed or considered at a meeting of the Council in relation to a State-owned enterprise or the board of a State-owned enterprise, the Council must invite the relevant portfolio Minister to attend that meeting and, when attending such meeting, a portfolio Minister who is not a member of the Council is deemed to be such a member.

(3) The Cabinet may appoint for each member of the Council a member of Cabinet to act as alternate for the member of Council whenever he or she is absent or is unable to attend to his or her duties as such a member.

Functions of the Council

4. (1) Subject to this Act, the functions of the Council are -

- (a) to establish generally accepted common principles of corporate governance and good practice governing State-owned enterprises;
- (b) to develop common policy frameworks for the operations of State-owned enterprises, including policy on issues relating to human resources, assets and finance;
- (c) to determine criteria for the performance measurement and evaluation of State-owned enterprises, and develop appropriate means for monitoring their performance;
- (d) to lay down directives in relation to -
 - (i) governance agreements to be entered into by a portfolio Minister with the board of a State-owned enterprise;
 - (ii) performance agreements to be entered into between a portfolio Minister and the individual members of a board of a State-owned enterprise and between such a board and its chief executive officer and other senior management staff;
 - (iii) the remuneration levels of board members, chief executive officers

- (iv) benefits for employees of State-owned enterprises generally;
 - (e) to make determinations in relation to the number of members to be appointed to the boards of State-owned enterprises and advise the portfolio Ministers on the appointment of such members in accordance with sections 14 and 15;
 - (f) to furnish a portfolio Minister with any comments it may wish to make in relation to an annual budget of a State-owned enterprise submitted to that Minister for approval and provided to the Council for its information and comment;
 - (g) to facilitate the provision of programmes for the training and development of members of the boards and management staff of State-owned enterprises on corporate governance and efficient management practices;
 - (h) to receive and consider for approval submissions made by State-owned enterprises on the annual distribution of profits and the declaration of dividends in terms of section 25;
 - (i) to submit to Cabinet for decision any proposed restructuring plan prepared and approved by the Council under Part VI in relation to any State-owned enterprise identified by Cabinet for restructuring; and
 - (j) to perform any other function entrusted to the Council by or under this Act or any other law.
- (2) The Council may -
- (a) classify State-owned enterprises into the following categories for the purposes of this Act, namely -
 - (i) regulatory enterprises;
 - (ii) service rendering enterprises;
 - (iii) economic and productive enterprises;
 - (iv) general enterprises; and
 - (b) in performing its functions under subsection (1), differentiate between the different categories of State-owned enterprises.

Meetings of the Council

5. (1) The Chairperson of the Council decides when and where the Council meets.
- (2) The Council must meet at least four times per year.
 - (3) At a meeting of the Council -
 - (a) the Chairperson or, in the absence of the Chairperson, any other member of the Council as the members present may elect, must preside;

- (b) a majority of the members of the Council form a quorum;
- (c) the Council must take decisions in a consensus-seeking manner and, if consensus cannot be reached on a matter, the matter must be submitted to Cabinet for decision.

(4) A resolution of the Council contained in writing and signed by all members of the Council constitutes a valid decision of the Council as if it had been passed at a meeting of the Council.

(5) The Council may, in its discretion, invite members of labour organisations, representatives of organised business, the members of the board, management and other representatives of a State-owned enterprise and any other persons or entities who or which, in the opinion of the Council, may have an interest in a matter to be considered by the Council to make representations to the Council in relation to the matter in the manner and form as the Council may determine, and to attend a meeting or part of a meeting of the Council as observers and to take part in the deliberations at the meeting in relation to the matter, but a person so attending has no vote at the meeting.

(6) The Council -

- (a) may regulate its own proceedings; and
- (b) must cause minutes to be kept of proceedings and decisions at each meeting of the Council.

Disclosure of interest by members of Council

6. (1) A Council member or portfolio Minister who has a direct or indirect personal or financial interest in any matter being discussed at a meeting of the Council must disclose the nature of that interest and must not further attend that meeting nor participate in any deliberations or decision of the Council in relation to the matter, except if the Council determines otherwise, and subject to any conditions the Council may determine.

(2) A disclosure of interest in accordance with subsection (1) must be noted in the minutes of the meeting concerned.

(3) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 2 years.

Committees of the Council

7. (1) The Council may establish committees -

- (a) to advise the Council, in relation to any matter which the Council refers to it; or
- (b) to exercise any of the powers or perform any of the duties of the Council which the Council delegates or assigns to it.

(2) The Council may at any time dissolve or reconstitute a committee.

Confidentiality in relation to functions of Council

8. (1) A member of the Council or of a committee of the Council, and any other person required or permitted to be present at a meeting of the Council or such a committee, must not publish or communicate or in any other way disclose any information relating to the affairs of any State-owned enterprise or a member of the board of a State-owned enterprise or a person being considered or recommended as a candidate for appointment as such a member, that has come to such person's knowledge -

(a) in the exercise of any power or performance of any duty or function in connection with the functions of the Council; or

(b) as a result of such person's attendance at a meeting of the Council or a committee of the Council.

(2) Subsection (1) does not apply to information disclosed -

(a) for the purpose of the proper administration or enforcement of this Act or the performance of a function of the Council;

(b) for the proper administration of justice; or

(c) at the request in writing of a member of the Council or of a person authorised in writing by a member of the Council.

(3) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment.

PART III SECRETARIAT

Administrative personnel

9. (1) The work incidental to the performance of the functions of the Council must be performed by a secretariat consisting of administrative personnel as the Council may consider necessary.

(2) The members of the secretariat referred to in subsection (1) may -

(a) be staff members in the Public Service designated for the purpose by the Council; or

(b) be persons other than such staff members appointed by the Council on such conditions of service and at such remuneration and service benefits as the Council may determine, after consultation with the Public Service Commission and with the concurrence of the Minister responsible for finance.

(3) The members of the secretariat must perform the functions assigned to them by this Act or by the Council.

Expenditure

10. All expenditure connected with the performance of the functions of the Council, including expenditure relating to the remuneration and other service benefits of persons employed under section 9(2)(b) and the remuneration of consultants engaged under section 11, must be defrayed from money appropriated by Parliament for the purpose.

Consultants

11. (1) The Council may engage under contract of service persons with appropriate qualifications, skills or experience to render professional, technical or other assistance as the Council may consider necessary for carrying out its functions.

(2) The Council must engage a consultant only after selection of a suitable person through a process of competitive tender conducted in a manner determined by the Council.

Preservation of secrecy

12. (1) A member of the secretariat of the Council or any consultant engaged by the Council, must not publish or communicate or in any other way disclose any information relating to the affairs of any State-owned enterprise or a member of the board of a State-owned enterprise or a person being considered or recommended as a candidate for appointment as such a member, that has come to such person's knowledge -

- (a) in the performance of any function in connection with the functions of the Council; or
- (b) as a result of such person's attendance at a meeting of the Council or a committee of the Council.

(2) Subsection (1) does not apply to information disclosed -

- (a) for the purpose of the proper administration or enforcement of this Act or the performance of the functions of the Council;
- (b) for the proper administration of justice; or
- (c) at the request of any member of the Council or any other person authorised in writing by a member of the Council.

(3) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

PART IV PROCEDURE FOR APPOINTMENT OF BOARD MEMBERS AND OBLIGATIONS OF STATE-OWNED ENTERPRISES

Application of this Part

13. (1) This Part applies in relation to every State-owned enterprise despite -

- (a) the absence of any provision; or
- (b) anything to the contrary contained,

in its establishing Act or constituent document or its memorandum of association and articles of association regulating any matter provided for in this Part.

(2) Any provision contained in the establishing Act or constituent document or memorandum of association and articles of association of a State-owned enterprise which is contrary to a provision of this Part must be construed as if it had been amended correspondingly with the provisions of this Part.

Council's function in relation boards of State-owned enterprises

14. (1) The function of the Council under section 4(1)(e) in relation to the board of a State-owned enterprise, includes the power -

- (a) to determine the number of board members to be appointed within the limits of 5 to 7 persons, or such larger number as the Council may consider appropriate in a particular case, but with due regard to any stipulation regarding the composition of a board provided for in the establishing Act or constituent document or memorandum of association and articles of association of a State-owned enterprise;
- (b) to determine the number of persons to be appointed as executive members, if any;
- (c) to determine the requisite qualifications, experience or skills of persons to be eligible for appointment as members of the board;
- (d) to determine the term of office of the members of the board, either in relation to members generally or members holding particular positions on the board;
- (e) to advise the relevant portfolio Minister in relation to -
 - (i) the determinations made by the Council under paragraphs (a), (b), (c) and (d);
 - (ii) on the persons to be considered by the portfolio Minister for appointment as members of the board of the State-owned enterprise, including the persons to be appointed as executive members, if any;
 - (iii) on the appointment of the chairperson and vice-chairperson of the board; and
 - (iv) on the appointment of alternate members for the members of the board; and
- (f) to advise a portfolio Minister on the removal of any member of a board from office in accordance with, and on any ground provided for in, its establishing Act, constituent document or, in the case of a member of a board of a State-owned company, in accordance with and on any ground provided for in the Companies Act, 1973 (Act No. 61 of 1973) or its

memorandum of association and articles of association, or in accordance with the provisions of this Act.

(2) Subsection (1) is not applicable in relation to a company in which any person holds shares jointly with the State, in which event the relevant provisions of the memorandum of association and the articles of association, or any relevant law, are applicable, except that the provisions of subsection (1)(e)(ii) and (iv) of this section and of section 15 must be complied with in relation to any persons required to be appointed or nominated as directors or alternate directors by or on behalf of the State.

(3) The Council must cause notice to be given in the *Gazette* of the determinations of the Council made in relation to a State-owned enterprise under subsection (1)(a), (b), (c) or (d).

Procedure for appointment of board members and alternate board members of State-owned enterprises

15. (1) Whenever it is necessary to appoint members of the board of a State-owned enterprise, either upon a first constitution or a new term of the board, or for filling a vacancy, a member of the secretariat of the Council designated for that purpose by the Council must, after consultation with the portfolio Minister, and with due regard to section 14(2), make a report to the Council containing -

- (a) recommendations on -
 - (i) the number of members, including executive members, if any, to be appointed;
 - (ii) the term for which the members, or members in particular positions are to be appointed; and
 - (iii) the expertise required in the membership of the board;
- (b) the names of persons, equal to at least one and a half times the number of members recommended under paragraph (a)(i), who are qualified to be members of the board and who are recommended as being most suited to serve on the board, including the persons recommended to serve as executive members, if any, together with reasons why they are recommended; and
- (c) in relation to the persons recommended under paragraph (b), particulars of -
 - (i) their personal details;
 - (ii) their knowledge, experience and skills concerning issues relevant to the functions of the State-owned enterprise concerned; and
 - (iii) their commitment, if any, in relation to positions held on boards of other State-owned enterprises and interests held in private undertakings; and
- (d) any other information that may be relevant to enable the Council to make the determinations and give the advice contemplated in section 14(1).

12

(2) The procedure prescribed in subsection (1) applies also in respect of the appointment of alternate members of a board.

(3) For the purposes of subsection (1)(b), a person is qualified to be a member of the board of a State-owned enterprise if the person -

- (a) is not disqualified in terms of the establishing Act or the constituent document or the articles of association and statutes of association of the State-owned enterprise, as the case may be, from being appointed a member of the board of the State-owned enterprise; and
- (b) is not disqualified in terms of the Companies Act, 1973 (Act No. 61 of 1973) from being appointed as a director of a company.

(4) When advising a portfolio Minister on potential candidates whom the Council considers most suited for appointment as members or alternate members of a board, the Council is not bound by the recommendations of the secretariat.

(5) The portfolio Minister appoints -

- (a) the members of the board of a State-owned enterprise;
- (b) the chairperson and vice-chairperson of the board; and
- (c) the alternate members of the board, if any.

(6) The portfolio Minister must cause notice to be given in the *Gazette* of the appointment of members of the board of a State-owned enterprise and of the date and period of their appointment.

Appointment of temporary board members

16. (1) If at any time during the term of office of the board of a State-owned enterprise -

- (a) the offices of all the members of the board become vacant; or
- (b) the number of members of the board is reduced to less than the number of members required for a quorum of the board,

the portfolio Minister may, despite sections 14 and 15 or anything to the contrary in any other law contained, and if circumstances of a pressing or urgent nature so requires, appoint suitably qualified persons on a temporary basis to serve on the board until new members are appointed.

(2) The appointment of a person as member of a board under subsection (1) ceases to be of effect upon expiry of a period of six months from the date of the appointment, but the council may approve that such period be extended by an additional period of not more than two months.

Governance agreement with board

17. (1) The board of a State-owned enterprise must, within one month of

being constituted, and with due regard to any directives laid down by the Council under section 4, enter into a written governance agreement with the portfolio Minister in relation to -

- (a) the State's expectations in respect of the State-owned enterprise's scope of business, efficiency and financial performance, and achievement of objectives;
- (b) the portfolio Minister's obligations in relation to any function conferred or imposed by the establishing Act of the State-owned enterprise.
- (c) the principles to be followed by the State-owned enterprise for business planning;
- (d) the measures which are necessary to protect the financial soundness of the State-owned enterprise;
- (e) key performance indicators in terms of which the State-owned enterprise's performance will be evaluated;
- (f) the structure of the business and financial plan;
- (g) the principles to be followed at the end of each financial year in respect of any surplus in the accounts of the State-owned enterprise; and
- (h) any other matter relating to the performance of the State-owned enterprise's functions under any law.

(2) The portfolio Minister and the board of a State-owned enterprise may in writing amend the governance agreement from time to time.

(3) A copy of the governance agreement must be open to inspection by the public at the head office of the State-owned enterprise during business hours.

(4) Failure by the board of a State-owned enterprise to comply with a provision of the governance agreement does not affect the validity or enforceability of any agreement, right, obligation or liability entered into, acquired or incurred by the State-owned enterprise.

Performance agreements with board members individually

18. (1) A person appointed as a member of a board must, within one month of his or her appointment, enter into a performance agreement with the portfolio Minister, with due regard to any directives laid down by the Council under section 4.

(2) Without limiting the directives which may be laid down by the Council under section 4 in relation to performance agreements, the following conditions apply to every member of the board of a State-owned enterprise as if they were contained in the relevant performance agreement entered into by that member in terms of subsection (1), namely:

- (a) The member must at all times act honestly in the performance of the functions of his or her office;
- (b) the member must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions;

- (c) the member, including after he or she has ceased to be a member of the board of a State-owned enterprise, must not make improper use of information acquired by virtue of his or her position as such a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the State-owned enterprise;
- (d) the member must not make use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or cause detriment to the State-owned enterprise.

(3) If a person contravenes a condition referred to in subsection (2) or any other condition of the performance agreement entered into by him or her in terms of subsection (1), the portfolio Minister, in the name of the relevant State-owned enterprise, may recover from the person as a debt due to the State-owned enterprise by action in a competent court -

- (a) if that person, or any other person, made a profit as a result of the contravention, an amount equal to the profit;
- (b) if the State-owned enterprise has suffered any damage or loss as a result of the contravention, an amount equal to that damage or loss.

(4) Subsections (2) and (3) are applicable in addition to, and not in derogation of, any other law relating to the criminal or civil liability of the member of a board and do not prevent the institution of any criminal or civil proceedings in respect of such liability.

(5) A contravention referred to in subsection (3) by a member of the board of a State-owned enterprise, constitutes a ground for the removal of that member from his or her office by the portfolio Minister.

Business and financial plan

19. (1) Every State-owned enterprise must annually, at least 90 days before the commencement of its next financial year, submit a business and financial plan to the portfolio Minister.

(2) The business and financial plan of a State-owned enterprise must encompass all the businesses and activities, including investments, of the State-owned enterprise and its wholly-owned subsidiaries, if any.

(3) The business and financial plan of a State-owned enterprise must include -

(a) a statement of -

- (i) the objects for which the State-owned enterprise is established or incorporated, as set out in its establishing Act or constituent document or its memorandum of association and articles of association;
- (ii) the State-owned enterprise's objectives for the next five years and for each year in that period and the strategy the State-owned enterprise intends to employ to achieve them; and

-
- (iii) the State-owned enterprise's expected performance for the next financial year as compared to its projected objectives for that year as set out in its last business and financial plan;
 - (b) the operating budget and the capital budget of the State-owned enterprise for the next financial year, with a description of the nature and scope of the activities to be undertaken, including commercial strategies, pricing of products or services and personnel requirements;
 - (c) a statement with particulars of any expenditure included in the budget in respect of any project to be funded from any subsidy or grant awarded or given to the State-owned enterprise, from whatever source, for that purpose, the conditions attaching to the subsidy or grant and the control measures to be applied for monitoring such expenditure and the application of the funds received in respect of the subsidy or grant;
 - (d) if the State-owned enterprise intends to borrow money in the next financial year, a general indication of the borrowing plans and strategies of the State-owned enterprise for that year;
 - (e) a statement of the kind of information to be furnished to the portfolio Minister and the Council in respect of the State-owned enterprise during the course of a financial year, including the information to be included in each annual report; and
 - (f) any other matters as may be agreed on by the portfolio Minister and the board of the State-owned enterprise from time to time.
- (4) The portfolio Minister must provide a copy of an annual business and financial plan received in terms of subsection (1) to the Council for the Council's information and comment, if any.
- (5) A State-owned enterprise must act only in accordance with its business plan, unless it has first obtained the written approval of the portfolio Minister to do otherwise.
- (6) Nothing done by a State-owned enterprise is void or unenforceable merely because it has failed to comply with subsection (5).
- (7) No person may publish or disclose information or material contained in a business and financial plan of a State-owned enterprise, except -
- (a) with the approval of the board of a State-owned enterprise and the portfolio Minister;
 - (b) for the purpose of performing a function under this Act or any other law; or
 - (c) for the proper administration of justice.
- (8) A person who contravenes subsection (7) commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

10

Approval of annual budget of State-owned enterprise

20. (1) After receipt of the business and financial plan of a State-owned enterprise in terms of section 19(4), the Council may furnish to the portfolio Minister any comment which the Council considers appropriate in relation to the proposed budget of the State-owned enterprise for the next financial year.

(2) The portfolio Minister may provide the State-owned enterprise in writing with any comments in relation to its budget for the next financial year.

(3) The board of a State-owned enterprise must -

- (a) consider any comments received from the portfolio Minister in terms of subsection (2) within 30 days of their receipt;
- (b) consult with the portfolio Minister on such of the comments as the board does not agree with, with a view to reaching agreement;
- (c) make such changes to the proposed budget as are necessary to give effect to the comments agreed to and any agreement under paragraph (b);
- (d) omit from the proposed budget any matter in respect of which agreement has not been reached; and
- (e) furnish the portfolio Minister and the Council with a copy of the completed budget within 2 months after the commencement of the financial year.

(4) A State-owned enterprise must not incur any expenditure except in accordance with an estimate of expenditure approved under this section.

Performance agreements of management staff of State-owned enterprises

21. (1) The board of a State-owned enterprise must require the chief executive officer, and such other senior management staff of the State-owned enterprise as the board may determine, to enter into a performance agreement with the board, with due regard to any directives laid down by the Council under section 4.

(2) Failure on the part of a chief executive officer or other senior management staff member to comply with any provision of a performance agreement which he or she entered into with the board of a State-owned enterprise, constitutes a ground for his or her dismissal from the service of the State-owned enterprise, subject to compliance with the rules of natural justice.

Remuneration of board members and management staff of State-owned enterprises

22. (1) The remuneration and allowances payable to the members and alternate members of a board of a State-owned enterprise must be determined by the portfolio Minister with the concurrence of the Minister of Finance and with due regard to any directives laid down by the Council under section 4.

(2) No remuneration is payable to a member of a board who is in the full-time service of the State.

(3) The remuneration and other service benefits of the chief executive officer and other management staff of a State-owned enterprise must be determined by the board of the State-owned enterprise with the concurrence of the portfolio Minister, with due regard to any directives laid down by the Council under section 4.

Council to be notified of significant affecting events

23. If any event occurs that may prevent, or significantly affect, achievement of the objectives of a State-owned enterprise or any of its wholly-owned subsidiaries, if any, under its business and financial plan, or achievement of the targets under that plan, the board must immediately notify the Council of such affecting events and the reasons therefor.

Duty to furnish information

24. (1) The Council may in writing request the chief executive officer of a State-owned enterprise, or a person acting in that capacity, to furnish to the Council any information or documents required by the Council in connection with -

- (a) any business or activity carried on or undertaken or to be carried on or undertaken by the State-owned enterprise or any of its wholly-owned subsidiaries in accordance with its business and financial plan, and in respect of any period covered by the business and financial plan;
- (b) any business or activity carried on or undertaken or to be carried on or undertaken by the State-owned enterprise or any of its wholly-owned subsidiaries otherwise than in accordance with its business and financial plan; or
- (c) any matter contained in the annual report of the State-owned enterprise in terms of section 26.

(2) A chief executive officer must comply with a written request of the Council within such time as may be specified in the Council's request or as the Council and the chief executive officer may agree.

(3) A chief executive officer who -

- (a) refuses or fails to furnish information requested by the Council in terms of subsection (1); or
- (b) furnishes information which is false or misleading, knowing that it is false or misleading,

commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment

Dividends

25. The board of a State-owned enterprise in the economic and productive category must -

- (a) annually, at such time as the Council may determine, submit to the Council a proposal on the distribution of its profits for the past financial year and the declaration of dividends; and
- (b) declare and pay such dividend as is agreed to between the board and the Council or, failing agreement, as the Council directs in writing.

Annual reports of State-owned enterprises

26. (1) The board of a State-owned enterprise must as soon as possible, but in any case not later than six months after the end of each financial year of the State-owned enterprise, submit an annual report on the operations of the State-owned enterprise in that year concurrently to the portfolio Minister and to the Council.

- (2) The annual report of a State-owned enterprise must include -
 - (a) the audited financial statements of the State-owned enterprise;
 - (b) the auditor's report on those financial statements;
 - (c) a statement on the extent to which the State-owned enterprise has met its objectives for the financial year;
 - (d) quantitative information respecting the performance of the State-owned enterprise, including its wholly-owned subsidiaries, if any, relative to the State-owned enterprise's objectives; and
 - (e) such other information in respect of the financial affairs of the State-owned enterprise as is required by the portfolio Minister to be included therein,

and must be prepared in a form that clearly sets out information according to the major businesses or activities of the State-owned enterprise and its wholly-owned subsidiaries, if any.

(3) The portfolio Minister must cause a copy of the report of a State-owned enterprise to be laid before the National Assembly within 30 days of the receipt thereof if the National Assembly is then in ordinary session, or, if the National Assembly is not then in ordinary session, within 30 days after the commencement of its first ensuing ordinary session.

Obligations concerning investments

27. (1) Any power entrusted by the establishing Act, constituent document or the memorandum of association and articles of association of any State-owned enterprise to any person to invest any money of the State-owned enterprise or controlled by it must not be exercised by that person unless the prior written approval of the portfolio Minister, acting with the concurrence of the Minister responsible for finance, has been obtained for the investment.

(2) To obtain the prior written approval of the portfolio Minister contemplated in subsection (1), there must be lodged with the portfolio Minister a written application in which full particulars of the terms of the proposed investment are furnished.

(3) The approval contemplated in subsection (1) must be obtained whenever it is sought -

- (a) to make a further investment of money;
- (b) to alter any investment or deal with it in a manner affecting the terms of the investment as were furnished in terms of subsection (2); or
- (c) to reinvest any money becoming available upon the maturity date of an initial or former investment.

(4) An approval in terms of subsection (1) may be granted on any conditions as the portfolio Minister, acting with the concurrence of the Minister responsible for finance, may stipulate.

Obligations concerning subsidiaries

28. (1) The Council may by regulation impose obligations in relation to any subsidiary of any State-owned enterprise in relation to any matter with a view to achieving the efficient governance of the subsidiary and the monitoring of its performance and the performance of the board and senior management of the subsidiary.

(2) In terms of subsection (1), obligations may be imposed either on the board of the State-owned enterprise or the board or senior management of the subsidiary and may include requirements with regard to -

- (a) the manner of composition of the governing board of a subsidiary and the appointment process;
- (b) the conclusion of performance agreements with the board members and senior management staff of the subsidiary and the matters to be provided for in such agreements; and
- (c) any other matter provided for in this Part in relation to a State-owned enterprise.

(3) A provision contained in the memorandum of association or articles of association of a subsidiary of a State-owned enterprise which is contrary to a provision of any regulation made under subsection (1) must be construed as if it had been amended correspondingly with the provisions of the regulation.

(4) For the purposes of this Part -

- (a) the question whether a body corporate is a subsidiary of any State-owned enterprise which is not a State-owned company, must be determined in the same manner as the question would be determined under the Companies Act, 1973 (Act No. 61 of 1973) if the State-owned enterprise and the body corporate were companies within the meaning of that Act; and
- (b) the question whether a body corporate is a subsidiary of a State-owned company must be determined in accordance with the Companies Act, 1973.

